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To: "Akhilesh Kumar Trivedi" <advmn@traigov.in>
Sent: Friday, September 29, 2023 7:26:38 PM
Subject: BIF Counter Comments on TRAI Consultation paper on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

Date: 29 September 2023

Shri Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India ,
Government of India.

Dear Sir,

Please find enclosed BIF counter comments (Word and PDF copy) to the TRAI Consultation Paper on 'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services' dated 7th July 2023.

We earnestly request your kind consideration and support in this regard.

Best Regards,

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“ Where the mind is without fear and the head is held high...

Where words come out from the depth of truth..

Where tireless striving stretches its arms towards perfection ...”

BIF Counter-Comments on TRAI's Consultation Paper on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"

- At the outset, Broadband India Forum ("**BIF**"), as an independent policy forum and think-tank, dedicated to working towards the proliferation of high-quality broadband and the realisation of a 'Digital India', wishes to thank the Telecom Regulatory Authority of India ("**TRAI**") for providing us the opportunity to submit our counter-comments on the consultation paper on "*Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services*" ("**CP**").
- To assist with the consultation process, we have, in addition to our original comments, provided our counter-comments to several of the issues and topics raised by multiple stakeholders after examining their published comments in response to the CP. For ease of convenience, we have provided our counter-comments below in a question-wise format.
- At the outset, we wish to highlight that as part of the consultation process, most Telecom Service Providers ("**TSPs**") have argued that Over-The-Top ("**OTT**") services should be regulated under the same framework as TSPs. They place reliance on the flawed argument of 'same service, same rules'. However, the reliance on this argument is completely flawed as OTT services are neither interchangeable nor substitutable for the services provided by TSPs, detailed justification for which has been provided in our original submission made to the Authority. Therefore, OTT services cannot be regulated under the same framework as TSPs. We reiterate our comments to the CP, that any additional regulations required for OTT services should be introduced under the existing framework of the Information Technology Act, 2000 ("**IT Act**") or such other existing applicable laws.
- Telcos wish to cling to an old legacy and obsolescent system of "Sending Party Network Pays (SPNP)" prevalent during voice telephony era of 1990s", when it asks for Network Usage Fees to be paid by the OTTs to them for carrying large traffic generated by the former. It must be recalled that the 'sending-party-network-pays (SPNP)' principle was inherent to the old voice telephony system of the 1990s. In that system, due to imbalance of traffic between large and small telephone operators, led to large wholesale payments being made to those telecom operators with larger customer base. To apply that legacy system to the open and free internet which works differently is akin to placing a bullock cart before the motor car and expect to pull it. The internet works in a different way: users do not want just to communicate between one-another, they want to be always online to connect to content, applications and services. This is the reason why internet traffic is normally unbalanced between content and application providers and internet access providers, with the inbound traffic from the former to the latter in normal circumstances likely to surpass

the outbound traffic from the customers of the telcos seeking the content. Given this as the principle, the 'sending-party-network-pay' principle which is from the bygone era, is not applicable in the internet era.

- The solitary example of South Korea cited in the case of SPNP has been a total failure with the involved parties (SKT & Netflix) mutually agreeing recently to withdraw the agreement between them. Hence the reference to this, is a lame excuse and has no basis at all.
- Telco claim to mandate OTTs to pay for network usage fees and the Government's intent to impose telecom licensing frameworks on OTTs, would lead to violation of the Net Neutrality principles & guidelines of 2016 and bestow telcos with the powers to tilt the level playing field to favour one OTT or another thereby leading to discrimination, curbing of innovation and adversely impact the startup ecosystem and adversely impact consumer choice.

A. ISSUES RELATED TO REGULATORY MECHANISMS FOR OTT COMMUNICATION SERVICES

Q.1. What should be the definition of over-the-top (OTT) services? Kindly provide a detailed response with justification.

- TSPs have control over the dissemination of OTT services:*** A few stakeholders have submitted in their comments that OTT services are necessarily provided over the internet and therefore TSPs have no control over the dissemination of their services. However, the OTT services can only be provided to the end-user over a TSP network and are therefore entirely dependent on TSPs for the dissemination of their services. OTT services neither operate a network nor lease the network capacity from a network operator,¹ which is essential for dissemination of their services. The OTT services therefore rely on the TSPs to provide their services. As a result, TSPs have the control to determine if the services provided by OTT players reach their end users or not.
- OTT services should be defined based on the content of the services provided:*** Some stakeholders have suggested that the term 'OTT services' is used to distinguish the manner in which the services are provided and not the content of their services. While other stakeholders have argued that the term 'OTT services' is a misnomer and instead the term 'Internet-based services' should be used. We are in sync with the latter approach. In our response to Question 1, as part of our comments to the CP, we proposed that instead of the term 'OTT services', the term 'Content & Application Providers' ("**CAPs**")

¹ Please note that this understanding is in tandem with the definition of OTT services adopted by the TRAI in its Consultation Paper on Regulatory Framework for OTT Services dated March 27, 2015 (<<https://traai.gov.in/sites/default/files/OTT-CP-27032015.pdf>>).

as defined by BEREC should be used.² Any further sub-categorization based on the nature of services like content, multimedia, communication services, etc is not required as amply clarified in our counter-comments to Question 2 below.

Q.2. What could be the reasonable classification of OTT services based on an intelligible differentia? Please provide a list of the categories of OTT services based on such classification. Kindly provide a detailed response with justification.

