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To: "Akhilesh Kumar Trivedi" <advmn@traigov.in>

Sent: Friday, September 29, 2023 10:20:29 AM

Subject: Counter Comments on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

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To,

Sh. Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
TRAI

Dear Sir,

Thank you for allowing us to submit counter comments to submissions made for the consultation on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

Our comments attached.

regards,

Nikhil

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To,

Sh. Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
TRAI

advmn@traigov.in

Subject: Counter Comments on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services

Dear Sir,

Thank you for allowing us to submit counter comments to submissions made for the consultation on on Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services.

We find that several submissions, especially those by Vodafone Idea, Bharti Airtel, Reliance Jio and COAI contain misleading information, and we wish to correct that record:

1. **Misleading interpretation of net neutrality:** Some telecom operators have misinterpreted Net Neutrality for their own convenience, trying to mislead the TRAI. The following comments are misleading:

- a. **Misleading comment from Vodafone Idea:** *"The collaborative framework (revenue sharing) should be applicable only on large OTT-CS providers who are having subscribers more than a certain defined threshold (let's say 50 lakhs). The DoT/TRAI should define such large OTT-CS providers at a regular frequency i.e. annually, to avoid any clash of interest or impact to Net Neutrality principles. With such defined threshold, it will neither impact any new OTT-CS providers nor innovation in the digital domain of OTT-CS"*
- b. **Second misleading comment from Vodafone Idea:** *"Myth 4: Demand for 'revenue sharing' or 'fair share' are an attempt to dilute net neutrality in India.*

Reality:

- i. *Fair share does not affect access to an open and free Internet.*
- ii. *Content and services will remain fully accessible with no traffic management / differentiation implemented for any specific entity. There will be no throttling, no blocking and no paid prioritization.*
- iii. *The price for the traffic paid by end users will not change depending on whether the traffic originator is subject to fair share payments or not.*

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Submission: By defining a threshold resulting into only large traffic originators having to pay fair share to TSPs, there will be no impact to net neutrality.

- c. **Misleading comment from Reliance Jio:** *“Therefore, we submit that a flexible approach that allows TSPs to increase their investments in infrastructure and help OTT players benefit from the rollout of additional infrastructure depending on the optimization of their traffic volumes will ensure the public internet remains affordable and equally available for everyone. **We submit that such an approach will be within the principles of Net Neutrality** and there will be no impact on prevention of unreasonable discrimination of internet traffic based on content, nature of service etc.”*
- d. **Misleading comment from Airtel:**
 - i. **The fair share proposal is fully compliant with net neutrality obligations.**
 - ii. *Any collaborative framework for fair contribution between OTT and licensed TSPs **will not affect access to an open and free Internet**. Need for systemic traffic generators to contribute fairly to network deployment has nothing to do with the net neutrality debate. It does not involve anyhow a differentiated traffic management or unequal treatment of LTGs traffic.*
 - iv. **Net Neutrality does not prohibit charging LTGs for the service they receive**, provided that such agreements and commercial practices do not limit the exercise of the rights provided for in the Regulation.
 - v. *Content and services will remain fully accessible with no traffic management/differentiation implemented. There will be no throttling, no blocking, and no paid prioritization.*
 - vi. **There is no violation of net neutrality if a peering charge is applied at an interconnection point between two networks** to compensate for an imbalance of data traffic. This charge is applied in relation to the volume of the traffic and not for certain data from certain OTT.
 - vii. *Such interconnection peering charge has no influence on the access of end customers to any content. **Thus, network neutrality would not be at stake in this situation.***
 - viii. *The price for the traffic paid by end users will not change depending on whether the traffic originator is subject to fair share payments or not.*

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ix. By defining a threshold to be subject to the obligation, only largest traffic originators will have to pay for the service of delivering their traffic to end users.

- e. Misrepresentation from COAI:** *“Another Bill prohibits content providers from using ISP’s network without paying “fair consideration” for use of the network, whereby the non-complying content provider’s service can be shut down by the authorities. This bill implicitly allows ISPs to refuse to carry traffic from content providers who fail to pay the “network share charges.”*

Our response:

- 1. Charging Network Usage Fee to select entities/classes of entities is discriminatory and violates Net Neutrality:** The TRAI has in its landmark differential pricing order, emphasised the need for non discriminatory practices from ISPs/TSPs, including prevention of zero rating and restriction on differential pricing.

The TRAI had recognised that all users are both creators and consumers online, unlike in traditional cable services. It said in its explanatory memorandum to its order on **“Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016”**:

“allowing the keepers of the infrastructure to differentiate on the basis of content, would impose negative externalities on the rest of the network as internet serves as infrastructure for many other markets. This is especially so since the internet is a fluid and dynamic space where **a user could be a simple subscriber at one moment (when she accesses the internet through a data pack), and become a content provider (when she writes a blog post) at the next.**

Thus, by charging some users, whether because of high traffic or because they’re messaging and communications, you or telecom operators will be discriminating against them, thereby violating the Differential Pricing Order.

The TRAI memorandum also stated:

A particular TSP which is offering data services to the consumer does not control the internet infrastructure in its entirety. It is dependent on several other networks to facilitate this task. Thus, allowing a TSP which is at one edge of the internet to charge differentially for data that it does not alone process, could compromise the entire

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architecture of the internet itself. Were other TSPs across multiple tiers allowed to do this, then the openness of internet as we know, would be altered. **Allowing price differentiation based on the type of content being accessed on the internet, would militate against the very basis on which the internet has developed and transformed the way we connect with one another.**

The same rationale also applies to volume of content. Discriminating against online services on the basis of type of service or volume of content, by charging them an additional fees, violates Net Neutrality.

Any form of interconnection or peering discrimination is a net neutrality violation.

