WITHOUT PREJUDICE

TCL/RA/TRAI-CP/CLS/2018/10

October 29, 2018

Principal Advisor (NSL)
Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan
Jawaharlal Nehru Marg,
New Delhi – 110002

Sub: TCL Response to TRAI Consultation Paper dated 18.10.2018 on Estimation of Access Facilitation Charges and Co-location Charges at Cable Landing Stations

Dear Sir,

This is in response to TRAI Consultation Paper mentioned as above.

The Order of the Hon'ble Supreme Court has given the following liberty to both the sides in its Order dated 8th October, 2018 while disposing off the SLPs filed by TRAI, RCOM and ACTO which reads as follows:

"All contentions may be raised and are kept open to both sides".

In accordance with the Order of the Hon'ble Supreme Court and the legal advice received by us, we are submitting all the contentions in respect of jurisdictional competence of TRAI, other legal issues and factually relevant issues in respect of the present exercise in addition to responding on the two issues raised in the abovementioned Consultation Paper.

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

Kind regards,
For Tata Communications Ltd.

P Sharma

(Praveen Sharma)
Authorized Signatory

Encl: a/a.

WITHOUT PREJUDICE

TATA COMMUNICATIONS LTD.

RESPONSE

TO

TRAI CP dated 18th October 2018

On

Estimation of Access Facilitation Charges and Colocation Charges at Cable Landing Stations

Background:

While exercising the powers under the TRAI Act, 1997 the TRAI has issued the following Regulations in respect of Cable Landing Stations-

(1) INTERNATIONAL TELECOMMUNICATION ACCESS TO ESSENTIAL FACILITIES AT CABLE LANDING STATIONS REGULATION, 2007 (5 of 2007) dated 7.6.2007, in accordance with Section 11(1) (b)(ii)(iii) & (iv) read with Section 36 of the TRAI Act.

(2) INTERNATIONAL TELECOMMUNICATION ACCESS TO ESSENTIAL FACILITIES AT CABLE LANDING STATIONS (AMENDMENT) REGULATIONS, 2012 (No 21 0f 2012) dated 19.10.2012, in accordance with Section 11(1) (b)(ii)(iii) & (iv) read with Section 36 of the TRAI Act.

(3) INTERNATIONAL TELECOMMUNICATION CABLE LANDING STATIONS ACCESS FACILITATION CHARGES AND COLOCATION CHARGES REGULATION, 2012 (N0. 27 of 2012) dated 21.12.2012, in accordance with Section 11(1) (b)(ii)(iii) & (iv) read with Section 36 of the TRAI Act.

The constitutional validity of aforesaid Regulations was challenged by TCL before the Hon'ble Madras High Court by filing Writ Petition No. 1875 of 2013, on various legal grounds including lack of legislative competence, violation of fundamental rights guaranteed under the Constitution of India, failure to conform to the statute under which it is made and manifest arbitrariness / unreasonableness etc. The said Writ Petition was dismissed the Ld. Single Judge of Madras High Court vide its Order dated 11.11.2016.

Being aggrieved by the said Judgment and order dated 11.11.2016 passed by the Ld. Single Judge in Writ Petition No. 1875 of 2013, TCL filed a Writ Appeal No. 283 of 2017 before the Hon'ble Division Bench which came to be partly allowed by the judgment and order dated 02.07.2018.

The Hon'ble Division Bench quashed Schedules I, II, III of the "The International Telecommunication Cable Landing Station Access Facilitation charges and Co-location charges Regulations, 2012 (no. 27 of 2012)" dated 21.12.2012 and directed TRAI to redo and re-enact the said schedules within six months. However the Hon'ble Division Bench also held that TRAI has the power to frame the above-mentioned regulations in exercise of its powers under Section 36 read with Section 11(1)(B)(i) &(iv) of the TRAI Act. All the three Regulations have been kept in abeyance for a period of six months from the date of receipt of the copy of order of the Hon'ble Division Bench of High Court.

The operative part of the Judgment of Hon'ble Division Bench of Madras High Court under the heading "Decision" is reproduced below:-

"(a) Both appeals are partly allowed. We partly confirm the dismissal of writ petitions, W.P.Nos.1875 and 3652 of 2013. We confirm the dismissal of the writ petitions insofar as it pertains to challenge to 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, i.e., 'CLS Regulation' and 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012, i.e., 'CLS Amendment Regulation'.

(b) Insofar as dismissal of the aforesaid writ petitions qua 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012, i.e., 'CLS Co-location Charges Regulation' is concerned, we partly set aside the same holding that Schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 stand quashed.

(c) TRAI shall redo and re-enact the aforesaid quashed schedules, i.e., schedules I, II and III of 'The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 after strictly following the procedure for subordinate legislation making, particularly transparency and principles of natural justice which have also been built into section 11(4) of TRAI Act within six months from the date of receipt of a copy of this order.

(d) Consequently, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations Regulations, 2007 (5 of 2007)' dated 7.6.2007, 'International Telecommunication Access To Essential Facilities At Cable Landing Stations (Amendment) Regulations, 2012 (No.21 of 2012)' dated 19.10.2012 and The International Telecommunication Cable Landing Stations Access Facilitation Charges and Co-location Charges Regulations, 2012 (No.27 of 2012)' dated 21.12.2012 are kept in abeyance for a period of six months from the date of receipt of a copy of this order or redoing / re-enacting aforesaid Schedules whichever is earlier.

(e) Writ appeals are partly allowed to the limited extent set out supra. Considering the nature of the matter and trajectory of the hearings, parties are left to bear their respective costs."

RCOM, ACTO and TRAI filed Petition for Special Leave to appeal in the Hon'ble Supreme Court challenging the judgment of the Hon'ble Madras High Court dated 02.07.2018 with prayer for grant of interim stay on the operation of the judgment dated 02.07.2018. These Petitions were heard together on 08.10.2018 wherein the Hon'ble Supreme Court made the following Order:

"In these Special Leave Petitions filed against the High Court judgment, it is clear that the Division Bench of the High Court has interfered only on two counts. Insofar as both the counts are concerned, the ultimate finding is that both need to be re-worked by the Authority.

We would request the Authority to re-work the figures on both counts within a period of six weeks from today. It will be open to the Authority, if it so finds, to re-determine the same two figures that have been accepted by the learned Single Judge.

All contentions may be raised and are kept open to both sides. *The parties shall not take adjournment on any count.*

The Special Leave Petitions are disposed of accordingly.

Pending applications also stand disposed of." (Emphasis supplied).

Preliminary Submissions:

It is submitted that in the operative part of the judgment dated 02.07.2018 under the heading Decision, there is no mention of two parameters only but TRAI has been asked to re-do and re-enact the quashed Schedules – I, II and III of Regulation dated 21.12.2012 after strictly following the procedure for subordinate legislation making, particularly transparency and principles of natural justice which have also been built into section 11(4) of TRAI Act. It is pertinent to mention that the aforesaid judgment also states that all the three regulations on this subject are kept in abeyance for the period of 6 (six) months from the date of the receipt of order or the re-enactment/re-do/re-work/re-frame of the new Schedules whichever is earlier.

It may be noted that while the Authority has been asked to rework the figures only on two counts **within a period of six weeks w.e.f. 08.10.2018, the day on which the Hon'ble Supreme Court passed the above-mentioned order expire on 19.11.2018**, all contentions of both the sides have been kept open by the Hon'ble Supreme Court and liberty has been given to raise all contentions.

The Hon'ble Supreme Court has also not interfered with that part of the order of Hon'ble Division Bench wherein the Hon'ble Division Bench of Madras High Court has kept the three Regulations in abeyance for a period of six months from the date of receipt of copy of this Order or re-doing/re-enacting aforesaid schedules whichever is earlier. In our view, the Authority will therefore be required to re-do/re-enact/re-frame the Schedules I, II & III to the CLS Charges Regulation dated 21.12.2012.