- a. ***Sub-Classification of OTT services cannot be based on whether communication service is being provided or not:*** We note that a few TSPs have abided by the following classification of OTT services into – (i) OTT communication services and (ii) Other OTT Services. Such a sub-classification is based on the Net Neutrality Report by the Department of Telecommunications (“DoT”). As it stands today, CAP/OTT services provide multiple different services through the same platform. In such cases, any attempt at sub-classification of OTT services based on the nature of services is complicated and redundant as it lacks any intelligible differentia. Communication services are rarely provided in isolation and are generally provided with other services like gaming, ecommerce platforms etc., which are already regulated by specific sectoral laws and regulations. Therefore, it is not technically feasible to further sub-classify OTT services based on whether communication service is being provided or not.
- b. ***Sub-Classification of OTT services cannot be based on the nature of services:*** Additionally, other stakeholders in their comments to the CP have delved further into the sub-classification of OTT services into OTT application services, media services, broadcasting services etc. We reiterate our response to Question 2 (in our comments to the CP), that the nature of services being provided cannot be the ground to further sub-classify CAPs/OTT services. Such an attempt would lack any intelligible differentia. TRAI seeks to only regulate telecommunication services. However, due to the overlap in the services that are being provided by CAPs / OTT platforms, regulations made by TRAI would overlap with other existing regulations. For instance, online games in general provide for internal voice calls between the players. Online games are already extensively regulated by the rules made under the IT Act. If TRAI seeks to regulate them due to such communication service being provided, it can lead to additional regulations for an already regulated service provider. This in turn will disincentivize the growth of the OTT sector.

² This position is in line with the approach taken by the BEREC in its paper titled “BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs” dated October 2022 (<https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf>).

Similarly, sub-classification of OTT services between OTT media services and OTT application services would create the same effect as OTT application services often include digital content as part of the application services. With the advent of WebRTC,³ even browser-based applications can have a layer of communication services attached to them. Therefore, to prevent such regulatory overlap and disharmony, a classification of OTT services should not be adopted by TRAI.

- c. **OTT players offering broadcasting and communication services are already regulated**– Few stakeholders, especially TSPs have identified a lack of regulatory oversight for OTT communication and broadcasting services. They have stressed on the 'same service, same rules' argument to push for a parallel regulatory framework for OTT services that mirrors the regulatory framework for TSPs. However, as highlighted in our comments to the CP (especially in our response to Question 5), OTT services are already subject to a myriad of regulations under the IT Act and the various rules made thereunder including the recently passed Digital Personal Data Protection Act, 2023 ("**DPDP Act**"). Any further attempt to regulate such services would lead to the creation of burdensome compliances and hamper the ease of doing business for especially new market entrants. It can also negatively affect the innovative steps taken towards the development of the CAPs / OTT services sector.

Q.3. What should be the definition of OTT communication services? Please provide a list of features which may comprehensively characterize OTT communication services. Kindly provide a detailed response with justification.

- a. As mentioned in the CP and in our comments to the CP (in response to Question 3), OTT communication services cannot be separately defined. This is primarily due to the multi-functional nature and rich interactive applications and services that OTTs offer to end-users. OTT applications no longer provide only telecommunication services like calling and messaging, and instead bundle them with other services like multimedia sharing, content generation etc. As noted in our comments to the CP (response to Question 3), any attempt to sub-categorise OTT services will lead to market fragmentation, and possibly market failure of OTT applications, ultimately causing harm to the end-user. Further, attempting to delineate OTT communication services as a separate category would be difficult, given communication is now an integral part of most OTT services.
- b. **Definition cannot be based on functional similarity:** We note that certain stakeholders have recommended that OTT communication services should be

³ WebRTC (Web Real-Time Communication) is a technology that enables Web applications and sites to capture and optionally stream audio and/or video media, as well as to exchange arbitrary data between browsers without requiring an intermediary. (Source: <https://developer.mozilla.org/en-US/docs/Web/API/WebRTC_API>).

defined based on a functional similarity with TSPs. They again place reliance on the 'same service, same rules' argument... All OTT services that provide communication services over the internet are sought to be classified as OTT communication services. But such a definition assumes substitutability between the communication services provided by TSPs and OTT players.

We reiterate our stance provided in our comments to the CP (in response to Question 3) that the two are neither similar or same. In fact even treating them as equal or similar is violative of Art. 14 of the Constitution as they are not even placed under similar circumstances. . As already stated, the TSPs and OTT services cannot be said to provide the same services. This is primarily because TSPs operate on the network layer and control the network infrastructure and exclusive rights to develop and deploy such infrastructure. Also OTTs work on application layer which rest in the handset much similar to dialling application in the handsets. Telcos do not provide application to customer but the application is part of handsets which is not provided by telco as standard service. Thus some Telcos claim themselves to be working on application layer is not correct. These exclusive rights give TSPs economic advantages like high entry barriers, reduced competition, and exclusivity in business operations. These privileges are the basis for regulating TSPs. No such rights and/or privileges are available to OTT services which operate on the application layer. They provide services that are completely dependent on the availability and quality of the network infrastructure deployed by TSPs. Any functional similarity is also absent due to the nature of bundled services provided by OTT applications which extend beyond traditional communication services. To a customer these two services are not substitutable or interchangeable. Therefore, OTT communication services cannot be classified or defined based on such presumed functional similarity.

- c. ***Definition cannot be based on the determination of the core service being provided:*** Some stakeholders have attempted at defining an OTT communication service based on the core service being provided by OTT service providers. It would require a delineation of services being provided by OTT players. Such delineation is technically impossible due to the interdependence of such services. At least one stakeholder in their comments to the CP has highlighted the interdependence of data and voice to provide communication services post the deployment of 4G/5G internet services. This indicates the difficulty in distinguishing between the core services and the ancillary services being provided by the respective OTT platforms. As such, it is not feasible to create sub-categories of the different services offered by OTT service providers.

Q.4. What could be the reasonable classification of OTT communication services based on an intelligible differentia? Please provide a list of the categories of OTT communication services based on such classification. Kindly provide a detailed response with justification.

- a. **Classification cannot be based on whether communication services are core or ancillary in nature:** The classification of OTT services between OTT communication services (main) ("**OTT-CS Main**") and OTT communication services (ancillary/incidental) ("**OTT-CS Ancillary**") places reliance on the 'same function, same rule' argument. Stakeholders that have advocated for such classification propose that OTT players which provide services that are functional substitutes of traditional communication services should be categorised as OTT-CS Main. All other OTT services providing any sort of communication services should be categorised as OTT-CS Ancillary. As discussed above in our response to Question 3, such a classification ignores the technical impossibilities involved in bifurcation of bundled OTT services, as they are interdependent services. A service cannot be argued to be intrinsically linked to any principal service. The level of interdependence between the varied OTT services varies on a case-to-case basis. It can, for instance, depend on the usage of the service by the end user. For instance, online gaming platforms which allow internal calling and messaging also allows such feature to be opted out of, whereas some team based online games cannot be played without such communication-based services. Therefore, such a method of classification would lack any reasonable nexus with the aim of regulating OTT communication services separately, as they cannot be singled out from the bundle of OTT services.