2. The South Korea situation has been misrepresented in submissions: Reliance Jio, Vi, and the three academics (Sridhar, Prasad and Kedia, who have authored a report on the same issue for a Vodafone Idea backed centre InViCT, titled “5G and beyond: Formulating a regulatory response”¹) whose submission appears to have been mistakenly tagged as that of ICRIER appear to have misrepresented the situation in South Korea.

The [Korea Legislation Research Institute translates the law in Korea](#) as follows:

Article 22-7 (Securing Service Stability by Value-Added Telecommunications Business Operators)

A value-added telecommunications business operator who meets the standards prescribed by Presidential Decree, such as the number of users and the volume of traffic, shall take necessary measures prescribed by Presidential Decree, such as securing the means of service stability and dealing with user requests, in order to provide users with convenient and stable telecommunications services.

As such, **nowhere does it state that a network usage fee is applicable to any online service provider.**

In fact the representation made by the three academics (V. Sridhar, Rohit Prasad and Mansi Kedia, who have also published a research paper on the same issue for Vodafone Idea backed InViCT, titled “5G and beyond: Formulating a regulatory response”) **misrepresents a report by Feigenbaum & Nelson, 2021**, which in fact does not say that content providers are required to “to pay a fee to cover network use”. There have been similar misrepresentations in the media, because of a misunderstanding of the Korean law, and because SK Telecom sought to force Netflix to pay a network usage fee. That issue has now been settled out of court by Netflix and SK Telecom.

¹ <https://icrier.org/invict/5GandBeyond.pdf>

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Professor Kyung Sin Park, the co-founder and Executive Director of www.opennetkorea.org and law professor at the Korea University Law School told MediaNama² recently that “The law has not been extended to include the content providers as the party is obligated to make the payment. So far, [the] sender pay rule applies only among ISPs [internet service providers]. Prof Park said that under the current law, content providers (aka OTT platforms) **are not required to pay** for the traffic generated by their services.

3. Misrepresentation of the Internet as a two sided market: The Internet is not a two sided market. The submission by Reliance Jio incorrectly represents the Internet as a two sided market. The Internet is a network of networks, with complex relationships and peering arrangements between interdependent ISPs, that enable a user to pull data from a server at the other end. Content Delivery Networks play a unique role in this ecosystem of optimising the route taken for that data delivery to reduce latency. Caching of content already accessed by users helps in reducing global bandwidth consumption by locating the source of the content closer to the end user, and hence reduces cost, latency and improves efficiency.

These are all market driven innovations in a fairly stable equilibrium of relationships among peering stakeholders.

Any attempt to interfere in a stable and efficient, market determined, Internet ecosystem should not be undertaken without examining the consequences of such a move.

4. Requirement of contribution from online services to the USO Fund, Telecom Development Fund or Broadband Infrastructure Fund is without rationale:

a. Taxation is the least preferred option: Taxation is the least efficient mechanism for developing telecom or broadband infrastructure, such investment must be the last choice after other options have been exhausted.

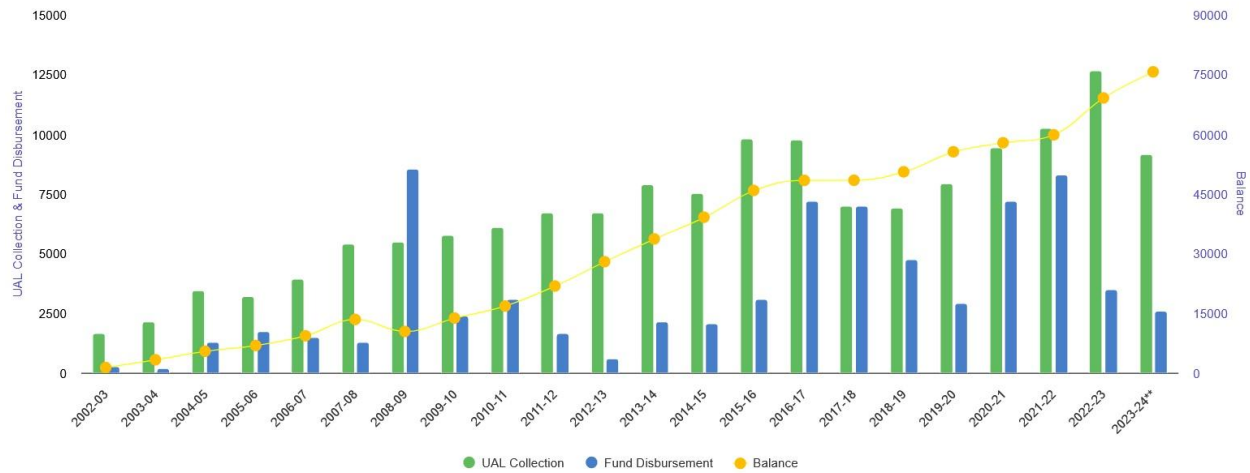
In addition, less than 50% of the total USO Fund collected so far has been disbursed, and the balance fund available has increased every year since 2008-09.

*Total accretion: ₹149246.98 crore Total disbursement: ₹73646.56 crore
Potentially available fund: ₹75689.53 crore*

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<https://www.medianama.com/2023/09/223-interview-professor-ks-park-korea-network-fee-arrangement/>

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We have the following recommendations regarding taxation:

1. Additional contributions to the USO Fund should only be considered after the existing USO Fund has been disbursed effectively.
2. TRAI should consider asking online companies to contribute to the fund only after taking into consideration **increasing USO Fund contribution from telecom operators, given that they operate in a market with low competition and larger profits**, while online companies operate in a market with infinite competition.
3. Creating a separate fund for broadband, while the USO Fund already exists and is severely underutilised does not make sense

b. Enabling competition is a preferred option: One can argue that competition is the ideal form of enabling infrastructure investment. For example, in June 2016, Bharti Airtel, after years of lack of improvement in its network infrastructure leading to major issues of call drops³, as a part of its Project Leap, launched the Open Network Initiative, to improve network infrastructure. It said then⁴:

The Company is deploying state-of-the-art technology solutions for better indoor coverage and network optimization; overhauling legacy networks with new equipment and making investments in additional spectrum and fiber

Follows Airtel's decision to voluntarily implement 25% more stringent mobile call drop benchmark of 1.5% versus 2% prescribed by the TRAI

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<https://www.indiatoday.in/magazine/cover-story/story/20150727-call-drops-airtel-vodafone-idea-trai-820109-2015-07-16>

⁴ <https://www.airtel.in/press-release/06-2016/airtel-announces-open-network-initiative-under-project-leap>

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This was, as is evident, an effort to retain its customer base because of the impending launch of Reliance Jio. In fact, Airtel has benefited from this investment in infrastructure, and has grown since.

