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Dear Shri Rao Inderjit Singh Ji,

I am in receipt of the notice for the next Sitting of the Standing Committee on IT on the subject '**Review of functioning and performance of TRAI and gaps in the TRAI Act**' on 18 May, 2011 in New Delhi.

The timing of this meeting could not have been better. The TRAI Act was formulated when India's telecom sector was at a nascent stage – in 1997. Due to an adverse judgment in 1998 which severely compromised the TRAI's functioning, an amendment to the TRAI Act was carried out in 1999, which was facilitated via the new National Telecom Policy '99. Since then, the Act has served its purpose well in earlier years, but is beginning to look severely compromised since 2003. There is certainly a need for a comprehensive review of the TRAI Act, its functioning and conventions.

The current discussions around losses arising from the 2G spectrum allocations have pointed to, amongst others, many lacunae in not only the powers and functioning of the TRAI, but more importantly, to the rigor and quality of its recommendations, the lack of accountability and oversight, the compromises it faces due to the DoT's ability to routinely cherry-pick or manipulate its recommendations, and finally, the lack of any obligatory timeline upon the DoT in which to implement the TRAI's recommendations.

Owing to certain prior commitments, I will be travelling away from the country on 18 May, and therefore, regret my inability to attend the sitting. However, I enclose herewith a brief note for your perusal which can assist in the deliberations/objectives of this meeting.

If required, I will also be able to provide detailed instances supporting each of the sections below – which describe a specific need for such a change. For the sake of brevity, I am limiting this note to the issues, potential remedies, and suggestions on the stakeholders who should be consulted – for the consideration of the Hon'ble Members.

Yours Sincerely,

RAJEEV CHANDRASEKHAR

Shri Rao Inderjit Singh, MP

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FUNCTIONING/PERFORMANCE OF THE TRAI AND LACUNAE IN THE TRAI ACT

1. TRAI lacks adequate Accountability and Oversight

The functioning of the TRAI suffers greatly on many accounts. Firstly, it needs to be accountable and a fresh approach to its oversight by the public through the Parliament needs to be developed and articulated. The whole area of the TRAI's accountability to the Parliament is highly questionable, especially given the fact that its current relationship with the DoT and the MoCIT represents a conflict of interest, with retired DoT Secretaries invariably becoming TRAI Chairmen. Secondly, the TRAI lacks any form of annual planning that is available for scrutiny. The TRAI's performance during the year is not measured in any objective fashion. There is no accountability within the TRAI in terms of time taken once an issue is raised, except when it is a formal reference. The MoCIT is responsible for the financial well being of BSNL and MTNL on one hand, and the rest of the telecom sector on the other. It also sits in judgment of the TRAI's recommendations which may sometimes be against the interests of the Government companies. The current structure of working with or through the MoCIT poses a conflict of interest and influences the TRAI's ability, independence and willingness to set and meet measurable results.

Therefore, the TRAI's accountability must be at a far higher level and certainly not to the MoCIT alone, and must provide for an appropriate review of its outcomes based on rigor of process, legality, economic accuracy and propriety.

Remedy:

There is a need to amend the TRAI Act to provide for a proper oversight of the TRAI through the Parliamentary Committee. The current engagement with the Parliamentary Committee by way of deposition is weak and does not place the onus on the TRAI to be responsible in the fashion that it should be – so that there is some form of appropriate supervision, at least by the Parliament – through whose Act this statutory body has been created. The level and areas of accountability can be debated, but a structure in general for regulating the regulator must be in place.



For example, the TDSAT, which makes quasi-judicial decisions, falls directly under the Supreme Court by way of an appellate system. The TRAI, on the other hand, lacks accountability, unless its orders are appealed or recommendations questioned as a by-product of a separate appeal filed against the Government's decision-making. Here too, the evaluation is on legal grounds, rather than economic, social, and competition and consumer issues, which are the key responsibility areas of the TRAI as stated in the preamble to the TRAI Act.