Additionally, the stakeholders, especially TSPs, which propose such a classification between the OTT-CS Main and OTT-CS Ancillary, also identify the difficulty that can exist in clearly demarcating such categories. Often multiple independent services can be provided by one OTT player. Therein, one single platform can be classified as an OTT communication service while providing for both online payment and instant messaging services. It will be difficult to determine whether the communication service is being provided as a main or an incidental/ancillary service. Therefore, we recommend that such an attempt towards classification of OTT communication services should be avoided altogether.

Further, no such classification should be based on whether the user can choose to communicate with another person on the OTT service, because whether they exercise the option to use the communication features of the service, those communication features are still part and parcel of the OTT service. For instance, some payment platforms provide for both instant messaging services between users (without any particular task assigned to the communication) and also provides for customer service chatbots (which have a particular task assigned to the communication). Therefore, such grounds of classification would make it difficult to classify OTT platforms like Paytm into a specific sub-category.

- b. **Classification cannot be based on the nature of communication services being provided:** Some stakeholders suggest that the OTT services be classified based on the nature of communication services like messaging, voice, social media, etc. However, they fail to account for the fact that OTT platforms that provide a bundle of such services in an interconnected manner like social media, video calling, voice calling and instant messaging. We note that the rationale for creating such a distinction between OTT platforms has not been presented by the respective stakeholders. In any case, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021) ("**Intermediary Guidelines**") broadly defines a social media intermediary as: any intermediary which primarily "*enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services*".⁴ This definition covers various communication services like instant messaging, video calling, voice calling etc. which will all classify as modes of online interaction. Therefore, such a ground of classification would lead to regulatory overlap between the regulations under the Intermediary Guidelines and any future regulations to be prescribed by TRAI.

Q.5. Please provide your views on the following aspects of OTT communication services vis-à-vis licensed telecommunication services in India:

- 1. Regulatory aspects;**
- 2. Economic aspects;**
- 3. Security aspects;**
- 4. Privacy aspects**
- 5. Safety aspects;**
- 6. Quality of service aspects;**
- 7. Consumer grievance redressal aspects; and**
- 8. Any other aspects (please specify).**

Kindly provide a detailed response with justification.

- a. In our comments to the CP, particularly in response to Question 5, we have provided a detailed list of regulations which already apply to CAPs / OTT services. At the outset, we highlight that in view of the existing regulatory framework, no additional regulatory framework should be developed for such services by TRAI. Additional regulations will disincentivize innovative growth which is required by OTT players to survive in this highly competitive sector.
- b. **No need for a common telecom framework for OTT services:** Some stakeholders in their comments to the CP have advised that all the existing regulatory frameworks governing OTT services (particularly the IT Act and the rules made thereunder) should be harmonized under a common telecom

⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021), r. 2(1)(w).

framework. Such harmonization is proposed to be introduced through a common licensing requirement. We wish to highlight that the regulatory framework under the IT Act regulates all types of OTT services. If the TRAI wishes to establish a separate category of OTT communication services (based on the scope of their jurisdiction) then such services would be required to be demarcated from other OTT services. As discussed above in response to Question 4, such a demarcation is technically not feasible. Hence a harmonised licensing framework would be difficult to achieve.

- c. **OTT services should not pay any share of the development costs of the network infrastructure:** The TSPs in their comments to the CP have highlighted the requirement to impose fair share of the costs related to network infrastructure development like 5G deployment etc. ("**Development costs**") on the CAPs / OTT services. This is due to the economic challenges faced by TSPs to achieve sustainable development of network infrastructure within the given investment framework. However, in our response to Question 5 in our comments to the CP, we have highlighted reports that showcase the contribution made by OTT services to the growth in revenue of TSPs. The findings and statistics referred therein are evidence of the positive effect OTT services have on the revenue growth of TSPs. Therefore, from an economic perspective the fair share of Development Costs should not be imposed on the CAPs / OTT services.
- d. **OTT services do not require to separately contribute towards the spectrum user charges:** Some stakeholders have pushed for the OTT services to be statutorily required to contribute towards the spectrum user charges ("**SUCs**"), which is currently paid by TSPs. The SUCs are borne by TSPs because of the exclusive rights they enjoy over the deployment of network infrastructure including the exclusive right to purchase spectrum that is allocated by the Government. OTT services have no such rights towards spectrum allocation. In addition, they already contribute towards the revenue generation of TSPs with increased usage of their broadband services and by providing bandwidth-intensive services. Such charges should therefore not be levied on OTT platforms as it would lead to an unreasonable increase in their regulatory costs. The increased regulatory costs would not only affect the ease of doing business in the sector but also be reflected in the form of increased subscription costs for users. The quality of service being provided can also be impacted as earlier the investment that was aimed to be made for service innovation would now be diverted towards increased regulatory costs. Cumulatively, it will negatively impact the end-users.
- e. **OTT platforms do not evade the laws governing interception or monitoring of network traffic:** Some stakeholders including TSPs have argued that the encryption model used by the OTT platforms allows them to escape the laws regarding interception or monitoring of network traffic under

the Indian Telegraph Act, 1885 ("**Telegraph Act**"). We would like to highlight that OTT services are still subjected to interception and traffic monitoring laws under the rules made under the IT Act such as the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 ("**Interception Rules**") and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ("**Blocking Rules**"). The encryption model also furthers the purpose of protecting user privacy and despite the encryption model being in place, the communications taking place over OTT platforms can be intercepted or monitored under the applicable laws.