Thus, if there is a need to encourage investment in telecom infrastructure, and existing telecom operators believe that they cannot do so without seeking rent from online companies, **there is a need to increase competition.**

Telecom operators seek to keep competition low to the detriment of ISPs by keeping Internet connectivity in India largely spectrum based, and then maintaining exclusivity over spectrum. We have the following recommendations regarding increasing competition in Internet Access:

1. **Delicense spectrum bands:** The TRAI should consider delicensing TV White Space Spectrum, and well as Wi-Fi 6E, and specifically the 6 GHz spectrum, in order to enable ISPs to deploy it. This will enable other ISPs to compete on a level playing field with the existing telecom operator-ISP oligopoly.
2. **Limit USO Fund deployment to ISP infrastructure:** at present, a majority of Internet access in India is via telecom operators using spectrum. Globally, scalable and reliable broadband access is possible only via wireline, and the TRAI should focus on improving the wireline to wireless internet access ratio in the country. Towards this end, we recommend that any deployment of the USO Fund should only be towards enabling wireline ISPs.
3. **Conduct a study in market competitiveness in broadband access in India,** like the TRAI has done in the past regarding media ownership using the **Herfindahl-Hirschman Index**, to determine the dominance of certain players in multiple forms of broadband delivery.

We'd like to point out that **Bharti Airtel is among the dominant players in wireless and wireline broadband access in India**, and also has plans to roll out satellite based Internet access. Reliance Jio is dominant in Wireless and is rolling out wireline broadband access.

TRAI needs to restrict dominant players to one type of Internet access service, in order to allow others to flourish, and increase competition in broadband access.

Why you shouldn't charge Internet services for the USO Fund: Consumers today want Internet access because of the destinations that the Internet has enabled for them. **Just as we don't charge restaurants extra for highways**, in terms of additional contribution in terms of taxes, we shouldn't be charging sources of information for the information highways. In fact, the reason we licence exclusive access to build these highways to telecom operators is so that consumers can benefit from the services that online providers provide. Telecom Operators like Bharti Airtel and Reliance Jio are profitable entities, and if others

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like Vodafone Idea are struggling, it's entirely down to their poor management of their business.

Counter Comments

Licensing of online communication services

Airtel: *“This principle of ‘Same Service – Same Rules’ is a must to ensure a level playing field and fair competition in the sector. In this context, we submit that the Authority shall consider bringing a separate authorisation for OTT communication services under the Unified License (UL), to balance security & privacy needs and service innovation”*

Airtel: *Notably Airtel in its comments has divided OTT Communication platforms into two categories — OTT Communication Services (Main) and OTT Communication services (Incidental, where the interpersonal communication feature is so intrinsically linked to the principal service that it cannot technically be used without that feature). It says that OTT Communication services (Main) are those services whose principal offering is interpersonal communication, and should be subjected to the same rules and regulations that telecom companies currently meet. It further gives the example of Paytm and says that while the platform’s principal offering is financial services, a messaging feature that is independent of the financial services is also offered. It claims that such platforms should also meet the same rules as telcos.*

Reliance Jio: *“Communication OTT service providers should also be required to comply with the financial obligations i.e. license fee obligations including USO levy as percentage of AGR and other levies, as per the Access services authorization under the Unified License, as part of the Same Service Same Rules regime and in order to maintain a level playing field,” it says.*

Our response:

1. **Addressing “Same Service Same rules” argument:** TSPs argue that the restrictions imposed on their voice calling services should also be applicable to Internet Telephony, including licensing, AGR related payments. They claim that the same rules must apply to the same service. This is fallacious, for multiple reasons:
 - 1.1.1. **Not the same service:** Internet Telephony is more malleable and can be integrated into multiple IP based services. PSTN calling cannot. At best, Internet Telephony and PSTN calling are **imperfect substitutes**.
 - 1.1.2. **Clear differentiation between online messaging and Access Services:** Telecom operators provide an Internet Access service to users. Users, using the client apps on their devices, pay Telecom operators and ISPs for data connections, which allow handsets to

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communicate with servers, and transmit messages sent by users to the recipient. Thus, there is a clear differentia between the two services from a regulatory perspective.

- 1.1.3. **Online messaging services are Internet services, regulated by MEITY**, and Telecom Operators are Internet Access services regulated by DoT. Online messaging services are governed by the IT Act and IT Rules 2020, although the constitutionality of the IT Rules is questionable. Telecom operators are regulated by the Telegraph Act, their licensing conditions, and by the IT Act (as intermediaries).
- 1.1.4. **Online services do not utilise spectrum, consumers do:** Telecom Operators license spectrum, which is a regulated national resource, and allow consumers to utilise spectrum to access the Internet, which they may do via apps or browsers. Online services are accessed by users, and do not utilise spectrum by themselves. They can only do so, on the basis of a demand coming from a telecom operators customer. Thus online apps have no control over utilisation of spectrum.