It is our submission that the order of the Hon'ble Supreme Court dated 08.10.2018 has to be harmoniously read with the order of the Hon'ble High Court of Madras dated 02.07.2018. The Hon'ble Supreme Court in its order dated 08.10.2018 has modified the timelines only to re-work/re-enact/re-frame the Schedules I, II & III of the Regulations dated 21.12.2012 to six weeks with effect from 08.10.2018. it Is submitted that there Is

no further change in the order/directions/ judgement passed by the Hon'ble High Court of Madras.

The Schedules I, II & III of the Regulations dated 21.12.2012 remain quashed in accordance with the order dated 02.07.2018 of Hon'ble High Court of Madras to that extent we do not agree with the statements made in para 1.20 and para 2.28 as the same is not in accordance with the legal position/ in line of the order of Hon'ble High Court of Madras dated 02.07.2018 and the order of Hon'ble Supreme Court dated 08.10.2018. 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 which has been modified by the Hon'ble Supreme Court.

Further, it is noted that in the Consultation Paper of TRAI while taking up the issues of the 'utilization factor' and the 'conversion factor' has relied on the same Access Facilitation design, cost data and other cost factors used in the previous exercise conducted vide it's Consultation Paper dated 19.10.2012. From the reading of the part/portion of the Consultation Paper it appears that TRAI is in the process of is in the process of giving effect of the charges from the retrospective period which was not the intent of the Hon'ble High Court of Madras hence the intended action of TRAI amounts to malice in law.

The Schedules- I, II and III of the 21.12.2012 regulation have been quashed by the Hon'ble High Court of Madras and the same are required to be re-worked/re-enacted and re-framed from the prospective date only though we do not agree/acknowledge the jurisdiction of TRAI to frame the regulation.

However, it is submitted that since 2012 the market scenarios & other cost affecting parameters have changed. It would therefore be appropriate and in the fitness of things that the Consultation Paper for considering the two issues of 'utilization factor' and 'conversion factor' should be based on the present day figures in respect of all the elements used for computation of annual access facilitation charges, annual operation & maintenance charges for capacity provided on IRU basis, and co-location charges.

We hereby submit our comments and response on various aspects related to jurisdiction, power and authority to frame the Regulations and various other legal and factual issues in respect of the computation of charges in the intended Schedule I, II & III of the Regulation dated 21.12.2012. It is re-emphasized that the following submissions are without prejudice to one of our primary submission that the TRAI has no jurisdiction in framing such Regulations, which are in question.

JURISDICTION, POWER & AUTHORITY TO FRAME THE REGULATIONS.

The three Regulations on the subject are without jurisdiction, self-acknowledged power to frame these Regulations is derived from an amendment to a license agreement between the TCL and DoT, which is a contract between two parties to which the TRAI is not even a party. The self-admitted facts of the TRAI in this regard are as follows :-

- The TRAI Act, 1997 under Section 36 provides for the power to make Regulations by TRAI herein and the powers and functions of the TRAI are set out in Chapter III under which Section 11 to 13 of which Section 11(1)(b) is relevant in the present context As far as the Regulations of 07.06.2007, 19.10.2012 and 21.12.2012 are concerned, the TRAI does not have the power to frame the Regulations as there is no function prescribed for regulating infrastructure sharing charges/access charges for sharing infrastructure facilities created under the license like towers by mobile operators or Cable Landing Stations by International Long Distance Operators (ILDOs) and also there is no provision which empowers TRAI to prescribe charges in this regard for Cable Landing Stations. Section 36 and Section 11(1)(b) of the TRAI Act, 1997 read as follows:-

  "36. Power to make Regulations.- (1) The Authority may, by notification, make Regulations consistent with this Act and the rules made there under to carry out the purposes of this Act.

  (2) In particular, and without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the following matters, namely:-

  (a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

  (b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

  (c) matters in respect of which register is to be maintained by the authority [under sub-clause (vii) of clause (b)] of sub-section (1) of section 11;

  (d) levy of fee and lay down such other requirements on fulfillment of which a copy of register may be obtained [under sub-clause (viii) of clause (b)] of sub-section (1) of section 11;

  (e) levy of fees and other changes [under clause (c) of sub-section (1) of section 11;"

Section 11 (1) (b) –

Functions of Authority (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service provider;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the Regulations;

(viii) keep register maintained under clause (vii) open for inspection to keep member of public on payment of such fee and compliance of such other requirement as may be provided in the Regulations;

(ix) ensure effective compliance of universal service obligations;"

This fact has been recognized by the TRAI in its recommendations of 16.12.2005 under which in para 3.3 it has been stated that "the CLS owning ILDO should be mandated through license amendment to publish the terms & conditions of such access with prior approval of regulator. This provision will enable TRAI to issue requisite regulation to ensure efficient, transparent & non-discriminatory access to the essential facilities at CLSs including fixing the cost-based access charges". In consonance with which observation TRAI at para 4.6 has made the recommendation requiring the ILDO to seek the approval of TRAI regarding terms and conditions for access provision as also empowering the TRAI to specify cost based access charges in its Regulations and furthermore that this can be carried out by bringing out suitable amendments to the International Long Distance License Agreement. The said extract reads as follows:-

"4.6.2 The ILDO owning the Cable Landing Station should also be mandated to publish, with prior approval of the Regulator, the terms and conditions and specify cost-based access charges through its regulation.

4.6.3 Clause 2.2[b] of ILD service license should be suitably amended for this purpose and the existing time limits mentioned therein may be deleted."

Pursuant to the above recommendation DoT (the licensor) had amended the License Agreement on 15.01.2007, to provide the authority to TRAI to give prior approval for conditions of access provision and that the charges for such access to be governed by Regulations as may be made by TRAI/ DoT. The relevant extract reads as follows:-

"The amended clause 2.2 (c) is as under:

"Equal access to bottleneck facilities at the Cable Land Stations (CLS) including landing facilities for submarine cables for licensed operators on the basis of non discrimination shall be mandatory. The terms and conditions for such access provision shall be published with prior approval of the TRAI, by the Licensee owning the cable landing station. The charges for such access provision shall be governed by the regulations/ orders as may be made by the TRAI/ DoT from time to time".

Without prejudice to the submission that the above-mentioned amendment to the license agreement and / or any other event would still not extend any jurisdiction to the TRAI to issue any Regulation / order under the Act, it is submitted that after this amendment to the license provision TRAI brought out its consultation paper on 13.04.2007 seeking to frame Regulations and where in the said Consultation Paper at para 1.5, it has been stated that the TRAI has assumed power to frame Regulation pursuant to the amendment to the license provision on 15.01.2007. The relevant extract reads as follows:-

"The licensor has also amended relevant clauses in ILD license vide letter no. 16-3/2006-BS-I dated 15th January 2007 **to enable TRAI** to bring out regulations to ensure efficient, transparent and no discriminatory "Access to Essential Facilities including Landing Facilities for Submarine Cables at Cable Landing Stations"(emphasis supplied).

This was reiterated in the Explanatory Memorandum to 07.06.2007 Regulation wherein at paragraph 1.2 of the Explanatory Memorandum it has been again stated that

"The Department has also amended relevant clauses in ILD licence **to enable TRAI** to bring out regulations to ensure efficient, transparent and non-discriminatory Access to Essential Facilitation (including landing facilities) for submarine cables at Cable Landing Stations"(emphasis supplied).

As far as the Explanatory Memorandum is concerned, the same provide a statement of objects and reasons of the Regulations and is always a part of the Regulation irrespective of whether it is expressly stated so or not.