- f. **Regulations on customer verification are already present:** Like TSPs which verify mobile/broadband customers, OTT service providers are also required to adopt methods of customer verification under the Intermediary Guidelines. This is in addition to the existing requirement of identifying the first originator of a message in case of infringing third party content, under the Intermediary Guidelines. Additionally, OTT platforms use telecom resources like numbers or KYC customer identities to provide their communication services to ensure such additional protection in terms of customer verification. Therefore, OTT platforms do not need to be brought under the telecom licensing regime to abide by requirements of customer verification.
- g. **Security conditions under the Unified Licensing Framework need not be complied:** The TSPs in their comments to the CP have advocated for the application of the Unified License – Internet Service Provider Authorization and Access Service Authorization under the Telegraph Act ("**Unified License**") to the OTT platforms. This is to ensure the compliance of the security conditions specified therein. We note that the security conditions under the Unified License apply to mainly network infrastructure (especially those specified under Cl. 39.7 of the Unified License). OTT platforms on the other hand have no control over the development or deployment of network infrastructure should not be required to comply with such security conditions under the Unified License. As already specified in our comments to the CP (in response to Question 5), we recommend that the existing security requirements under the IT Act including those specified by the Computer Emergency Response Team of India ("**CERT-In**") should suffice in this regard.
- h. **Compliance with privacy requirements under the Unified License not required:** In the same vein as the aforementioned proposition, the stakeholders also propose that the stringent privacy requirements under the Unified License and regulations under TRAI like the Telecom Commercial Communications Customer Preference Regulations 2018 ("**TCCCP 2018**"). Reiterating our response above, OTT services will be subjected to the data privacy requirements under the DPDP Act. Additionally, the requirements for safe electronic communications under the IT Act will cater to the prohibition of

unsolicited commercial communications under the TCCCP 2018. The more stringent privacy requirements for TSPs are due to their control and access of the entire network infrastructure. Such exclusive rights of control are not available to OTT service providers. In any case, encryption models are in place for most OTT platforms to ensure the necessary level of privacy protection.

- i. ***Compliance with customer safety and environmental requirements under the Unified License not required:*** In the same vein as above, the specific environmental requirements which deal with exposure of electromagnetic radiations at the base stations, and such other specific requirements, would not apply to OTT platforms. These OTT service providers lack any control over the development of network infrastructure and would therefore lack the access points to implement such requirements even if the Unified License were to be applicable to them. *(Please refer to our counter-comments to the issues noted under Question 6 below on why the Unified License should not be made applicable to the CAPs / OTT service providers).*
- j. ***Additional compliance with quality of service requirements not required:*** A few stakeholders, especially TSPs, have urged that the quality of service ("QoS") requirements that apply to TSPs should also apply to OTT services. This is because, the bandwidth-intensive high quality OTT services that are provided require the TSPs to expand the capacity of network infrastructure. As discussed in our response to Question 5 in our comments to the CP, OTT players end up having a high quality of service because of the existing internal market competition in the sector. Additional QoS standards are not required, instead such standards will be ensured by the operation of market forces in the highly competitive OTT sector. Further a symbiotic relationship exists between TSPs and OTT service providers to ensure the congruence of applicable quality standards of content being shared on the existing network infrastructure. *(Please refer to our counter-comments to the issues noted under Question 9-10 with respect to such collaborative framework between TSPs and OTT service providers).*
- k. ***Additional consumer grievance redressal requirements not required:*** We would like to highlight that considering the existing consumer grievance redressal mechanisms that exist under the Intermediary Guidelines, the Consumer Protection (E-Commerce) Rules, 2020 ("**E-Commerce Rules**") and the DPDP Act, any additional requirements under the TRAI regime should not be imposed. It would lead to both overlap of regulatory requirements and increased burden of compliance.
- l. ***Requirement to provide emergency services should not be imposed:*** Some stakeholders have argued that the obligation to provide emergency services that exists under the Unified License for TSPs should be shared with OTT service providers. Please refer to our response to Question 7 in our

comments to the CP for specific averments on why such emergency service communication requirements should not be imposed on OTT services. The limitation in terms of network connectivity prevents the OTT service providers to provide the last mile access that is required in case of emergency services. Therefore, the purpose of such emergency services, that is, universal accessibility, cannot be fulfilled by OTT players. Additionally, other stakeholders like the Indian Council for Research on International Economic Relations ("ICRIER") have argued in their comments to the CP, that since OTT services are close ended services and do not have access to the entire network infrastructure like TSPs, such emergency service requirements cannot be imposed on them.

Q.6. Whether there is a need to bring OTT communication services under any licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation? Kindly provide a detailed response with justification.

- a. ***OTT services should not be subjected to the Unified License:*** Some stakeholders, especially TSPs, have urged that OTT communication services be subject to the conditions under the Unified License. Please refer to our comments to the CP, especially our response to Question 6 for arguments against such extended application of the Unified License. The principal reason being that the services provided by OTT service providers are not substitutable with services provided by TSPs. This is because, for instance: (a) the nature of services provided are distinct like instant messaging, real time notification etc., (b) the services are not considered interchangeable by the end users, (c) OTT services do not have access to the exclusive rights under the Telegraph Act for network operation and development that is available to TSPs, (d) OTT platforms operate at the application and not the network layer where TSPs operate, etc. Any additional licensing framework besides the Unified License would further contribute to the additional compliance burden for OTT service providers.

We further support the stance taken by stakeholders like the IFF, that licensing requirements should be adopted where the resource that is sought to be regulated is scarce, like spectrum bands or network connectivity infrastructure, etc. Such a consideration is clearly not applicable to OTT service providers. Therefore, a light touch approach should be followed in terms of regulating OTT services which are already subject to intense market competition.

- b. ***OTT services are not in violation of the Telegraph Act:*** Some stakeholders in their comments to the CP have further argued that if OTT service providers are not subject to the requirements under the Unified License, then they will end up providing telecommunication services in breach of the Telegraph Act. However, we would like to point that the licensing requirements are for the exclusive rights that TSPs have over network infrastructure and spectrum

allocation. OTT platforms do not operate on the network layer and therefore do not deal with such resources that are allocated through the Unified License. Please further refer to our counter-comments under Question 5 above for specific reasons why the various conditions under the Unified License should not be applied on OTT service providers and if applied they will lead to unnecessary regulatory burden.