If a user doesn't have an Internet connection, the app or website will not work. Thus, the same regulatory treatment cannot apply to an app and an ISP/TSP.

- 1.1.5. **Online services cannot provide Internet access**, unless they get a telecom or a VNO license. TSPs are Internet access service providers.
- 1.1.6. **There is clear unbundling between TSPs and online services**, which is the basis of Net Neutrality. The job of a TSP is that of a neutral exchange: connecting users to each other, as a neutral exchange. Internet access is one such service. Internet Telephony, which uses Internet Protocol for transferring data packets which may be voice, is not an exclusive telecom operator mandate.

Additionally, **TSPs provide non-access services which are similar to regulated services:** For example, they provide "Value Added Services" such as Mobile Radio. We don't see FM radio stations demanding that TSPs buy an FM license. Similarly, their prepaid balance is used for purchase of goods and services from third party vendors. We don't see TSP's being asked to confirm to RBI regulations related to semi-closed prepaid wallets, or FM Radio licenses for Mobile Radio. Similarly, Airtel provides music streaming service Wynk: they don't need to buy an FM Radio license.

2. No need for licensing: To enable entrepreneurship and innovation in messaging and/or with the integration of messaging, we need **low friction, predictable systems, ideally without having to negotiate agreements between creators of content and services, and distributors, or licensing agreements, including those with the government.**

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Licensing will kill innovation and make messaging the exclusive preserve of a few large service providers.

It will prevent/inhibit the integration of messaging and communications into multiple types of other services, such as ecommerce, payments, BPOs, games, education, healthcare, entertainment, video calling, among others.

The Internet thrives in an environment of permissionless innovation.

2.1. Licensing of messaging services limits speech in digital transmission:

Licensing of content is flawed at its very core. *The Supreme Court of India, in the case of Ministry of I&B v. Cricket Association of Bengal*⁵ has held that:

“[a]irwaves being public property, it is the duty of the State to see that airwaves are so utilized as to plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech rights of the body of citizens in as much as only a privileged few - powerful economic, commercial and political interests - would come to dominate the media.

Thus:

2.1.1 Licensing of speech, including the carriers of speech, negatively impacts diversity and plurality of content, by limiting provisioning of content to only licensed entities, and allowing concentration of power in the hands of few. It creates barriers to entry: only those creators who have the wherewithal to bid for or acquire licenses are given the opportunity to create and distribute content.

2.1.2 Licensing of speech, including the carriers of speech, lends itself to excessive state control over its creation and distribution. This is unnecessary, especially given that there exist constitutional restrictions to free speech, under Article 19(2), and further restrictions via control over distribution of content and licensing are unnecessary and unwarranted.

Any attempt to create a licensing or registration framework for VoIP would create barriers to entry, innovation, and is unwarranted

2.2 There is no market failure in messaging: The idea that there is a need for “a licensing/regulatory framework to promote a competitive landscape for the benefit of consumers and service innovation” is flawed by itself.

⁵ <http://judis.nic.in/supremecourt/imgs1.aspx?filename=10896> (Source: Internet Freedom Foundation submission to TRAI on Preconsultation on Net Neutrality)

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Firstly, licensing for one set of services is a form of discrimination. **Discrimination is not innovation.** There is NO market failure in messaging and communications: it is a highly competitive space.

There is sufficient innovation and competition in messaging, as evidenced by the growth of Slack, Zoom, the rollout of WhatsApp communities, the implementation of disappearing messages, one time message, GIF only messaging apps, the creation of the XMTP/Waku protocol for messaging, among several other features.

The TRAI needs to clearly demonstrate and publish evidence of market failure in messaging if it intends to suggest lack of competition as a reason for recommending licensing.

3. The phrase OTT is flawed: As mentioned in our comments, we would like to reiterate that the phrase OTT is misleading and is a telecom creation. There is no clear definition of OTT Communication services, given that there is no such thing as an OTT service. Access service providers provide Internet Access. Internet services are not “over the top”. The Department of Telecommunications and the TRAI should not be trying to classify Internet services since this is the remit of the Ministry of Electronics and Information Technology. The classification Airtel suggests would adversely affect innovation and would discourage platforms from introducing communication into their services.

4. Everything on the Internet is messaging and communication: If the TRAI or DoT intend to try and define communication and messaging services, it’s worth noting that everything on the Internet is messaging and communications: Across the Internet, data packets are communicated between computing devices. The TCP/IP protocol enables networks to communicate and exchange data.

5. Impact of classification on innovation: What is a feature today could be the main business tomorrow. Take GoIbibo as an example: it started as ibibo.com, a blogging platform in 2006. By 2008⁶, it had a Q&A feature called (Sawaal), similar to Yahoo Answers; Photo storage, blogs, a vertical search, a mobile calling feature, email, videos, a messenger, Push SMS (SMS+), online and mobile games, group SMS, voice-based status updates, a social network, all via the same online platform. The company finally found a product-market fit in online travel, and shut other services down to focus on GoIbibo. A “classification” system

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<https://www.medianama.com/2008/08/223-ibibo-overhauled-integrates-mail-introduces-online-and-mobile-games/>

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would have prevented Ibibo from finding a product market fit, given the barriers to entry created. A platform like Slack, which was initially an internal communication tool⁷ for Tiny Speck has now grown into platform that integrates multiple third party services, offers chatbots that send automated notifications and so on. If we put in place a licensing framework for communication platforms in India, a Slack like service (for example Gupshup is a slack alternative in India) wouldn't be able to evolve.

6. Challenges with the determination of incidental usage: On what basis will a messaging service be determined as a messaging service? For example, Line has incorporated messaging, calling and games into a single application. WeChat has done this and added e-commerce. There are games that integrate messaging and Internet Telephony, allowing gamers to interact with each other while playing. Everything is a remix on the Internet⁸, and everything involves some aspect of messaging and communication. Slack is a B2B messaging platform with an Open API which enables the integration of thousands of independent services. Zoom is a meeting and communications platform that has webinars. When exactly messaging 'incidental', is not clear.