It is submitted that the Explanatory Memorandum of that Regulation also cannot be improved/retracted/detracted as per the law laid down by Hon'ble Supreme Court in the M. S. Gill and Another vs. The Chief Election Commissioner, New Delhi and others. (1978) 1 SCC 405 para 8). In terms of the law laid down by the Hon'ble Supreme Court that an order made by a statutory functionary based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise, as laid down by the Hon'ble Supreme Court and

followed in M.S. Gill till date. The relevant extract in this regard from the case of M.S. Gill vs. Chief Election Commissioner ((1978) 1 SCC 405) para 8 reads as follows:

"8. The second equally relevant matter is that when a statutory functionary makes on order based on certain ground, its validity must be judged by the reasons so mentioned and cannot' be supplemented by fresh reason in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional ground later brought out. We may here draw attention to the observations of Bose, J. in GordhandasBhanji':

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older."

The consistent stand of the TRAI has been the recognition of the fact that its jurisdiction, power and authority to frame the Regulations is derived from a license amendment.

It is submitted that terms and conditions of the license cannot empower TRAI to regulate a business since it would be a restrain on the fundamental right to carry on business guaranteed by Article 19(1)(g) of the Constitution which can be restricted or regulated only in terms of Article 19(6), that is to say by law.

It is on this basis of an amendment to the Licence Agreement on which the TRAI seeks to trace its power to frame the Regulations. It is submitted that under Section 36(1) the power of the TRAI is to make Regulations consistent with this Act and the rules made thereunder, a license agreement issued by the DoT under an enabling provision of the proviso to Section 4(1) of the Indian Telegraph Act, 1885 cannot confer any power or authority to the TRAI to frame Regulation nor TRAI can issue Regulations on the pretext of ensuring compliance to the terms and conditions of the license if it does not have the power under the Act to issue Regulations. The power to frame Regulation, which is a subordinate / delegated legislation is not traceable to any provision of the TRAI Act, rather as the TRAI itself has admitted in its various documents cited above, it is by virtue of an amendment to a license that it seeks to frame the Regulation.

Secondly, if TRAI had power and jurisdiction under Section 11 (1)(b)(ii) to (iv) read with Section 36 (1) of the TRAI Act then there was no need to seek amendment to the terms and conditions of the license for enabling TRAI to issue the Regulations on the subject.

Thirdly, TRAI in its various documents viz. Consultation Papers, Recommendations and Presentation before International Telecommunication Union (ITU) has categorized access to CLS as a case of infrastructure sharing and TRAI does not have powers to specify/determine charges for infrastructure sharing or charges for access to infrastructure.

Realizing this legal disability, consciously provided / stipulated by the legislature in the Act,, TRAI has sought an amendment to Section 11(1)(b) of the TRAI Act, by seeking insertion of "access" in Section 11(1)(b)(ii).

TRAI has itself recognized the fact that access facilitation is one of access to the essential facilities of a Cable Landing Station and admittedly classified under the infrastructure sharing and is not an issue of interconnection, because it lacked jurisdiction to legislate on this subject it has sought an amendment to the TRAI Act, 1997 and in which respect a proposal has been forwarded to the DoT. A news report in Telecom LIVE a Magazine published from Delhi in February 2013 has extracted the proposed amendment to Section 11(1)(b) (ii) of the TRAI Act, 1997, the relevant extract from the said proposal as carried in the news item reads as follows:-

"Existing Section 11(1)(b)(ii): Notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

Proposed: Notwithstanding anything contained in the terms and conditions of the license fix the terms and conditions of access and inter-connectivity between the service providers.

Decision: It was agreed to as the per the stand of DoT conveyed in the ongoing matter between TRAI and BSNL in an ongoing supreme Court case based on advice of Attorney General."

It is humbly submitted that such an assumption on the part of TRAI that on the amendment of the license agreement, it had assumed jurisdiction to frame the Regulations in question, is entirely impermissible in law and such an assumption is entirely non-existent.

Principle of Contemporanea Exposito

It was the contemporaneous understanding of the TRAI that it did not have the power to regulate access to CLS and therefore adopted the route of a license amendment and which is reflected in various documents including the Regulation of 7th June 2007, in its Explanatory Memorandum. It was also the clear understanding of the TRAI that access to CLS is a case covered under infrastructure sharing and is not covered under interconnection. Following judgments of Hon'ble Supreme Court are relevant in this regard:

1. State of Tamil Nadu Vs. Mahi Traders &Ors. [MANU/SC/0561/1989, AIR 1989 SC 1167 para 5]
2. P. Kasilingam and Others Vs. P.S.G. College of Technology and Others [MANU/SC/0265/1995, AIR 1995 SCC 1395, Para 20]

Section 11(1)(b)(i) relating to ensuring compliance to license terms & conditions cannot confer the Jurisdiction to TRAI.

(b) Section 11(1)(b)(i), reads as follows:-

"Sec. 11(1)(b)(i). ensure compliance of terms and conditions of license;"

The above provision is purportedly the basis for the Regulations as reflected in the recommendations of 16.12.2005, Consultation Paper of 13.04.2007 and Regulation of 07.06.2007 as stated hereinabove on the fallacious premise that amendment of licence will empower it to frame Regulations. Ostensibly, Section 11(1)(b)(i) has not been adverted to much less invoked in the Regulations dated 07.06.2007 and 19.10.2010 .

It is submitted that the power to frame Regulations, cannot be derived from provisions of a license agreement. The Regulations are in the nature of subordinate legislation, which u/s 36 of the Act has to be conferred by the Act. There is admittedly no power conferred by the Act to frame the regulations under various provisions of the Act and the same therefore cannot be justified on the basis of seeking compliance of a term of license. Framing of a subordinate legislation cannot be predicated and made subject to amendment of contractual clauses.

It has been held by the Hon'ble Supreme Court in the case of Union of India and Another Vs Association of Unified Telecom Service Providers of India and Others [(2011) 10 SCC 543 at para 39, 40]

……that the license granted under Section 4(1) of the Telegraph Act as in the case of an ILD License "is in the nature of a contract between the Central Government and the Licensee" (para 39)and furthermore at para 40 says that "once a license is issued under the proviso to sub section (1) of Section 4 of the Telegraph Act, the license become a contract between the licensor and licensee. Consequently, the terms and conditions of the license including the definition of adjusted gross revenue in the license agreement are part of a contract between the licensor and licensee".

Section 11(1)(b)(ii)& (iii) Relating To Interconnection Is Not Applicable in the case of Access to CLS.

The relevant Sections read as under:

11 (1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to-

(b) discharge the following functions, namely:-

(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) Ensure technical compatibility and effective inter-connection between different service providers;"

Wherein sub clause (ii) relates to the power of the TRAI to fix terms and conditions of interconnection between the service providers, Sub Clause (iii) relates to the power of TRAI to ensure technical compatibility and effective interconnection between service providers.

It is submitted that since the fundamental distinction between the concept of interconnection on the one hand and sharing of infrastructural facilities on the other was unambiguously known to the TRAI, the TRAI had clearly understood of complete absence of its jurisdiction in relation to sharing of infrastructural facilities and therefore, had kept itself completely away from the temptation of stipulating any mandate to the service providers regarding sharing of infrastructural facilities. The TRAI, as per the scheme of the Act, never had any occasion and / or permissibility in ever attempt to construe access to essential facilities at cable landing system as a case of interconnection.