- c. **No competitive imbalance between the TSPs and the OTT services:** Yet another argument advanced by TSPs for applying the Unified License to OTT services is to achieve the social good of levelling the competitive playing field between them and OTT service providers. Reiterating our comments to the CP (especially response to Question 5), since TSPs and OTT services do not provide interchangeable services, the 'same service, same rules' arguments should not be followed. In fact, TSPs have control over the dissemination of OTT services, and OTT platforms are dependent on the network infrastructure provided by TSPs to reach end users. TSPs can create market restrictions in the form of entry barriers for the OTT sector and therefore have an upper hand in terms of market competition. OTTs are working for last one decade and there has not been any issues with these services to telcos as OTTs were increasing their revenues. It is noteworthy to mention that Data revenue of telco has increased 248% between march 2019 and march 2023 itself.
- d. **OTT services do not separately need to contribute to the digital infrastructure:** The argument of free riding of OTT services over the internet has been used as a rationale by TSPs (in their comments to the CP) to argue that the Unified License should apply to them to ensure their monetary contribution towards Development Costs. Please refer to our counter-comments in Question 5 (paragraph (c) and (d)) in this regard. Additionally, OTT services already contribute towards revenue generation for TSPs by increasing data usage for accessing the services and content provided by them. This revenue generated can in turn be used for the development of digital infrastructure and no excess regulatory burden should be imposed on the OTT service providers in the process.
- e. **Separate OTT Communication Authorization under the Unified License not required:** Stakeholders including industry body associations have advocated for the introduction of OTT Communication Authorization under the Unified License. Please take note that –
 - i. No rationale has been provided for developing a separate framework under the Unified License for OTT services and imposing excess levies, performance bank guarantee, service charges and taxation duties on these services. These charges and levies are especially against the right to control the development and deployment of the network infrastructure which will still not be available to OTT services under this new framework.

- ii. Please refer to our counter comments under Question 3 and 4 above. They highlight the reasons why a separate category of OTT services in the form of OTT communication services cannot be created for this framework.
- f. ***Application of the Unified License for national security concerns unwarranted:*** Stakeholders have advocated for the application of the Unified License to OTT services based on the ground of national security concerns. As already highlighted above, OTT services are already subjected to requirements under the Intermediary Guidelines to identify the first originator of a message, the Interception Rules for interception of network traffic, the Blocking Rules for illegal content etc. In any case the security conditions under the Unified License apply to TSPs because they deploy network infrastructure which is a crucial infrastructure of the country. In the absence of such an exclusive right being transferred to OTT service providers, there is no need to regulate them under the Unified License.
- g. ***Application of the Unified License would not foster net neutrality requirements:*** Contrary to the arguments made by some stakeholders, subjecting OTT service providers to the Unified License would hamper net neutrality requirements instead of fostering it. It will hamper the growth of small OTT platforms due to excess regulatory requirements and create entry barriers to this market segment which are virtually absent at the moment. In the absence of application of the Unified License, net neutrality can be achieved as the growth in the market would only be linked to the requirement to foster innovation. The openness of the internet will be encouraged by the lack of entry barriers to the OTT market.

Q.7. In case it is decided to bring OTT communication services under a licensing/ regulatory framework, what licensing/ regulatory framework(s) would be appropriate for the various classes of OTT communication services as envisaged in the question number 4 above? Specifically, what should be the provisions in the licensing/ regulatory framework(s) for OTT Communication services in respect of the following aspects:

- (a) lawful interception;
- (b) privacy and security;
- (c) emergency services;
- (d) unsolicited commercial communication;
- (e) customer verification;
- (f) quality of service;
- (g) consumer grievance redressal;
- (h) eligibility conditions;

- (i) **financial conditions (such as application processing fee, entry fee, license fee, bank guarantees etc.); and**
(j) **any other aspects (please specify).**

Kindly provide a detailed response in respect of each class of OTT communication services with justification.

- a. We note that some stakeholders, especially TSPs, have proposed specific regulation on lawful interception, privacy and security, provision of emergency services, unsolicited commercial communication, customer verification, quality of service and consumer grievance redressal need to be imposed on OTT service providers. Please refer to our counter-comments to Question 5 above for our responses in that regard. At the outset, we would like to again highlight that the specific stringent requirements under the suggestive Unified License or such other licensing framework relate to the authority to control the network infrastructure. Such an exclusive right under the Telegraph Act is not extended to OTT services.
- b. **Entry fee, license fee, etc. and bank performance guarantees not required for OTT Services:** Stakeholders that have advocated in favour of licensing OTT services under the Unified License, propose that all the extant entry fee, license fee, etc. requirements as well as the bank performance guarantee requirements be made applicable. The requirement of such fees and guarantees lies in the technical and crucial nature of the services being delivered by TSPs. The quantum of the fees is also linked to the fact that the license under the Telegraph Act seeks to regulate a scarce resource (i.e., the spectrum band). No such rights are available to OTT service providers and therefore no additional requirements should be applied to them.
- c. **Additional lawful interception requirements not required:** Stakeholders, especially TSPs, have pushed for additional lawful interception requirements to be imposed on OTT services such as facilities for continuous monitoring of the systems, sharing decryption keys in case of bulk encryption, data localisation requirements, protection of privacy of communication and confidentiality of subscriber information, etc. We would like to highlight here that many such requirements are already covered under the applicable laws like the Interception Rules, Blocking Rules, Intermediary Guidelines and the DPDP Act. In case the Government feel that there is a necessity for such additional requirements to be imposed on all OTT service providers horizontally, then it can be done under the extant applicable laws. Additional lawful interception requirements under the Telegraph Act should not lead to regulatory burden for OTT service providers.
- d. **Share of network charges not to be paid by OTT services:** Any arguments for the requirement of a voluntary agreement between TSPs and OTT platforms

for fair sharing of network charges, have been addressed by our counter comments in Question 5 above. Additionally, if such agreements are imposed as a mandatory requirement under the envisaged licensing framework, then it would violate the net neutrality principles. TSPs have control over the dissemination of OTT services over their network and hence in case of any mutual agreement the negotiating powers will always be imbalanced. In turn, we fear that such a mechanism will operate as an entry barrier for small OTT services. We propose that such a mechanism should be discouraged.