7. How will email be regulated? Structurally, there is no fundamental difference between an email system and a messaging system. Email is based on protocols like SMTP and/or POP, while online messaging may be based on the XMPP or XMTP protocol. The authority needs to consider that messaging has been unbundled from telecom services, and given the TRAI's commitment to unbundling, there is no clear rationale for bundling or bringing messaging under differential regulation.

8. How will services like Slack be regulated? While Slack is a business based application, it has free personal usage upto a particular level. It is a messaging platform that allows users to message and engage in chats, and integrate multiple additional services, whether server updates, traffic stats etc via its API. These are offered mostly to businesses for internal communication, coordination and planning, but also used by students, schools and other service providers.

9. How will Discord be regulated? Discord is an instant messaging and VoIP social platform, allowing users to set up their own servers, and give them the ability to message each other. It started as a gamers platform but has expanded to include non-gaming communities as well. Given that anyone can set up a messaging server within discord, how does the authority intend to consider bringing it under a regulatory framework?

10. How will federated messaging be regulated? With federated messaging protocols like Jabber/XMPP and Waku/XMTP, it's not possible to regulate or ban all messaging applications. These allow messaging across service providers, in the same manner that emails can be sent across multiple service providers.

⁷ <https://www.cnet.com/tech/tech-industry/flickr-founder-plans-to-kill-company-e-mails-with-slack/>

⁸ <https://www.youtube.com/watch?v=xPzpIRZAWUc>

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11. USO Fund: As highlighted in our initial remarks above, the USO Fund not been used to develop network infrastructure. Moreover, online platforms already contribute to the development of network infrastructure, they develop undersea cables ⁹and create caches on the ISP's network to ensure that content reaches the customer efficiently. In May 2021, a Facebook-backed consortium 2Africa revealed that it was laying down a 45,000-kilometer subsea or undersea cable network that reaches 26 countries, including India and Pakistan. Imposing a USO levy will create a barrier to entry in the communication platform market, only those platforms that have the wherewithal to bid for or acquire licenses are given the opportunity to create and distribute content.

Interoperability and Portability:

Reliance Jio: "To enable choice of OTT communication service provider for the user, we suggest that service providers should be mandated to facilitate switch from one OTT communication service provider to another by easily porting user's data as and when they desire, where technically feasible. Interoperability between applications will foster competition. OTT communication service providers should consider data protection and security requirements in designing tools to enable portability and deciding with whom to interoperate, with guidance from regulators."

Our response:

1. On portability:

- a. **Considered in the data protection bill:** This is something that the data protection bill had considered in its first iteration and the absence of this in the final version of the law indicates that the government may have rejected the idea of portability.
- b. **Portability of userbase is unnecessary when userbase is determined by phone address book:** Services like WhatsApp, Signal and many others rely on the phone address book for determining contacts in the messaging app. All apps have access to the same address book, and thus portability is unnecessary here.
- c. **Portability of messages:** Message export and import are complex activities and can create cybersecurity issues for users.

2. On interoperability:

1. **Interoperability of messaging already exists:** protocols such as XMPP and the newly developed XMTP protocol allow messaging across formats. XMPP as an interoperable platform has been around for almost 20 years, and such messaging applications already exist. As such, consumer choice in the market

⁹ <https://www.medianama.com/2021/09/223-facebook-2africa-submarine-cable/>
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has existed for over a decade. That consumers have chosen platforms that don't offer interoperability is an indication of consumer choice.

2. **Forcing interoperability in existing systems is a complex activity:** While interoperability is clearly of benefit to consumers, the TRAI should take into consideration that online services, especially those with billions of messages being sent globally, are complex systems with many moving parts, and forcing interoperability in a pre-existing system has ramifications for the stability and security of such systems, its efficacy is not really guaranteed.
3. Online competition issues are best left to the Competition Commission of India, and the pending Digital Competition Act, rather than a myopic focus on online communications, which is, in any case, beyond the jurisdiction of the TRAI or DoT. Please note that competition related to Facebook (Meta) and Whatsapp are already under consideration at the Competition Commission of India¹⁰. Some issues related to abuse of dominance have already been addressed.¹¹

Economic Aspects

***Airtel:** Airtel's submission highlights that India's mobile data traffic has increased in the last few years and that this jump coincides with the launch of commercial 5G services. It says that Indian operators spent Rs. 1.5 Lakh crore in the recent spectrum auctions and the telecom industry faces increasing challenges in maintaining the pace of investment and sustainability of networks. Under these conditions, Airtel argues, the telecom sector faces increasing challenges in maintaining the pace of investment and the sustainability of the digital ecosystem. Telecom operators can undertake investments only if they receive fair and proportionate returns on their investments.*

Our response:

1. **Airtel's revenues and profitability have increased:** MediaNama has observed Airtel's revenue between 2019 and 2023 and found that the total revenue generated by the company has been rapidly increasing, going from Rs. 20,738 crore in 2019 to Rs.37,440 crore in 2023. Similarly, the company's profits have also increased: its EBIDTA profit went from Rs. 8493 crore to Rs.19,746 crore. Please note that given capital expenditure by the company, it is the EBITDA number that truly reflects profitability, rather than its net profit, given high depreciation that telecom operators benefit from for capital expenditure. What this also tells us, is that the company does indeed have enough money to invest in its own infrastructure. Besides, as mentioned clearly by Airtel, operators spent that money to license

¹⁰ <https://www.cci.gov.in/images/antitrustorder/en/1520201652262847.pdf>

¹¹ <https://www.medianama.com/2020/08/223-cci-whatsapp-payments-dominance/>
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Spectrum, a resource that telcos **exclusively enjoy access to**. Such exclusivity isn't available to online services, they have to compete to make themselves stand out in the market.