The term interconnection has been construed and defined in very specific terms by TRAI in its various Regulations starting from the year 1999. In fact, there are three major Regulations of TRAI along with its amendments which clearly and conclusively demonstrates that access to CLS and the agreements (access facilitations agreements) in respect of the same has never been construed to be covered as a case of interconnection. These three Regulations are:

- The Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 2001. The Telecommunication Interconnection Usage Charges (IUC) Regulation 2003 and its later amendments which interalia dealt with the Interconnection Charge and the Revenue Sharing amongst various service providers as per various schedules provided in the Regulation of 2001 and in the later Regulations from 2003 onwards dealt with the revenue sharing arrangement by determining the cost based Interconnection Usage Charges. It is submitted that had access to CLS been a case covered under interconnection in the understanding of TRAI as well as the industry, TRAI would have required to add one more schedule to the Regulations of 2001 or could have dealt with the same in the Interconnect Usage Charges Regulations issued in 2003 and thereafter. Moreover had access to CLS been a case covered under interconnection in the above mentioned 2001 Regulations (which incidentally dealt with revenue share applicable for ILDOs) there was no need or reason for the TRAI to have sought the amendment in the License agreement vide its recommendations of 2005. From above it is transparently clear that access to CLS has never been construed to be covered as a case under the term "interconnection" by TRAI and the industry at large.

Secondly, the term "interconnection" has been identically defined by the TRAI in the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 2001

and various other Regulations and the same definition has been followed in the successive/successor Regulations on the subject which is as follows:

"Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, network and services to enable their customers to have access to the customers, services and networks of other service providers.

The case of provision of access to the CLS which is provided by the owner of the CLS like the TCL, such access is provided to other eligible ITEs (ILDOs) so that they can access the international bandwidth owned by them through the CLS of TCL. TCL in this case is neither connecting its network with the network of the eligible ITE nor does the eligible ITE is connecting it's customer to the network of TCL at TCL's CLS. It is therefore abundantly clear that access to CLS is not covered under the term "Interconnection" as defined by the TRAI.

Admittedly, facilitation of access to the CLS owned by TCL to the other ILDOs/ IGSPs is a case of infrastructure sharing and in no manner can be termed as interconnection because interconnection has been construed by the TRAI in the Interconnection Usage Charge Regulation, 2003 to be the commercial and technical arrangement under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services and network of other service providers.

Even in the Consultation Paper, leading to Regulation of 07 June 2007 TRAI has consistently construed access to Cable Landing Station as not being interconnection at all places and at all times the reference has been to "access" with no reference to "Interconnection" and which is the correct position.

The relevant paragraphs and their extracts in this regard, are as follows:

"4.2.2 ……The Landing station owners provide access to submarine cable bandwidth purchased by the service providers from cable consortium/ carriers under the provisions of landing party signatory agreement signed between cable owners and landing station party. ……"

The Hon'ble Division Bench of Madras High Court in its Judgment dated 02.07.2018 has also rightly held that access to CLS is not a case covered under interconnection and therefore the Hon'ble Division Bench has not accorded the jurisdiction to TRAI on the basis of Section 11 (1)(b)(ii) & (iii) read with Section 36 (1) of the TRAI Act.

Section 11(1)(b)(iv) Relating To Revenue Sharing Is Not Applicable In The Case Of Access to CLS.

Clause (iv) of Section 11 (1)(b) of the TRAI Act, 1997 reads as follows:

Section 11(1)(b)(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services.

Reading of the above clause discloses that it is the revenue arising out of providing a common service provided to a customer which has to be shared between various service providers. In a nutshell this clause, as evident from the above, relates to sharing of revenue generated by provision of a service by two or more operators to the end customer(s).

Section 11(1)(b)(iv) relating to sharing of telecommunication revenue is concerned, the same in no manner covers the present case as there is no case of revenue sharing and the eligible ITE is paying cost based access charges to the owner of the CLS for accessing its own bandwidth through the access facilitation set up installed by the owner of the CLS.

The said provision relates to sharing of revenue out of provision of telecommunication services in which it is a situation where provision of telecommunication service by two or three operators in conjunction generates the revenue, which is then apportioned between the different operators. In this regard, TRAI has framed "The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001" and the "Interconnection Usage Charges Regulations, 2003" along with their subsequent amendments have been framed specifically for commercial arrangements envisaged by this provision and these Regulations deal with Revenue sharing arrangement as spelt out in Regulation 4 of these Regulations.

In the present case there is no question for provision of service by two or more operators, as far as the CLS is concerned - the Operator who owns the capacity on the submarine cable accesses its own capacity through the CLS owned by the OCLS for which it pays Access Facilitation Charges and thereafter it is the same capacity belonging to the same Operator which exits the CLS and is connected to the domestic network of the access seeker. There is no question of any revenue being generated by joint activities of two service providers accruing out of a third party or a consumer.

A bare reading of "The Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001" relating to revenue sharing discloses the network / equipment to which it is applicable. In fact, the definition Section at Clause 2 defines all the services to which it is applicable, which nowhere includes Cable Landing Station. There are two Schedules appended to the said Regulation which refer to revenue sharing for basic services and revenue sharing for cellular mobile. Had access to CLS been a case of revenue sharing, TRAI need not have brought out a separate regulation or sought the amendment to the license agreement of ILDOs, all it needed to do was to bring forth a third Schedule to the Regulation by amending the same and including access facilitation in this Regulation – provided it ever had any jurisdiction in this behalf. It is reiterated that the TRAI has no jurisdiction to stipulate any mandate either through Regulations or through any other manner in this behalf, under the Scheme of the Act.

The purport of the said statutory provision i.e. 11(1)(b)(iv), read with the Regulations framed in terms thereof very clearly relates to voice telephony and no other segment like Cable Landing Station. An important aspect in the case of revenue sharing as envisaged and covered under Section 11(1)(b)(iv) of the TRAI Act is that two or more service providers provide service to consumers and the revenue earned from that customer by one of the service provider is shared amongst these service providers as per the above Regulations as per the interconnection usage charges mandated in the Regulations.

Other Legal Issues :

TRAI CANNOT REGULATE ABUSE OF DOMINANT POSITION SINCE IT IS GOVERNED BY COMPETITION ACT, 2002

The primary reasons articulated by TRAI for specifying the charges payable by a access seeker seeking access to a cable landing station or for regulating such charges is that there is abuse of dominant position by the owners of cable landing station in India and that they are in the nature of a monopoly and they indulged in practices which deny access to cable landing station on fair and non discriminatory terms. While it is completely denied that there is any abuse of dominant position by the owners of cable landing station in India and that they are in the situation of a monopoly and / or indulge in practices which deny access to cable landing station on fair and non discriminatory terms, it is submitted that if this is the justification for the regulation, then the same is beyond the powers of TRAI in terms of discharging its functions under Chapter III of the TRAI Act relating to Section 11, 12 & 13 of the said Act.

The Parliament has enacted the Competition Act, 2002 (Act 12 of 2003) with the express object of establishing a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in market, to protect the interest of consumers and to ensure freedom of trade carried out by other participants in the markets. Section 3 deals with prohibition of anti-competitive agreements and section 4 deals with prohibition of abuse of dominant position. Section 18 mandates the commission to eliminate such practices and Section 19 to 26 sets out an elaborate procedure for inquiry into such abuse of dominant positions by an enterprise and section 27 empowers the commission to pass orders to restrain such abuse of dominant position, remedy the same, impose penalty, award compensation and direct that agreement shall stand modified as specified in the order of the Commission. The Competition Act has been given an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force by virtue of Section 60 of that Act.

In the present case the TRAI, without holding any inquiry, and without discussing the relevant facts and submissions of TCL to substantiate as to whether any of the OCLS has any dominant position as on date and that there is no such abuse of dominant position, has arrived at an erroneous conclusion and chosen to make a regulation which is beyond the jurisdiction of TRAI.

In fact, Section 21 of the Competition Act obligates the TRAI if they were of the view that the owners of cable landing station were abusing the dominant position to make a reference to Competition Commission. Section 21 is set out herein below:

"21. Reference by statutory authority (1) Where in the course of proceedings before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue of the Commission.

(2) On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit:

Provided that the commission shall give its opinion under this section within sixty days of receipt of such reference."