- e. **Additional requirements for maintaining financial records not required:** OTT service providers cannot be subject to the same financial accounting and auditing standards as TSPs. The record keeping requirements exist under the licensing regime because of the license fee, SUCs, etc. that are payable by TSPs, which are in turn dependent on their average revenue per user ("ARPU"). However, such metrics of ARPU would not apply to OTT services which generate revenue for a bundle of services and have alternate streams of revenue like advertisements etc. which are absent in the case of TSPs. OTT services can be subject to record-keeping regulations under existing applicable laws but any additional requirements under the Telegraph Act would lead to increased burden of compliance. The increased regulatory costs would further affect the ease of doing business in the OTT sector.
- f. **Additional eligibility requirements like net worth, license fee as per the adjusted gross revenue not required:** The stakeholders advocating for a separate licensing regime for OTT services propose that it should include eligibility requirements like net worth, obtaining entry fee, license fee etc. based on their adjusted gross revenue, etc. We request that pursuant to our counter comments in Question 6 above, OTT services should not be subject to additional licensing requirements. In the absence of any additional licensing requirements, OTT service providers would not be required to abide by such eligibility requirements. There cannot be differentiation between OTTs based on above criteria as non-significant player is not taken into ambit of OTT Communication self-defeats the arguments of same service same rule or substitutability of service.

Q.8. Whether there is a need for a collaborative framework between OTT communication service providers and the licensed telecommunication service providers? If yes, what should be the provisions of such a collaborative framework? Kindly provide a detailed response with justification.

- a. **Burden of investments for network development should not be imposed:** In their comments to the CP some stakeholders, especially TSPs, have proposed that the Development Costs should be mutually shared between TSPs and OTT platforms. Please refer to our response to Question 8 in our

response to the CP, which has highlighted multiple reports that showcase that OTT services have already made complimentary investments in terms of Development Costs across the world, including in India. Further, by creating an increase in demand for their services which are data-intensive and bandwidth intensive, OTT service providers have helped increase the revenue of TSPs. Telcos have been resorting to funds based on their own ARPU and sound business case and not on the basis of the revenue share from OTTs. Any investment by telco is due to the fact that there has been robust increase in their revenues due to customer demand.

- b. ***The rate of network traffic cannot be the parameter for determining fair sharing of network usage fees:*** TSPs in their comments to the CP have proposed that if fair sharing of network usage fees ("**NUF**") is allowed between them and OTT services then it should be based on the rate of network traffic being generated by OTT services. We wish to highlight our response to Question 9 in our comments to CP, which cite the reasons as to why a NUF cannot be imposed on OTT services. Further, the rate of network traffic generated is linked to the revenue that is generated by TSPs in the form of data charges from the end-users and for which no direct benefit accrues to OTT services. OTT services cannot be made to compensate based on the factor of network traffic. NUFs are based on the network load being generated by the end users and in any case, the OTT services do not receive any revenue directly out of such network traffic. At this point we would also like to highlight, the symbiotic relationship that exists between OTT services and TSPs. Any fair sharing arrangement for NUFs would alter this relationship and cause market entry barriers for the OTT players. The result will be the breach of net neutrality principles which is sought to be achieved by the mutual cooperation of TSPs and OTT services.

Telcos wish to cling to an old legacy and obsolescent system of "Sending Party Network Pays (SPNP)" prevalent during voice telephony era of 1990s", when it asks for Network Usage Fees to be paid by the OTTs to them for carrying large traffic generated by the former. It must be recalled that the 'sending-party-network-pays(SPNP)' principle was inherent to the old voice telephony system of the 1990s. In that system, due to imbalance of traffic between large and small telephone operators, led to large wholesale payments being made to those telecom operators with larger customer base. To apply that legacy system to the open and free internet which works differently is akin to placing a bullock cart before the motor car and expect to pull it. The internet works in a different way: users do not want just to communicate between one-another, they want to be always online to connect to content, applications and services. This is the reason why internet traffic is normally unbalanced between content and application providers and internet access providers, with the inbound traffic from the former to the latter in normal circumstances likely to surpass the outbound traffic from the customers of the telcos seeking the content. Given this as the principle, the 'sending-party-network-pay' principle which is from the bygone era, is not applicable in the internet era.

The solitary example of South Korea cited in the case of SPNP has been a total failure with the involved parties (SKT & Netflix) mutually agreeing recently to withdraw the agreement between them. Hence the reference to this, is a lame excuse and has no basis at all.

Telco claim to mandate OTTs to pay for network usage fees and the Government's intent to impose telecom licensing frameworks on OTTs, would lead to violation of the Net Neutrality principles & guidelines of 2016 and bestow telcos with the powers to tilt the level playing field to favour one OTT or another thereby leading to discrimination, curbing of innovation and adversely impact the startup ecosystem and consumer choice.

Other stakeholders like Consumer Unity & Trust Society ("**CUTS**") have also identified that models of pricing which employ the 'sending-party-network-pays' ("**SPNP**") policies are also indiscriminate methods of determining the NUF that would be payable. The SPNP policies place the obligation on one level of service providers where the rate is determined agnostic of the real network load or capacity at play. In any case, OTT services provide their share to the Development Costs (as highlighted in our response to Question 8 in our comments to the CP) which is one of the major reasons to claim NUFs. Instead, we agree with the position taken by CUTS that no such additional collaborative framework should be developed, and the existing symbiotic relationship should be maintained.

- c. **Charges on content providers not required:** The stakeholders which advocate for the 'beneficiary pays' argument require that content providers along with end users should bear the burden of the NUF. However, such a financial imposition would indiscriminately disincentivise the generation of digital content by OTT services. These content providers create the necessary bandwidth-intensive content that leads to higher revenue generation for both OTT services and TSPs. The beneficiary pays argument cannot therefore be squarely applicable as it will breach the net neutrality requirements by creating market hindrances for OTT services as a whole, and especially for small OTT players. In either case, TSPs are also a beneficiary of the content providers' activities.
- d. **OTT services do not hamper the revenue generated by traditional communication services:** Please refer to our response to Question 2 in our comments to the CP, wherein we have highlighted that OTT communication services cannot be treated as interchangeable products with respect to the traditional communication services. The end users cannot substitute traditional services with the OTT services due to constraints like network connectivity, requirement to access emergency services etc. We therefore disagree with the argument that OTT services should compensate for the loss of revenue faced

by TSPs in terms of traditional communication services, as no such loss is faced.