2. **Telecom operators are responsible for their own business decisions:** Telecom operators take considered and evaluated business decisions when participating in spectrum auctions. When the price is too high, they choose not to participate in auctions.

For example: In the 2013 spectrum auction, the Government planned to auction 50 MHz of airwaves in the 1800 MHz band and 76.25 MHz of spectrum in the 800 MHz band. None of the telecom operators, including Airtel, Vodafone and Idea participated in these spectrum auctions. Only MTS (Systema Shyam) bid for spectrum in 800 MHz band.

Vodafone Group's CEO Vittorio Colao said then that, "The problem is that in India there is a misperception of what is the value of spectrum. The reserve prices are set too high. India has very low prices and very low revenues so we cannot afford to pay high price for spectrum. We have told them [Indian government] a number of times that the order of magnitude that they have in mind just does not make sense".

Therefore, if they couldn't afford to spend Rs. 1.5 Lakh crore in spectrum auctions, they shouldn't have.

The Internet ecosystem in India cannot be held hostage to bad business decisions by telecom operators.

If they believe that they cannot continue to invest in the market, then the government of India should look at means of facilitating the entry of other players in the telecom sector, especially in broadband.

3. **Online messaging is fragmented and competitive:** Consumers, given the availability of multiple types of messaging apps, can choose to use different applications for different purposes: for example, they may choose to use WeChat for communicating with someone in China, or Kakao Talk for someone in South Korea, and Line with someone in Japan. They may choose Telegram for participating in communities or receiving news updates. Paytm messaging may be used for communicating a payment and its reasons to someone using UPI.

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Privacy and security aspects

Reliance Jio: *Reliance Jio suggests that online platforms should share decryption keys with the Licensor for all bulk encryption deployed in the country.*

Reliance Jio: *“Many OTT players like “Telegram” allows use of fictitious identities leading to misuse of such platform for illegal activities. They must keep the record of all such identities and provide it to LEAs within the prescribed timelines to protect the users from financial and non-financial crimes.”*

Airtel: *Airtel mentions in its submission that “the Authority shall consider bringing a separate authorisation for OTT communication services under the Unified License (UL), to balance security & privacy needs and service innovation.”*

Our response:

1. **Technically not feasible:** This is technically challenging, because in an end-to-end encrypted environment, encrypted platforms themselves don't have access to the communication taking place between two users, nor is there an imaginary “Master Key” that can decrypt all communications. Those suggesting otherwise are ignorant of how modern day, gold standard encryption works. In fact, decryption keys are exchanged between the two users in question, and generated specifically for the communication between the two individuals, and the platform does not have access to these. To change this, **platforms will have to re-architect in order to introduce a vulnerability, like a back-door.**
2. **Creates security risk for users:** Introducing a back-door in an encrypted platform would mean that all users will be exposed to that vulnerability, and that is a national security threat. There is no reliable way of ensuring that ONLY law enforcement officials can use a back-door, and bad actors won't.

You can't make people more secure by making them more vulnerable.

3. **Users on Telegram are already verified by their mobile numbers:** Many internet platforms, including Telegram, use phone numbers to verify the identity of the customer. For the purchase of mobile numbers, users already go through an extensive biometric verification process via ASTR, which we believe is a disproportionate requirement and violates users' fundamental right to privacy. There's no real need to additionally verify each user.
4. **Proportionality in verification:** Additionally, verification is a violation of privacy. There needs to be, as per the Puttaswamy judgement, proportionality in the introduction of verification of messaging. The onus will be on the TRAI to demonstrate in its recommendation, why, for example, it is recommending identification as opposed to pseudonymous communication, or complete anonymity.

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There has to be a rationale behind this recommendation that is proportionate to the harm anticipated. In addition, there has to be a rationale behind verifying every internet messaging application user, given the Data Protection Bill and the Puttaswamy judgement.

- 5. Verification norms assume everyone is a criminal:** Verification is a violation of privacy, and thus needs to be governed by proportionality. **Verifying everyone for everything they do is the approach of an authoritarian surveillance state.** We conducted a roundtable conference on Exploring User Verification, Prasanna S, Advocate, said—

“You cannot have a presumption that everybody is a money launderer; you cannot start from that presumption. So you think about all the verification rules, there is a presumption... that everybody is a potential criminal.”

- 6. Verification mandates may normalise surveillance online:** At the same discussion, Beni Chugh of Dvara Research said—

“Anonymity should be the default setting [for users online]. If I have to make a comparison to my real life, then every time I’m going to my pharmacy, unless I’m asking for a restricted drug, I’m not even asked to show a prescription. Why am I then being asked to identify myself over and over again on Practo?. So, why is it that the Internet needs to have so much more surveillance?”

- 7. Compliance norms already exist:** With the Information and Technology Act, 2000, and the Digital Personal Data Protection Act, 2023; online services already have privacy and data protection norms that they are required to comply with, adding another layer of compliance would only lead to over-regulation.
- 8. Caller-identification does not solve any problem, including prevent scamming/spamming:** There is no evidence that verification has served the purpose it was intended for. There's no correlation with the harm that can be prevented just because someone's identified. If my name is being shown to someone I'm calling, they might not know me, but they might still take the call because I might be calling about something so no one's going to not pick up your call just because they can see your name, right? **If verification can't serve the purpose it was intended for with telcos, why would things be any different for online platforms?**

Quality of Service Aspects (QoS)

Reliance Jio: *“While the quality of service at network layers is controlled by the TSPs, but the QoS at the service layers such as Quality of Service for Voice, deliver of messages, Quality of Video etc is controlled by the OTT Providers. The authority needs to prescribe the QoS framework for OTT services and they must comply with such guidelines failing which there should be financial disincentive like the licensed TSPs.”*

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Our response:

1. **QoS requirements should be limited to telecom operators:** Telecom companies have to meet quality of service requirements because they use a scarce national resource like spectrum, and the government needs to ensure optimal utilization of the spectrum. In comparison, online services don't utilize spectrum, and spectrum is only used by telecom operators to enable user access to the online service. Thus, the TRAI has no basis for expecting QoS from online services.
2. **Online QoS is subject to several factors:** including peering and interconnection arrangements, stability of undersea cables, optimal utilisation of spectrum by Edge ISPs. Thus, their QoS is almost never entirely in their control.
3. **No market failure in online messaging:** Online services have the incentive to ensure that they maintain a high quality of service because if they don't users would just move on to another service provider. It's a highly competitive environment, and there is no market failure.