This clause contains provisions relating to the circumstances under which a reference can be made to the Commission by statutory authorities. It provides that if in the course of a proceeding before any statutory authority, entrusted with the responsibility of regulating any goods or service or market therefore, a party has raised an issue that the decision taken by the statutory authority would be contrary to the provisions of the Competition Act, then the statutory authority shall be bound to make a reference to the Commission. The Commission shall after hearing parties to the proceedings give its opinion to the statutory authority and the statutory authority shall thereafter pass its orders.

The Competition Commission would have been obliged to investigate in case a reference was made by TRAI on the allegation on misuse of dominance and would have provided its findings to TRAI. It is only thereafter, that the power could have been exercised, if at all by TRAI.

This aspect has assumed particular significance in view of the repeated erroneous contention of TRAI that the owners of CLS are abusing the dominant position and therefore it became necessary to regulate, firstly by mandating prior approval of the rates and thereafter by TRAI itself specifying the rates.

THE REGULATIONS OF OCTOBER 2012 AND DECEMBER 2012 ARE VITIATED FOR VIOLATION OF TRANSPARENCY AND NATURAL JUSTICE

Without prejudice to the submission that the TRAI has no jurisdiction whatsoever in mandating any stipulation as a compulsion with regard to infrastructure sharing, including sharing for access to Cable Landing Station by the operators, either through the Regulations or through any other manner, it is submitted that the Regulations of October 2012 and December 2012 are violative of Section 11(4) of TRAI Act in respect of obligation of transparency which requires that the hearing and reasons should be given. No hearing was given by the Authority in respect of Consultation Paper dated 22.03.2012

leading to Regulation dated 19.10.2012 and Consultation Paper dated 19.10.2012 leading to Regulation dated 21.12.2012. Moreover the contentions raised by TCL in respect of issues raised in both the aforesaid Consultation Papers have not been dealt with and no reasons have been assigned in the Explanatory Memorandum for the same. The Hon'ble Division Bench of Madras High Court vide its Judgment dated 02.07.2018 has rightly set aside the Schedules I, II& III of the Regulation dated 21.12.2012 for the lack of transparency.

It is submitted that the amendment made to the same on 19.10.1012 is vitiated as much as the said regulation has been made in gross violation of the principles of natural justice as well as the mandatory requirement of transparency in terms of section 11(4) of the TRAI Act. The submission that the TRAI has no jurisdiction whatsoever in mandating any stipulation as a compulsion with regard to infrastructure sharing, including sharing for access to Cable Landing Station by the operators, either through the Regulations or through any other manner is reiterated.

The Hon'ble Supreme Court in several judgments considered the need for compliance with the principles of natural justice while exercising such regulatory power even if they are in the nature of exercise of delegated legislative power and has taken the view that compliance with principles of natural justice is necessary. They are as follows:-

- Cellular Operators Association of India& Ors. Vs. TRAI &Ors. reported in (2016) 7 SCC 703

- Kumari Shrilekha Vidhyarthi and Others Vs. State of U.P. & Others [(1991) 1 SCC 212 Para 36 & 37]

- Godawat Pan Masala Products I.P. Ltd & Anr. Vs. Union of India (UPI) &Ors. [MANU/SC/0574/2004, AIR 2004 SC 4057, Para 57 to 60, 73 to 76],

- Delhi Science Forum and Others Vs. Union of India and another [MANU/SC/0360/1996, AIR 1996SC 1356, Para 10]:

- East Coast Railway And Another Vs. Mahadev Appa Rao and Others (2010) 7 SCC 678, Para 21-25 :

- West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd etc. etc. [MANU/SC/0859/2002, AIR 2002 SC 3588, para 39-40]

- Indian Express News Paper Vs. Union of India [AIR (1986) SC 515 Para 71 & 77]:

- Sri Malaprabha Cooperative Sugar Factory Ltd Vs. Union of India [MANU/SC/0306/1994, AIR 1994 SC 1311, para 57 & 58]

- DAI ICHI Kakaria Ltd Vs. Union of India and Others [(2000) 4 SCC 57,para 8]

It is also settled law that the hearing of the decision will have to be by the same person otherwise there will be failure in compliance with the principles of natural justice. This

has been so held by the Hon'ble Supreme Court in Gullapalli Nageswar Rao and Ors. Vs. Andhra Pradesh State Road Transport Corporation and Anr. [MANU/SC/0017/1958, AIR 1959 SC 308, para 22,23 & 45]

The said decision was followed by the Hon'ble Supreme Court in the case of Automotive Tyre Manufacturers Association Vs. The Designated Authority and Ors. [(2011) 2 SCC 258, para 55, 57 & 59]

The vesting of power and functions by the Parliament including by Section 11 on the TRAI is conditional upon compliance with the requirement of transparency under Section 11(4) of the TRAI Act. TRAI is required to strictly comply with "Transparency" and all that necessary comprehends, while exercising any of its powers and discharging any of its functions. There is no exception to mandatory requirement of section 11(4) in respect of regulation making.

The entire exercise of TRAI is vitiated by lack of transparency, not only in terms of the procedure followed, but also in terms of the non disclosure of relevant materials and most crucially the costing calculations and cost methodology to be followed. The requirement of transparency is prescribed under Section 11(4) of the TRAI Act, 1997, the relevant extract reads as follows:

Section 11(4):

The Authority shall ensure transparency while exercising its powers and discharging its functions.

The prescription in terms of Section 11(4) is mandatory as it requires that the TRAI "shall ensure transparency" while exercising its powers and functions. The Regulations have been ostensibly framed under Section 36 relating to the "Power to make Regulations" and under Sections 11, 12 and 13 which are under the heading of "POWERS AND FUNCTIONS OF THE AUTHORITY" IN CHAPTER III. In other words whenever TRAI acts under Section 36 and under Section 11 of the TRAI Act as it has purportedly under the Regulation, there is a mandatory requirement to ensure transparency.

TRAI has also construed transparency in this manner as for any Regulation published, by it follows a step by step process, best articulated in the power point presentation by the Secretary of TRAI in Chennai, conducted by the Hon'ble TDSAT. The presentation alongwith the relevant slide are filed alongwith the present submissions and the same is extracted herein below:-

"Regulatory Process (Adopted by TRAI)

To Ensure Transparency TRAI adopts the following process before taking any regulatory decisions:

- Consultation Paper is issued soliciting comments from stakeholders.
- The Comments of the stake holders are published on the website.

• Stake holders are invited in the Open House discussions (OHDs) organized in different parts of the country".

The above presentation is also available on the website of the TDSAT at the following link:-

http://www.tdsat.nic.in/Chennai_pre/8.%20R_K_Arnold.TRAI.ppt

The TRAI procedure is also documented in its Annual Report and the same is extracted below from the TRAI Annual Report, 2016-17:

"2.3 To formulate recommendations andsuggest policy initiatives, TRAI interactswith various stakeholders such as theservice providers, their organizations,Consumer Advocacy Groups / ConsumerOrganizations and other experts in thisfield. It has developed a process, whichallows all the stakeholders and thegeneral public to participate in discussionsabout policy formulation by offering theirviews whenever sought for. This processinvolves floating of a consultation paperhighlighting the issues involved andsoliciting the views of the stakeholders onthe issues, holding Open House Meetingsarranged in different parts of the country,inviting written comments on e-mail andthrough letters, and having interactive sessions with stakeholders and experts toobtain different views and clarificationson policy issues. The Regulations / Orders issued by TRAI also contain an Explanatory Memorandum which explains the basis on which the decisions are taken. The participative and explanatory process adopted by TRAI has received wide acclaim."

No hearing given by the Authority

1. It is submitted that Regulatory Transparency comprehends within itself the following process:.

(i) Articulated reasons for any regulation or change in regulation.