- e. **QoS requirements by TSPs cannot be subject to revenue sharing agreements:** Some stakeholders in their comments to the CP have pushed for revenue sharing agreements ("RSAs") between TSPs and OTT service providers. As a part of such RSAs, the OTT services would be required to fulfil additional QoS requirements by the TSPs. However, we wish to highlight that if the TSPs maintain such QoS requirements independently, then it will help OTT services to develop more bandwidth-intensive services. This in turn will help in further revenue generation for TSPs by increasing the usage of network services and in the form of data charges being paid by the end users. Therefore, any requirement for mutual collaboration in the form of RSAs is negated.

Q.9. What could be the potential challenges arising out of the collaborative framework between OTT communication service providers and the licensed telecommunication service providers? How will it impact the aspects of net neutrality, consumer access and consumer choice etc.? What measures can be taken to address such challenges? Kindly provide a detailed response with justification.

- a. **Principles of net neutrality will be violated in implementing a collaborative framework:** TSPs have proposed in their comments to the CP that the principles of net neutrality can be protected in a collaborative framework if the RSAs are only entered with large OTT communication services (determined based on the number of subscribers). Reiterating our counter comments in Question 4 above, any classification model based on number of subscribers of an OTT service is unreasonable. In any case, in the proposed model, while some small OTT services would gain better access to the market, a whole segment of content providers which rely on these large OTT services would face market barriers. If the NUFs and SUCs are imposed on OTT services, then the same would be reflected in the increase of subscription costs which will percolate down to the end-users.

Telcos wish to cling to an old legacy and obsolescent system of "Sending Party Network Pays (SPNP)" prevalent during voice telephony era of 1990s", when it asks for Network Usage Fees to be paid by the OTTs to them for carrying large traffic generated by the former. It must be recalled that the 'sending-party-network-pays(SPNP)' principle was inherent to the old voice telephony system of the 1990s. In that system, due to imbalance of traffic between large and small telephone operators, led to large wholesale payments being made to those telecom operators with larger customer base. To apply that legacy system to the open and free internet which works differently is akin to placing a bullock cart before the motor car and expect to pull it. The internet works in a different way: users do not want just to communicate between one-another, they want to be always online to connect to content, applications and services. This is the reason why internet traffic is normally unbalanced between content

and application providers and internet access providers, with the inbound traffic from the former to the latter in normal circumstances likely to surpass the outbound traffic from the customers of the telcos seeking the content. Given this as the principle, the 'sending-party-network-pay' principle which is from the bygone era, is not applicable in the internet era.

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Telco claim to mandate OTTs to pay for network usage fees and the Government's intent to impose telecom licensing frameworks on OTTs, would lead to violation of the Net Neutrality principles & guidelines of 2016 and bestow telcos with the powers to tilt the level playing field to favour one OTT or another thereby leading to discrimination, curbing of innovation and adversely impact the startup ecosystem and consumer choice

Other stakeholders like CUTS in their comments to the CP have also envisaged such increased charges being faced by the users.

In sum, such a model of RSA would hamper the end-users' ability to access the internet and therefore lead to violation of the principles of net neutrality.

- b. **Consumer accessibility of OTT services cannot be ensured through RSAs:** TSPs further propose that the consumers' accessibility to the varied nature of OTT services would not be impacted by an RSA if the OTT services are prevented from changing their route of network traffic. However, such an argument fails to acknowledge the increased financial burden on OTT services, which will result in a decrease in investment for providing quality OTT services. Therefore, even though consumer accessibility may be ensured, the quality of OTT services would be impacted.

Additionally, the RSA framework is envisaged to reduce consumer costs paid in the form of NUFs. However, to the contrary, such a framework will impose additional burden on consumers in the form of increased subscription costs by OTT services. The consumers would therefore be required to pay for both the network services and the application services being provided (a lot of which is freely accessible in the form of OTT services as of date).

- c. **Frameworks like RSA would hamper competition:** We wish to highlight that contrary to the arguments advanced by TSPs, the RSA framework would increase market competition for OTT services by introducing financial hardships. The nature of OTT sector competition is such that there should be constant innovation by OTT service providers to survive the competition. However, with the introduction of the fair sharing of NUFs and SUCs for OTT services, investments would be diverted towards regulatory compliance instead

of fostering market competition. A combined effect of this framework will result in stagnation of innovation and denigration of QoS standards of the OTT services being provided.

Q.10. What are the technical challenges in selective banning of specific OTT services and websites in specific regions of the country for a specific period? Please elaborate your response and suggest technical solutions to mitigate the challenges.

- a. At the outset, we would like to take this opportunity to reiterate the comments to the CP made by multiple stakeholders, including some TSPs, with respect to selective banning of specific OTT services and websites in specific locations. The commonly acknowledged challenges that can be faced are-
- i. TSPs cannot be required to selectively ban only specific OTT services as at the network level there is no differentiation between OTT platforms. This is in addition to the fact that often OTT services are bundled in nature and blocking of one service can affect the other interlinked services.
 - ii. OTT platforms use dynamic IP addresses using their cloud servers which makes it difficult for TSPs to effectively block OTT services at the network level. The use of dynamic IP addresses means that other OTT services can be wrongly blocked.
 - iii. OTT platforms would have to collect proprietary information such as IP addresses, etc. from the OTT platforms to effectively block them. This will lead to sharing of proprietary information by OTT services with TSPs which is discouraged.
 - iv. Lastly, irrespective of the method of IP/URL blocking that is followed, the users can circumvent the same by using virtual private networks ("VPNs") or tunnelling etc. Therefore, no such method of blocking will be effectively implemented at the network level by TSPs.