Consumer grievance redressal aspects

Vodafone Idea: "While OTT players do not have to follow the Regulatory norms and TCCCP Regulation, in our view, they also lack in protecting rights of consumers and do not have grievance redressal and spam-preventing frameworks, leading to huge inconvenience for consumers."

"as in the case of TSPs, non-compliance of such regulation/directions or any consumer complaints should lead to stringent financial disincentives for OTT-CS providers."

Our response:

1. **Misleading to suggest there is no spam regulation:** As specified in MediaNama's comments, including our comments to the CNAPs consultation, the internet has mechanisms that deal with consumer grievances such as unsolicited commercial communications (UCC), as required under the IT Act. They **use signals for determining spam**, and develop a trust score for each marketer/email address: Email spam filters determine spam by attributing a trust score to messages, by analyzing headers, text content, reference to a publicly available IP address, and domain name filters, and determining spam using algorithms[[source](#)]. Platforms use verification to identify trustworthy marketers and also allow for easy reporting and blocking of spammers. To say that online services do not have mechanisms to protect consumer rights when it comes to spam is misleading.
2. **Misleading to suggest there is no grievance redressal mechanism:** All online intermediaries are required under the IT Act to designate an grievance officer. Additionally, the IT Rules 2020 put additional requirements for a grievance redressal process on multiple entities, including Significant Social Media Intermediaries,

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Online Curated Content Publishers (streaming services) and online news platforms. In some cases there are self regulatory bodies and a government appellate committee. To suggest that there is no grievance redressal process is misleading.

3. **Highly competitive environment:** Online services earn their user base by high-quality service and their ability to meet the needs of the customer, it is in their best interest to address customer grievances quickly and effectively. As such, we see no need for mandating a consumer grievance redress system for online services.

Collaborative Frameworks

We feel the need to highlight that it is unclear what TRAI means by 'collaborative frameworks' in the consultation paper but the responses from telecom companies seem to suggest that this collaborative framework should be a so-called "fair share" agreement wherein platforms would be required to pay a network usage fee.

***Reliance Jio:** "In a streaming led era, investments in high-capacity networks will be critical to cater to increasingly growing demands for data. TSPs globally have responded to this increased demand by investing heavily in augmenting the capacity of their networks. And while this market is clearly two sided, TSPs are only recovering network rollout costs from end users, making services costlier for the public. The above has prompted global sector regulators, notably from the UK and South Korea – two highly mature internet markets, to re-evaluate their prior positions on NN and on the Fair Contribution towards network costs by the OTTs."*

Our response: Neither of these claims justifies network usage fees. Despite illiterate/malevolent claims from telecom operators that online services are "free riding" on their networks, the fact is that the **Internet is a network of networks, and every user pays for Internet access, whether they are a business or not. Each user pays their immediate ISP, and those hosting content online pay for both bandwidth and hosting/server space.**

While telcos claim that online platforms generate a large amount of traffic and cause network congestion, we believe the problem is not one of bandwidth but rather of congestion. The problem for telecom operators is that when thousands of people congregate in a particular area, for example in Connought Place/ Rajiv Chowk in Delhi. Thousands of pings tend to overload the base stations and Internet connectivity doesn't work.

In situations such as these, telecom operators globally have offloaded traffic to WiFi, which Indian telecom operators have failed to invest in. **Internet companies should not be forced to pay for the inability of Indian telecom operators to adequately service their customers.**

IMPORTANT: TSPs should not be allowed to block traffic emanating from online companies just because they don't pay telcos. We are concerned about COAI's misrepresentation of the

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South Korea Bill, where they say that the bill “*implicitly allows ISPs to refuse to carry traffic from content providers who fail to pay the “network share charges.”* While such a situation **does not exist in South Korea**, the TRAI should not allow Indian telecom operators such power to block online service providers for not paying a network usage fee. This would violate net neutrality.

Infrastructure development can be addressed by competition:

BSNL: “However, there is need to do a detailed study in this regard in Indian context, as this report has been published by ITU in 2017 and in India fact cannot be ignored that in last 10 years many TSPs have shut down their operations and number of TSPs have been reduced from more than 12 to 4. Based on above it is submitted that considering the unique market proposition of India in telecom space there is need to create equal level playing field for TSP and OTT and arbitrage in entry & operating cost should be addressed.”

Our response: We also argue in our previous submission that the core of this debate is the issue of how we let one business (a network operator) regulate the consumer's ability to access another (app or website), given that the availability to provide Internet access (spectrum and right-of-way access) is not unlimited, and exclusively lies with a few entities (network operators).