(ii) Initiate a proposal on basis of such articulated reason

(iii) Invite responses from all stakeholders

(iv) Consider the responses including the criticism on the proposal and alternative suggested.

(v) Give a hearing to all stakeholders specifically by the decision maker.

(vi) Evaluate alternate options with due application of mind and free from any predetermined biased or preconceived approach.

(vii) After following the procedure and after adequate consideration to all the factors including the view of all the stake holders, arrive at a decision.

(viii) Give adequate publicity to the said decision with Explanatory Memorandum articulating the reasons and rationale for the decision and

the consideration of various views of the stakeholder in the manner of a speaking order.

2. This is the regulatory framework which has been evolved in this country consistent with the best international practice and WTO guideline and is in vogue in sectors like power, highways, airport, and environment as also telecom.

3. Even in respect of changes in Policy by the Govt., the Court insists that it must be informed with reasons and adequately justified and it cannot be arbitrary and whimsical. (Delhi Science Forum judgment). It may be noted that while bringing out the new telecom policy, 2012 and National Digital Communication Policy, 2018 the Government of India rightfully undertook extensive consultations with all the relevant stakeholders before arriving at the said policies.

4. The practice in the very case of the CLS when the recommendations of 2005 were issued and the Regulation of 2007 was issued as also in respect of other Regulations by TRAI on substantive issues like IUC Charges, Spectrum related issues has been consistent with what is set out above, in fact TRAI has expounded the regulatory transparency in the manner described above from its Annual Report.

The Open House Discussion is a mandatory requirement under the TRAI Act, 1997 as it is the only time when the full Authority comprising of the Chairperson and the Members give hearing to the stakeholders including the affected parties. The statute in terms of Section 11(4) requires transparency to be ensured by "the Authority", "Authority" is defined and construed in Section 3 of the Act to be the Chairperson and the Members. Section 3 being of relevance is extracted herein below:-

"3. On the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, a person appointed as Chairperson of the Authority and every other person appointed as member and holding office as such immediately before such commencement shall vacate their respective offices and such Chairperson and such other members shall be entitled to claim compensation not exceeding three months pay and allowances for the premature termination of the term of their offices or of any contract of service].

The requirement therefore in terms of the above provisions is for the Chairperson and Members to give a hearing, admittedly which has not been carried out by TRAI while framing the 19th October 2012 and 21st December, 2012 Regulations.

It is submitted that no such interaction/ hearing was given to TCL while framing the Regulation of 19th October, 2012, despite TCL having furnished its detailed response to the consultation paper of 22nd March 2012.

Under Section 33 of the TRAI Act, 1997, which provide for delegation, the Authority may delegate all its powers under the Act, save and except the power to settle disputes and to make Regulations under Section 33. Section 33 reads as follows:-

"33. Delegation- The Authority may, be general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under Section 36 as it may deem necessary."

From the above it is clear that :-

a. Requirement of transparency is on the part of the Authority to give a hearing, whether through Open House Discussions or otherwise, which have not been complied with for the two Regulations of 2012.

b. The Authority under Section 33 cannot delegate this essential legislative function, which it has, on which ground alone the two Regulations of 2012 are liable to be set aside.

The Regulations infringe upon the fundamental right to carry business as enshrined under Article 19(1)(g) of the Constitution of India

That by means of the 2012 Regulations TRAI has restricted / constricted the fundamental right to carry on business under Article 19(1)(g) of the Constitution of TCL which needs to be justified by TRAI from out of the grounds set out in Article 19(6) i.e., restrictions made by law, which are in the interest of the general public and which are reasonable as the language of Article 19(6) provides. It is submitted that terms and conditions of the license cannot empower TRAI to regulate a business since it would be a restraint on the fundamental right to carry on business guaranteed by Article 19(1)(g) of the Constitution which can be restricted or regulated only in terms of Article 19(6), that is to say by law. The issue of Public Interest already stands decided against TRAI by the Hon'ble Division Bench decided on 25.06.2013, the said judgment has attained finality.

Two Procedures – Less drastic to be followed

Without prejudice to the above it is submitted that even if both the procedures namely the procedure for fixing charges in terms of Regulations 3, 7 and 10 of the 07.06.2007 Regulation and the prescription of charges in terms of the 21.12.2012 Regulation continue to co-exists, the law laid down by the Hon'ble Supreme Court is very clear that in the event of two procedure co-existing for the determination of liability, the one less drastic and burdensome should be followed.

This is the ratio of the judgment of the Hon'ble Supreme Court in a constitution bench of 7 judges in the case of Maganlal Chhaganlal vs. Municipal Corporation of Greater Mumbai and Ors reported in (1974) 2 SCC 402.

No Power to Prescribe Uniform Charges In Terms of 21.12.2012 Regulation

Without prejudice to the above submissions, regarding complete absence of jurisdiction of the TRAI to frame the Regulations, it is submitted that the 21.12.2012 Regulation of 21.12.2012 is illegal and ultra vires the Regulations of 07.06.2007 and 19.10.2012, inasmuch as there is no power conferred upon TRAI to prescribe uniform charges across

all the CLSs, assuming without admitting that TRAI has the power to issue Regulations of 07.06.2007 and 19.10.2012.

It is the admitted case of TRAI that it is only upon the amendment to the 07.06.2007 Regulations by insertion of proviso by Regulation of 19.10.2012, TRAI was empowered to frame the Regulations of 21.12.2012. Even assuming, though not admitting that TRAI is correct in assuming powers to prescribe charges, however the same cannot be uniform charges for all CLSs as prescribed in the 21.12.2012 Regulation but have to be individual charges based on individual costs in terms of 07.06.2007 Regulation.

The scheme and application of the 07.06.2007 Regulation is to treat every CLS as a distinct entity for the purposes of assessment of cost and consequently charge for access by every CLS. This is evident from Regulations 3, 4, 5, 6, 7, 8, 9, 10, 12 and 14.

Regulation 3 prescribes fair and non - discriminatory access, provide landing facilities, submit RIO application, Regulation 4 requires every access seeker to apply to owner of the CLS, Regulation 5 relates to the terms of confirmation by owner of CLS, Regulation 6 relates to entering agreement for CLS. Regulation 10 which is relevant provides for access facilitation charges and payment terms, Regulation 10 (1) provides for the access facilitation charges to be in terms of Part II of Schedule, Regulation 10(1)(a) provides for it to be paid to the owner of the CLS, 10(1)(b) says that it has to be determined on the basis of the cost of network elements, involved in the provision of access and distributed over the complete capacity of the system. Regulations 12 and 14 relate to cancellation and restoration of access facilitation..

The 19.10.2012 Regulations amended the said Regulation by inserting a proviso into clauses 10, 12 and 14 of the 2007 Regulation giving power unto TRAI to prescribe charges.

A bare perusal of the above Regulation, specifically Regulation 10 which is relevant for the present context reveals the following:-

- Regulation 10(1)(b) prescribes that the access facilitation charges will be determined on the basis of the costs of network elements involved in the provision of access and distributed over the complete capacity of the system. This therefore, clearly means and specifies that the charges will have to be specific to every individual CLS based on its costs. There is also a note appended to Part II of the Schedule which reads as follows:-

"NOTE: The owner of Cable Landing Station shall provide to the Authority, the costing elements considered, their costs and costing methodology employed along with calculations sheet in arriving at the charges submitted above in Part-II of the Schedule of these regulations for international submarine cable capacity access and co-location facilities etc., while submitting the Cable Landing Station- Reference Interconnect Offer as per clause (d) of sub-regulation (1) of regulation 3."

- In other words, the charges for every CLS will have to be on an individual basis, such charges being based on the cost of the various network elements and projected utilization of such CLS.