Please refer to our responses to Question 9 in our comments to the CP for detailed information on the same.

- b. **Selective blocking cannot be effectively carried out by OTT players:** In their comments to the CP, some of the TSPs agree that selective blocking at the level of the network layer by TSPs is not feasible. We are in sync with this understanding. While other stakeholders have pushed for selective blocking at the level of the OTT services in their comments to the CP. We would like to point out that such methods of blocking at the level of OTT services would require OTT platforms to collect location-based information of the users, which can lead to privacy concerns. Additionally, such specific blocking at the regional level cannot be carried out quickly keeping in mind the technical complexity involved in the process.

- c. **Regulations to prevent dynamic IP addresses and mandatory disclosures to the TSPs should not be allowed:** Any regulation which is aimed at directing OTT services to mandatorily share their IP addresses with TSPs to execute blocking orders and to maintain constant IP addresses, would lead to major market restraints for OTT service providers. OTT service providers generally have dynamic IP addresses, especially if they are hosted on cloud platforms. A specific IP address cannot be shared, and neither can dynamic IP addresses be blocked without deep packet inspection. Additionally, mandatory disclosures of IP addresses to the TSPs would also raise concerns for breach of privacy and other cyber security incidents.
- d. **Requirement for the Government to provide proper identification of OTT services should not be imposed:** Some TSP stakeholders have proposed that at the network level selective blocking of OTT services can be done by TSPs, subject to proper identification (i.e., name of the service provider, its web address and IP address, the specific service or content to be blocked etc.). However, reiterating our position as explained above, any proper identification of OTT services is not possible due to inherently dynamic IP addresses. As noted above, mandatory disclosures of the IP addresses would also create privacy concerns.

Alternatively, any framework which requires that there shall be a complete internet shutdown followed by selective unblocking of permitted OTT services would face the same issue. It would require proper identification of OTT services which in turn will have the same concerns as identified above.

- e. **Content filtering by OTT services:** Content filtering at the application layer by the OTT services cannot be a viable alternative to selective blocking. It would require the OTT services to be an independent arbiter of the legality of the content being published online. As an intermediary, OTT services cannot perform such an action as it would breach the fundamental rights of freedom of speech and expression, as per directions of the Supreme Court in *Shreya Singhal v Union of India*.⁵ Additionally, any requirement to takedown content based on actual knowledge through orders from courts or respective government authorities is already covered under the Intermediary Guidelines. Hence any further content filtering obligations imposed by TRAI will amount to increasing the burden of compliance.
- f. **Indiscriminate blocking of significant OTT service providers based on number of subscribers should not be allowed:** Any regulation which requires certain OTT service providers, based on the nature of subscribers, to constantly disclose their IP addresses or be subjected to indiscriminate blocking, would be detrimental. It would lead to increased burden of

⁵ *Shreya Singhal v Union of India* AIR 2015 SC 1523.

compliance along with technical challenges of daily disclosure of dynamic IP addresses. Furthermore, as already discussed above, due to the nature of bundled services, the number of subscribers is not a reasonable parameter for classifying OTT services from the perspective of blocking orders (*Please refer to our response in Question 4 above*).

Q.11. Whether there is a need to put in place a regulatory framework for selective banning of OTT services under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 or any other law, in force? Please provide a detailed response with justification.

- a. We note from the comments submitted by other stakeholders to the CP, especially TSPs, that the recommendation has been to formulate an independent framework for selective banning at the application level by OTT services. In response, we would like to reiterate our response to Question 10 in our comments to the CP. Such a selective blocking at the level of OTT services is not technically feasible and can lead to privacy concerns and increased regulatory burdens for OTT service providers.
- b. **Regulations which ban specific classes of OTT services should not be allowed:** Some stakeholders, especially TSPs, have proposed that regulatory frameworks should be developed to ban specific classes of OTT services, based on consultation with law enforcement authorities. However, considering the overlapping nature of bundled OTT services, it would be difficult to segregate such specific classes of OTT services to be banned.

Q.12. In case it is decided to put in place a regulatory framework for selective banning of OTT services in the country, - (a) Which class(es) of OTT services should be covered under selective banning of OTT services? Please provide a detailed response with justification and illustrations. (b) What should be the provisions and mechanism for such a regulatory framework? Kindly provide a detailed response with justification.

And

Q.13. Whether there is a need to selectively ban specific websites apart from OTT services to meet the purposes? If yes, which class(es) of websites should be included for this purpose? Kindly provide a detailed response with justification.

And

Q.14. Are there any other relevant issues or suggestions related to regulatory mechanism for OTT communication services, and selective banning of OTT services? Please provide a detailed explanation and justification for any such concerns or suggestions.

- a. **Specified classes of OTT services cannot be indiscriminately banned without justification:** A few stakeholders in their comments to the CP have advised that specific classes of OTT services can be created which can be specifically banned. This can include, for instance, (a) OTT services which provide inter-personal communication at mass level; (b) OTT services required for content take down. However, we would like to highlight that existing laws already govern blocking of access (Blocking Rules) and content takedown (Intermediary Guidelines). OTT services under the first category, being intermediaries are already subject to the Blocking Rules specified under the IT Act. Other services, which fall under the second category are governed by the Intermediary Guidelines with respect to content takedown requirements. Therefore, for such requirements, there is no rationale for imposing separate regulations under the Telegraph Act.
- b. **Bundled OTT services cannot be classified:** Reiterating our response above, bundled OTT services cannot be distinguished. In such cases, it will not be technically feasible for the Government to dynamically determine the classification of a service based on its core service. It will become a dynamic regulatory exercise as the business model of the OTT platforms are susceptible to change based on market needs. Therefore, the regulatory objective would not be achieved in the given case.
- c. We therefore reiterate our position as elaborated in our comments to CP, that selective banning of OTT services is technically not feasible, and any regulatory framework sought to be developed should keep in mind the economic and market considerations of the sector.

In conclusion, we would like to express our gratitude to provide us with this to opportunity to submit counter-comments for this CP. We are hopeful that it would assist the TRAI in taking a judicious decision on the legal queries raised regarding the regulation and selective banning of OTT services.
