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EXTRAORDINARY, PART III, SECTION 4

TELECOM REGULATORY AUTHORITY OF INDIA
NOTIFICATION

NEW DELHI, THE 24TH DECEMBER, 2012

F. NO. 305-21/2012-QOS.----- In exercise of the powers conferred upon it under section 36, read with sub-clauses (i) and (v) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Telecom Regulatory Authority of India hereby makes the following regulations to amend the Quality of Service of Broadband Service Regulations 2006 (11 of 2006), namely:-

QUALITY OF SERVICE OF BROADBAND SERVICE
(AMENDMENT) REGULATIONS, 2012
(28 OF 2012)

1. (1) These regulations may be called the Quality of Service of Broadband Service (Amendment) Regulations, 2012.

(2) They shall come into force with effect from 1st January, 2013.

2. After regulation 3 of the Quality of Service of Broadband Service Regulations, 2006, (hereinafter referred to as the principal regulations), the following regulation shall be inserted namely:-

“3A. Consequences for failure of the service provider to meet Quality of Service benchmarks.- (1) If a service provider providing broadband service fails to meet the benchmark of QoS parameter specified under serial number i to viii of regulation (3), it shall, without prejudice to the terms and conditions of its licence, or the Act or rules or regulations or orders made, or direction issued, thereunder, be liable to pay an amount, by way of financial

disincentive, not exceeding rupees fifty thousand per parameter and in case of second or subsequent such contravention, to pay an amount not exceeding rupees one lakh per parameter for each contravention, as the Authority may, by order direct:

Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider providing broadband service has been given a reasonable opportunity of representing against the contravention of the regulation observed by the Authority.

(2) If the compliance report furnished by a service provider providing broadband service for QoS parameter specified under serial number i to viii under regulation 3 is false and which such service provider knows or believes to be false or does not believe to be true, it shall, without prejudice to the terms and conditions of its license, or the Act or rules or regulations or order made, or, direction issued thereunder, be liable to pay an amount, by way of financial disincentive, not exceeding rupees ten lakh per parameter for which such false report has been furnished.

Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider providing broadband service has been given a reasonable opportunity of representing against the contravention of the regulation observed by the Authority.

(3) The amount payable by way of financial disincentive under these regulations shall be remitted to such head of account as may be specified by the Authority.”

3. After regulation 4 of the principal regulations, the following regulation shall be inserted, namely:----

“4A. Consequences for failure of the service providers to submit compliance report.- (1) If a service provider providing broadband service contravenes the provisions of regulation 4, it shall, without prejudice to the terms and conditions of its licence, or the provisions of the Act or rules or regulations or order made, or direction issued, thereunder, be liable to pay an amount, by way of financial disincentive, not exceeding rupees five thousand for every day during which the default continues.

Provided that no order for payment of any amount by way of financial disincentive shall be made by the Authority unless the service provider providing broadband service has been given a reasonable opportunity of representing against the contravention of the regulation observed by the Authority.

(2) The amount payable by way of financial disincentive under these regulations shall be remitted to such head of account as may be specified by the Authority.”

(Rajeev Agrawal)
Secretary

Note 1.--- The principal regulations were published in the Gazette of India, Extraordinary, Part III, Section 4 dated the 10th October, 2006 vide notification number No. 304-6/2004-QoS dated the 6th October, 2006.

Note 2.--- The Explanatory Memorandum explains the objects and reasons of the Quality of Service of Broadband Service (Amendment) Regulations, 2012.

Explanatory Memorandum

TRAI has laid down the Quality of Service Standards for Broadband Service through the Quality of Service of Broadband Service Regulations, 2006 (11 of 2006) dated the 6th October, 2006. As part of compliance to these regulations the quarterly Performance Monitoring Reports are received from service providers providing broadband service. TRAI also conducts periodic audit and assessment of Quality of Service (QoS) through independent agencies across the country, to monitor the compliance of prescribed standards/benchmarks. Analysis of these reports of several past quarters reveals that some of the service providers are repeatedly not meeting the Quality of Service benchmarks for some of the prescribed parameters and no consistent improvement is noticed in spite of continuous follow up with the service providers by TRAI. Therefore, a need has been felt to provide for financial disincentives for failure to meet the Quality of Service benchmarks.

2. Keeping in view the need to ensure the Quality of Service provided by the service providers and to protect the interests of the consumers by making these regulations more effective, it is felt that the Quality of Service of Broadband Service Regulations, 2006 (11 of 2006) dated the 6th October, 2006 need to be amended to introduce financial disincentive in relation to the performance of service providers with regard to the Quality of Service benchmarks so as to strengthen the effectiveness and compliance of the said regulations.