- The insertion of the proviso by the amendment of 19.10.2012 only gives power to TRAI to prescribe charges, which means apart from submission of the RIO, the TRAI will also have the power to prescribe charges.

- However, it is significant that the power to prescribe charges by the TRAI in terms of Regulation 10 has to be specific to every CLS, based on its cost and cannot be a uniform charge across different CLS.

- The prescription therefore, of uniform charges in terms of Regulation 3 under the Schedule to the 21.12.2012 Regulation is therefore in violation of the parent Regulations of 2007 as amended by Amendment Regulation dated 19.10.2012.

It is a well settled proposition in law that a proviso is only an exception to the main provision and cannot override the main enactment as laid down by the Hon'ble Supreme Court in the case of Dwarka Prasad vs. Dwarka Das Saraf, (1976) 1 SCC 128 .

Thereafter the Hon'ble Supreme Court has held to similar effect in the following judgments:

i) M/s Ram Narain Sons Ltd. vs. Asst. Commissioner of Sales Tax and Others - AIR 1955 SC 765 (Para 10)

ii) Abdul Jabar Butt vs. State of Jammu & Kashmir AIR 1957 SC 281 (para 8)

iii) Kerala State Housing Board and Others vs. Ramapriya Hotels (P) Ltd. and Others (1994) 5 SCC 672 (para 6 and 7)

iv) Nagar Palika Nigam vs. Krishi Upaj Mandi Samiti and Others – (2008) 12 SCC 364 (para 9)

v) Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative land Development Banks Employees Union and another – (2004) 1 SCC 574 (para 9)

Without prejudice to the submissions in respect of complete absence of jurisdiction of the TRAI and lack of transparency in respect of the Regulation dated 19.10.2012 and 21.12.2012 issued by the Authority, it is our submission that the Schedules I, II & III need to be worked out for all the Cable Landing Stations individually as per the legal position given above as also because of the fact that each Cable Landing Station has its own Capex and Opex, Capacity Utilization and Capacity forecast and the charges cannot be made uniform due to these features of individual CLS.

THE REGULATIONS OF 19.10.2012 and 21.12.2012 ARE ARBITRARY, DISCRIMINATORY AND UNREASONABLE

Without prejudice to the submission that the TRAI has no jurisdiction whatsoever in mandating any stipulation as a compulsion with regard to infrastructure sharing, including sharing for access to Cable Landing Station by the operators, either through the Regulations or through any other manner, it is submitted that the Regulations suffer from the vice of arbitrariness, more particularly the Regulations of 19th October 2012 and 21st December, 2012. A large number of the issues addressed in this section relate to and have been extrapolated in detail in other sections, for the sake of convenience TCL is setting out the gist of its submissions on this aspect.

5.1. 19th October 2012 Regulations

a. The very process of framing this Regulation is hit by arbitrariness for the following reasons:-

I. There is no Open House Discussion.

II. There is no hearing by the Authority.

III. There is no transparency.

IV. There is violation of the principles of natural justice.

b. The Consultation Paper for this Regulation was issued on 22.03.2012, when TRAI was already seized of the submission of revised rates by TCL in respect of CLS access charges in terms of the 07.06.2007 Regulations. The Consultation Paper in fact commended the working of the 2007 Regulations by stating at para 1.16 to the following effect

"1.16 The Regulation has paved way towards debottlenecking the essential facility at Cable landing stations, which resulted in a significant competition in international bandwidth segment. The enhanced competition has helped in reduction of the prices of international bandwidth substantially in India during the past four years."

It is significant that there is a categorical admission by TRAI that the bottlenecking has been achieved. TRAI has relied extensively upon the license provision of access to CLS being a bottleneck facility while framing the Regulation of 2007, once the bottlenecking has been achieved the alleged purpose of the license amendment which was carried out on a suo moto recommendation of the TRAI has been achieved.

There was no Open House Discussion or any hearing given to TCL by the Authority in respect of the consultation process which led to issue of Amendment Regulation dated 19.10.2012. HoweverTCL had various discussions/ meetings with the officials of the TRAI between May to August 2012, all of which related to initially on the methodology used by TCL for computation of Access Facilitation Chargesand thereafter from August 2012 onwards TRAI called for the meetings to discuss the revised RIO rates submitted by TCL in terms of 2007 Regulations submitted in November 2010. While TCL submitted

its final calculations on 27 September 2012 and was waiting for the approval of its submitted charges from TRAI, TRAI came out with the Regulations of 19th October 2012 wherein it took powers to specify charges.

c. TRAI raised 10 issues for consultation and in the Explanatory Memorandum addressed only one issue, namely Question No.1., i.e. the method and need for Regulation was dealt with and that too in a very sketchy manner and the reasons given in support of the decision are without any basis and rationale and without due consideration of submissions made by TCL in this regard as none of the submissions made by TCL in respect of Question no. 1 have been adverted to or dealt with by TRAI in the Explanatory Memorandum to the Amendment Regulation dated 19.10.2012.

d. Considering that the debottlenecking of CLS as a facility as per TRAI's own stated stand have been achieved, not to furnish any reasons and peremptorily amend the parent Regulation by empowering itself to prescribe charges, required reasons to be furnished, more so when the purpose of the Explanatory Memorandum is to deal with the contentions of all the stakeholders and arrive at a reasoned decision.

e. The only reason advanced by TRAI towards framing the regulations is that "the process of approval of the charges involves scrutiny by TRAI of costing elements considered, costs and costing methodology employee by OCLS and final approval by TRAI, it takes more time and provide competitive advantage to the owner of Cable Landing Station as OCLS is also integrated operator……."

This reason is totally arbitrary and contrary to its own parent regulation of 07.06.2007, where specific time lines have been set out for approval of charges by TRAI upto a maximum of 60 days. TCL had furnished its revised rates for approval to TRAI in November 2010, which were never approved and for which TCL was called for giving a presentation in January 2011 and thereafter number of meetings were held with the officials of TRAI in August-September 2012. To attribute an alleged delay furnishing a benefit to the OCLS is totally without any foundation when the TRAI itself has not followed its statutory time lines stipulated in the 07.06.2007 Regulation in respect of revised charges submitted by TCL in November 2010.

It is, therefore, respectfully reiterated that in the light of the primary submission that the TRAI has no jurisdiction whatsoever in mandating any stipulation as a compulsion with regard to infrastructure sharing, including sharing for access to Cable Landing Station by the operators, either through the Regulations or through any other manner, even otherwise and for the other without prejudice grounds, the request / prayer on our behalf that the above-mentioned regulations in question would deserve to be withdrawn. The Operators, in accordance with the scheme of the Act and having regard to the fundamental distinction

between interconnection on the one hand and sharing of infrastructure on the other, would be entitled for their rights under the law and would be entitled to have their contractual freedom in exercising those legal rights. It is prayed accordingly.

No need to regulate as market has matured

As per the extracts of the December 2005 Recommendations of TRAI, there were two issues regarding bottleneck to essential facilities at a landing station. One was denial of access to the international capacity of a Consortium cable by a CLS owner and the other was denial of landing facility to a third party who possess the requisite license desirous of landing new cable at the CLS of a carrier. The purpose of the regulatory action was to remove these bottlenecks. As on date, there is no reported case of denial of access to the international capacity of a Consortium cable by TCL. Also out of the three new consortium cables which have come up since 2006, two (SMW4 & IMEWE) are landing at more than one CLS providing choice of CLS and OCLS for the eligible ITEs to access the bandwidth. Further, as multiple choices of CLSs as well as submarine cables from different OCLSs are available resulting in multiple choices for the eligible ITEs which is a clear sign of evolution and maturity of the competition and maturing of the market in India over a period, there is no need to continue treating CLS as a bottleneck facility.