2. TRAI's Independence stands compromised due to weaknesses in its Powers / Functions and Procedure for processing its Recommendations

There is a serious shortcoming in the scheme of the TRAI Act. Under the Act, the Government is mandated to seek recommendations in the areas of introduction of new service providers or while setting terms and conditions of license, but it often circumvents the TRAI. When it does so, the TRAI has no powers to stop the Government, even when it knows that its recommendations are being manipulated or that the provisions of the TRAI Act are being vitiated. This needs to be corrected and the TRAI must be guaranteed the independence – both financial and functional – through appropriate amendments in the legislation so that there is a greater check that is introduced in the way the DoT functions vis-à-vis the TRAI and that the TRAI has the powers to enforce the provisions of the TRAI Act when it knows that its recommendations or functions/powers are being vitiated under the TRAI Act.

Remedy:

Specific provisions under Section 11 of the TRAI Act (Powers and Functions) must be added to ensure that the TRAI is minimally able to effectively and in a time-bound manner, enforce its own decisions. Parties should be able to appeal against the TRAI's decisions if found illegal, arbitrary or ad hoc. But unless these parties are able to secure a stay against the TRAI's decisions, the legislation must allow for the TRAI to police and enforce its own decisions on licensees, licensor and consumers. Appropriate legislative language needs to be included as the same is missing. This will increase the effectiveness of the TRAI and also



increase its own need for writing orders which are implementable, as it will now become incumbent upon the TRAI to suggest orders which it can enforce through legislative powers.

The inclusion of such powers of enforcement should not in any way be construed as an absolute power or a power against which an appeal does not lie in the appropriate court / forum.

3. TRAI's Regulatory Function stands severely compromised due to DoT's repeated acts of Cherry-Picking and Manipulation of its Recommendations in violation of the TRAI Act

Recommendations made by the TRAI, either suo moto or on a reference to the Government under Section 11(1)(a)(i) and (ii) on Need and Timing and Terms and Conditions of License, are binding on the Government. If the Government wishes to modify, reject or change such recommendations, it must send the same back to the TRAI under Section 11, Fifth Proviso. The TRAI is mandated to provide a review within 15 days after which the Government's decision is final.

However, it has been seen in many cases that the Government simply cherry-picks sections of the TRAI's recommendations or interprets them differently or part-implements the TRAI's recommendations or simply ignores the recommendations, i.e., implements change without re-referring the matter back - depending upon its convenience and comfort. In doing this, it refuses to recognize the inter-linkages between a comprehensive set of recommendations, and may accept recommendations in part - which do not meet the policy objectives or transparency tests that are necessary for the functioning of the telecom sector and policy making.

This act of the Government means that notwithstanding the public consultation and detailed work done by the TRAI, the Government is able to alter, modify, ignore, or cherry-pick recommendations to suit their own understanding and/or needs. This not only renders the TRAI's function ineffective but also leaves the TRAI remediless as it can do nothing to prevent such situations, except write letters which have no legal bearing or impact on the Government's decision-making. The TRAI, for example, cannot take the licensor for



violating Section 11, Fifth Proviso of the TRAI Act, or for cherry-picking its recommendations to the TDSAT.

Remedy:

Checks and balances need to be built in the system wherein the TRAI's recommendations are either accepted or rejected in totality or, if modified in part, then that should be done with the consent of the TRAI, rather than cherry-picking. Appropriate amendments in the TRAI Act need to be made to ensure that if and as soon as the TRAI feels that its recommendations are being manipulated, part-accepted or ignored – those which fall under Section 11(1)(a)(i) and (ii) or other recommendations that are being part-accepted – then the TRAI should have the right to stop the Government from making decisions without following the due process of re-reference laid out under Section 11, Fifth Proviso.