3. The draft amendments to the Standards of Quality of Service of Broadband Service Regulations, 2006 (11 of 2006) on financial disincentives were released on 26.10.2012, seeking the comments of the stakeholders. Some of the stakeholders have stated that Telecom Regulatory Authority of India Act, 1997 does not confer upon the Authority power to impose penalty in the form of financial disincentives. In this context, it is stated that the TRAI Act confers power on the Authority not only to regulate but also to ensure the compliance of the provisions of the regulations. The word “ensure” has mandatory connotation, it means “make certain”. Furthermore, the Hon’ble Supreme Court, in its judgment dated the 17, Aug, 2007, in Civil Appeal No. 2104/2006 (Central Power Distribution Co. & Ors Vs. CERC & Anr), inter-alia, held that “it is well settled that a power to regulate includes within it power to enforce”. It will not be out of place to mention that there are a catena of judgments by the Supreme Court wherein the Hon’ble Court has repeatedly re-stated the proposition that legislation should be read and interpreted so as to further the purpose of its enactment and not in a manner that derogates from its main objectives. The Hon’ble Supreme Court in its judgment in the case of State of Karnataka Vs. Vishwabharthi House Building Co-operative Societies and Ors. [(2004) 5 SCC 430], quoted with approval the judgment of Hon’ble Guwahati High Court in the case of Arbind Das Vs. State of Assam & Ors. [AIR 1981 Gau 18 (FB)] wherein it was inter-alia, held that where a statute gives a power, such power implies that legitimate steps may be taken to exercise that power even

though these steps may not be clearly spelt out in the statute. The Hon'ble Court further held that in determining whether a power claimed by a statutory authority can be held to be incidental or ancillary to the powers specially conferred by the statute, the court must not only see whether the power may be derived by reasonable implication from the provisions of the statute, but also whether such powers are necessary for carrying out the purposes of the provision of the statute which confers power on the Authority in exercise of such powers. The relevant part of the said judgment reads as under:-

“We are of firm opinion that where a statute gives a power, such power implies that all legitimate steps may be taken to exercise that power even though these steps may not be clearly spelt in the statute. Where the rule-making authority gives power to certain authority to do anything of public character, such authority should get the power to take intermediate steps in order to give effect to the exercise of the power in its final step, otherwise the ultimate power would become illusory, ridiculous and inoperative which could not be the intention of the rule-making authority. In determining whether a power claimed by the statutory authority can be held to be incidental or ancillary to the powers expressly conferred by the statute, the court must not only see whether the power may be derived by reasonable implication from the provisions of the statute, but also whether such powers are necessary for carrying out the purpose of the provisions of the statute which confers power on the authority in its exercise of such power.”

In view of the above, the Authority has power to impose financial disincentives on the service providers for non-compliance of the provisions of the Regulations. Keeping in view the comments received from the stakeholders and the need to ensure compliance with the Quality of Service regulations, these regulations have been formulated.

4. Some of the stakeholders have stated that the broadband industry itself is still at a very nascent stage and it needs lesser regulatory framework and hence the QoS KPIs should be revised. Further, exclusions for events beyond the control of service providers should also be taken into consideration for calculation of KPIs, like force majeure & natural calamities, impact due to law & order issues like curfews, bandhs etc., infrastructure issues in security sensitive areas, site access issues due to limited availability of road network, installation time and restoration time delay due to customer unavailability or reasons related with customer premises, failures caused by major power grid failures, unreliable electricity supply, impact due to fibre cuts and other disruptions caused by ongoing- infrastructure improvement projects, repeated theft at sites even after logging complaints with law enforcement agencies like Police, Right of Way (ROW) issues, building access issues, field related permission issues, customer own CPE & wiring issues, laying of aerial network which is prone to external factors and customers who voluntarily accept the lower QoS.

In this context, it is stated that the benchmarks for the QoS parameters as laid down in the Quality of Service of Broadband Service Regulations 2006 (11 of 2006) are sufficiently lenient keeping in view the growth of broadband services and customer interests. Further, it has been provisioned in the regulations that a reasonable opportunity of representing against the contravention of the regulation observed by the Authority shall be given to the service provider before an order for payment of any amount by way of financial disincentive is made.

5. The Authority will monitor the Quality of Service reported by service providers subsequent to the coming into force of these regulations from the point of view of non-compliance with the benchmarks. In case the benchmark for any of the quality of service parameter for Broadband Service e.g. the benchmark for packet loss <1%, is not met by an operator in the first quarter after coming into force of these regulations financial disincentive not exceeding Rs.50000/- is liable to be imposed. In case in any of the subsequent quarters the benchmark for the same parameter i.e. packet loss <1% is not met financial disincentive not exceeding Rs.1 lakh is liable to be imposed by the Authority.

6. It has been commented that the Broadband QoS Regulation describing calculation methodology for some of the parameters are not fully clear which may lead to variance in the performance of the parameter reported by service providers vis-à-vis understanding of the regulations by independent auditors while carrying out the audit. However, the measurement methodology of the parameters is already explained in detail in the explanatory memorandum to the principal regulations.

In order to prevent furnishing of false compliance reports to the Authority, financial disincentive not exceeding rupees ten lakh per parameter has been provisioned in the regulations. The Authority is of the view that such provision of financial disincentive will act as a deterrent against false reporting of performance against Quality of Service benchmarks.

7. Some of the stakeholders have stated that the proposal to impose financial disincentives for even minor delay in submission of report for few days is too harsh as delay in reporting is minor/technical violation in nature especially when consumer is not harmed. The case for penalty arises only when any harm has been caused to subscribers due to willful violation by service providers.

It has been observed that in many cases repeated letters and reminders are required to make service providers submit the PMRs. The Authority is of the view that provision of financial disincentive will be a deterrent against such lapses by service providers. Financial disincentive, not exceeding rupees five thousand for every day of delay in submission of the Performance Monitoring reports is liable to be imposed on service provider.