It is submitted that the number of OCLS, CLS and cables landing in India have increased substantially as on date (reference table below) and is likely to grow further. On a comparison with countries like Australia, U K, Brazil, Philippines, Canada where the CLS access was not regulated in December, 2005 itself, the state of competition in India is now as fully robust. It is noted from examination of global practices that even in formerly CLS access regulated countries, the regulation of access to CLS was withdrawn when these countries had lesser number of Cables, OCLSs and CLSs as compared to India statistics as on date as the competition was adjudged to have matured in those countries. Thus on the examination of the global practices as of December, 2005 and the current figures of India a clear case is made out for cessation of regulation in respect of access to the CLS due to market forces taking over.

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

TCL Response to the issues raised in the Consultation Paper

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 ?

TCL Response:

TRAI has used a single measure of built capacity and utilization for arriving at a uniform figure of cost across different Cable Landing Stations. Built capacity and utilization are important elements in determination of cost. TRAI assumption of uniform capacity build of 60G & 70% capacity utilization across all landing stations is not correct because the actual uptake of AFA varies from CLS to CLS and the data for same is available with TRAI, in the annual submissions made by OCLSs to TRAI as "Annex-II of OCLS".

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 buildup of the Access Facilitation set-up including interface cards. 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 performance & 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 capcity 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 5 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?

TCL Response:

TCL recommends that the factor of 4 should be used while determining the cost of various interfaces of STM-1/STM-4/STM-16/STM-64.

Use of 2.6 as a multiplier assumed by TRAI in it's cost working will lead to improper & erroneous recovery as demonstrated in the illustration below.

Illustration:

If the cost recovery is to happen by selling 60G of capacity as determined by TRAI taking 2.6 as a multiplier – the full recovery of the cost will happen only when the Access Facilitation capacity sold is exactly as per the volume and type of interfaces assumed by TRAI in Table-2.3 of this CP. In case of any change in mix of client interfaces assumed by TRAI – the recovery of cost will not match the total cost assumed.

The illustration assumes the cost to be recovered as captured in Table 2.8 for OCLS-1 of this CP i.e. INR 2,11,49,808, while we do not agree with the assumption of the cost due to multiple reasons.

The table below is the assumption used by TRAI fixing the volume of each interface type sold at each CLS (Table 2.3 of this CP).

Table-2.3
DXC configuration for 60-G Capacity

Sl.No.	Interface	Total No. of interfaces	No. of interfaces available (in protection mode) at client side for sale	Equivalent Capacity in Gbps
(i)	STM-1	128	64	10
(ii)	STM-4	32	16	10
(iii)	STM-16	32	08	20
(iv)	STM-64	16	02	20
Total				60

Scenario 1: Volume of various capacity interface sold (as per Table-2.3 above) : Using 2.6 Multiplier

Total capacity sold is 60G

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	64	10	108,554	6,947,461
2	STM-4	16	10	282,241	4,515,850
3	STM-16	08	20	733,826	5,870,605
4	STM-64	02	20	1,907,947	3,815,893
Total			60		21,149,809 **(100%)**

Now, if the utilization of the capacity does not happen as per TRAI assumption in Table-2.3, in respect of various capacity interfaces sold, then it would lead to either under recovery or over recovery of the cost as per tables below.

Scenario 2: Under recovery using 2.6 Multiplier – total capacity sold remains at 60G with changed volume of various capacity interface sold.

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	32	5	108,554	3,473,731
2	STM-4	16	10	282,241	4,515,850
3	STM-16	2	5	733,826	1,467,651
4	STM-64	4	40	1,907,947	7,631,786
Total			60		17,089,018 **(81%)**

Scenario 3: Over recovery using 2.6 Multiplier – total capacity sold remains at 60G with changed volume of various capacity interface sold.

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	96	15	108,554	10,421,192
2	STM-4	32	20	282,241	9,031,700
3	STM-16	6	15	733,826	4,402,954
4	STM-64	1	10	1,907,947	1,907,947
Total			60		25,763,792 **(122%)**

The above 2 scenarios demonstrate 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. 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.

This anomaly is taken care of if multiplier factor of 4 is used in the cost working as illustrated below.

When we consider 4 as multiplier any combination of capacity interfaces sold will always recover 100% of the CAPEX & OPEX spent after selling 60G of the capacity.

Scenario 1: Volume of various capacity interface sold (as per Table 2.3 above) : Using 4 Multiplier

Total capacity sold is 60G. Cost Recovery = 100%

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	64	10	55,078	3,524,968
2	STM-4	16	10	220,311	3,524,968
3	STM-16	08	20	881,242	7,049,936
4	STM-64	02	20	3,524,968	7,049,936

Total	60		21,149,809 **(100%)**

Scenario 2: Using Multiplier of 4 – total capacity sold remains at 60G with changed volume of various capacity interface sold.

Cost Recovery = 100%

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	32	5	55,078	10,421,192
2	STM-4	16	10	220,311	9,031,700
3	STM-16	2	5	881,242	4,402,954
4	STM-64	4	40	3,524,968	1,907,947
Total			60		25,763,792 **(100%)**

Scenario 3: Using Multiplier of 4 – total capacity sold remains at 60G with changed volume of various capacity interface sold.

Cost Recovery = 100%

Sr No	Interface	# Of client side interface	Equivalent Capacity (in GBPS)	Corresponding Per port charges (INR)	Effective Revenue
1	STM-1	96	15	55,078	5,287,452
2	STM-4	32	20	220,311	7,049,936
3	STM-16	6	15	881,242	5,287,452
4	STM-64	1	10	3,524,968	3,524,968
Total			60		25,763,792 **(100%)**

As illustrated above in all the 3 scenarios using the multiplier of 4, the cost recovery remains at 100% and is not dependent on the volume mix of interface types. It is therefore 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.

This fact was again submitted by TCL to TRAI in it's presentation in 29.11.2012 as extracted below :

"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."

TRAI has assumed 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.

Other factual issues:

1. **Built-up to the cost calculated in Table 2.7 & 2.8**

   TRAI has captured various CAPEX items in the CP in tables 2.1, 2.2 (i), 2.2 (ii), 2.2 (iii). Table 2.5 captures the OPEX items considered for the cost working with high level assumptions. The total Annualized costs are then provided in Table 2.7 & 2.8. There are no explanation and linkages provided as to how the values/costs in Tables 2.7 & 2.8 are computed basis the individual CAPEX & OPEX items mentioned in earlier tables or any other factors considered. Thus, the costing methodology is not at all clear and needs to be disclosed so that the same can be commented upon. It may be noted that such details were not provided for or disclosed in the CP of 19.10.2012 and/or Explanatory Memorandum to the regulation dated 21.12.2012.

2. **Annual recovery of Capital Cost**

   a. Life of network elements (excluding Fiber) should be 5-7 years instead of 10 years assumed by TRAI. In the current environment equipment may not last beyond 5-7 years, due to Technology Obsolesce.

   b. WACC should be taken at 23.9% rather than 15%.

3. **Annual recovery of Opex Cost**

   a. Manpower cost should be taken as actuals rather than % of CAPEX currently assumed
   b. Miscellaneous expenses (like corporate overheads & IT) assumed at 10% of Opex is low and it is recommended to be taken at 20% of revenue.
   c. Other Opex items like Power Charges, Rental Charges, Salaries vary from CLS to CLS hence cannot be uniform.

d. The costing methodology used by TRAI to arrive at annual colocation charges is not clear. It is also submitted that TRAI in it's working of cost towards space & power need to consider future expansion.

4. **Project Management Cost:**

TCL's view is project management cost should be based on actuals rather than % of CAPEX as assumed in current working by TRAI

5. Rate of dollar:

TCL recommends to use of the most recent rate of USD / INR. Further to this costing needs to factor the impact of forex rate fluctuation.

****