4. TRAI's objects and effectiveness is compromised since MoC&IT/DoT have no obligation under the TRAI Act to act in a time-bound manner

There is no time limit with regard to how long the Government can wait or delay implementing a set of recommendations by the TRAI. When the Government finds it appropriate, it implements recommendations within weeks. In other cases, recommendations have been pending for 2–3 years. The fact that the DoT is under no obligation to implement the TRAI's recommendations, even either suo moto or based on a reference, and in a time-bound manner, has the ability to paralyze the work of the regulator and its intentions – notwithstanding the powers and functions laid out under Section 11. This would mean that the DoT can not only choose to schedule later recommendations by implementing them earlier, but also hold off implementing some crucial recommendations through an inordinate delay without being obligated to provide any sound reasoning for such delays.

Remedy:

Just as the TRAI has been given a time limit within which it must provide a response to a reference (15 days under Section 11, Fifth Proviso), the MoC&IT and the DoT should,



through a legislative amendment, be given a prescribed time period – no more than 2 months – to respond to a TRAI recommendation by either accepting, rejecting, or modifying it. In the event that the DoT is unable to meet this deadline, it must provide in writing such reasons and be open to filing of cases (for non-implementation) against itself in the TDSAT (Section 14 of the TRAI Act will need to be amended).

This will ensure that policy making is timely, that decisions are not caught up in bureaucratic delays and most importantly, that the relevance to the TRAI recommendations, which by itself is a time consuming process of consultation, open house discussions, etc, is not further delayed, which in turn, causes harm to consumer interests and national infrastructure, and delays the much needed investment in the country.

An amendment of the Act to bind the DoT on a timeline is extremely important to improve the efficiency, effectiveness and response of the regulatory infrastructure that the Parliament has created or intends to create.

5. Parliamentary Standing Committee on IT needs to engage in Wide- Ranging Consultations leading to Legislative Amendments

It is strongly recommended that a serious discussion with a wide-ranging set of stakeholders be undertaken on the appropriate legislative amendments as well as the financial assistance that needs to be given to the TRAI as a part of NTP'2011. For the purposes of consultation, it is recommended that the following stakeholders be invited to depose and provide insights:

1. TRAI Chairman/Members on the challenges and changes, including legislative amendments that they need for a more effective functioning.
2. TDSAT Chairman/Members to understand their perspective on whether any amendments or changes in the TRAI Act, including and specifically Section 14, will enable their better functioning. Their views can also be invited through a written document.
3. The Hon'ble Justice Shivraj V. Patil who submitted the One Man Committee (OMC) Report dated 31st January 2011 with specific recommendations on spectrum issues – to



- understand his perspective and areas of improvement given the in-depth study and critique that he has provided in his study/analysis in the functioning of the TRAI, the DoT and their working relationship inter se.
4. Secretary - DoT for understanding the DoT's perspective for the better functioning of the TRAI and to understand why the DoT regularly resorts to cherry-picking/manipulating or causing inordinate delays in implementing the TRAI's recommendations.
 5. Secretary Generals/Director Generals of key telecom industry associations such as COAI, AUSPI and ISPAI, to understand the industry's perspective on the shortcomings in the TRAI Act, its functioning and accountability.
 6. Chairmen of the telecom committees of leading industry associations who deal with telecom matters such as the telecom committees at FICCI, CII and ASSOCHAM to understand their views and members' perspective – which will go beyond merely those of telecom service providers.
 7. Regulatory specialists/consultants and heads of consumer bodies to get their perspective on how the TRAI's functioning can be improved to benefit and enhance consumer interest.

The Government must also consider the TRAI's comprehensive proposals for amendment to the TRAI Act 1997 dated 28th March 2008, which regrettably have remained unattended to by the Government for nearly three years. The dialogue must discuss its accountability to the Parliament, as well as comprehensive amendments to further strengthen the powers and independence of the TRAI, especially in the areas of licensing, competition management, spectrum utilization and interconnection etc.

Equally, the discussion must also review the TRAI's funding and service terms to enable it to attract and retain best-in-class talent, including from within the ranks of Government employees.