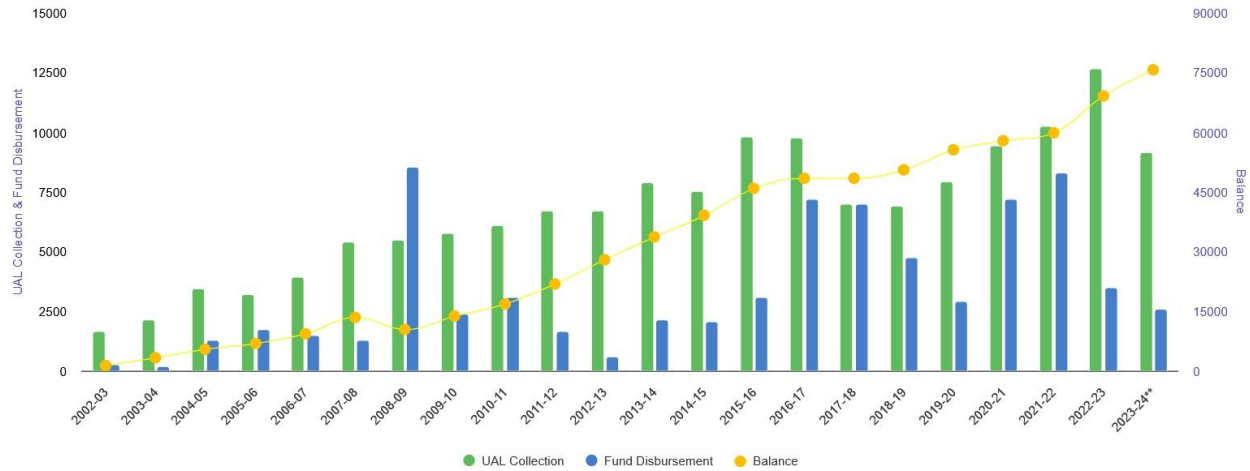
A genuine free market requires restrictions on the ability of large predatory companies (like telecom operators), whether multinational or otherwise, to create monopolies.

a. Taxation is the least preferred option: Taxation is the least efficient mechanism for developing telecom or broadband infrastructure, such investment must be the last choice after other options have been exhausted.

In addition, less than 50% of the total USO Fund collected so far has been disbursed, and the balance fund available has increased every year since 2008-09.

*Total accretion: ₹149246.98 crore Total disbursement: ₹73646.56 crore
Potentially available fund: ₹75689.53 crore*

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We have the following recommendations regarding taxation:

4. Additional contributions to the USO Fund should only be considered after the existing USO Fund has been disbursed effectively.
5. TRAI should consider asking online companies to contribute to the fund only after taking into consideration **increasing USO Fund contribution from telecom operators, given that they operate in a market with low competition and larger profits**, while online companies operate in a market with infinite competition.
6. Creating a separate fund for broadband, while the USO Fund already exists and is severely underutilised does not make sense

b. Enabling competition is a preferred option: One can argue that competition is the ideal form of enabling infrastructure investment. For example, in June 2016, Bharti Airtel, after years of lack of improvement in its network infrastructure leading to major issues of call drops¹², as a part of its Project Leap, launched the Open Network Initiative, to improve network infrastructure. It said then¹³:

The Company is deploying state-of-the-art technology solutions for better indoor coverage and network optimization; overhauling legacy networks with new equipment and making investments in additional spectrum and fiber

Follows Airtel's decision to voluntarily implement 25% more stringent mobile call drop benchmark of 1.5% versus 2% prescribed by the TRAI

¹²

<https://www.indiatoday.in/magazine/cover-story/story/20150727-call-drops-airtel-vodafone-idea-trai-820109-2015-07-16>

¹³ <https://www.airtel.in/press-release/06-2016/airtel-announces-open-network-initiative-under-project-leap>

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This was, as is evident, an effort to retain its customer base because of the impending launch of Reliance Jio. In fact, Airtel has benefited from this investment in infrastructure, and has grown since.

Thus, if there is a need to encourage investment in telecom infrastructure, and existing telecom operators believe that they cannot do so without seeking rent from online companies, **there is a need to increase competition.**

International discussions on network usage fees:

Responses from Reliance Jio, Vodafone Idea and three academics (Sridhar, Prasad, and Kedia) whose submission appears to have been mistakenly tagged as that of ICRIER have mentioned discussions on the sending party network pays (SPNP) system in South Korea and have misinterpreted the situation as we specified earlier. Section 22-7 of the Telecommunications Business Act, which has been labeled as the ‘Netflix law’ by Reliance Jio and the researchers, **requires platforms to maintain service stability** and does not mention network usage fees.

Professor Kyung Sin Park, the co-founder and Executive Director of www.opennetkorea.org and law professor at the Korea University Law School told MediaNama that it is unclear what the amendment means, and that one can only make a guess based on the context in which it was passed.

He said that when in 2016 the SPNP regulation was brought in, Facebook’s content delivery servers (also called caches) were connected with SK Broadband’s network. But because of SPNP, SK Broadband demanded payment for allowing Facebook’s cache servers to connect to its network to which Facebook refused. Instead, it began rerouting traffic¹⁴ into Korea through Hong Kong which led to users experiencing slower speeds because the data had to cross vast distances to reach Korean internet users. He guesses that the amendment was passed to, **“make it difficult for Facebook to change the routing of the traffic.”**

Park clarified that the SPNP regulation is currently only applicable to ISPs. He said that when content is sent from one ISP to another, the ISP sending the content would have to pay a fee. This, he explained has disincentivized ISPs to host caches of popular platforms on their networks. Those that decide to host popular platform caches despite the fee, tend to charge the platform more for the caches.

¹⁴ <https://www.medianama.com/2020/08/223-net-neutrality-south-korea/>
<https://www.medianama.com>

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Challenges posed by network usage fees:

Airtel: “We do not foresee any potential challenges that may arise out of a collaborative framework. Rather, we believe that a legislative / regulatory framework that allows fair contribution towards creation of digital connectivity infrastructure, will help address the sustainable investment challenges that the industry faces.”

Our response: Park’s explanation (mentioned above) reveals one major challenge posed by implementing network usage fees. It tells us that if platforms are forced to pay network usage fees, they will take alternate routes to get to the users, which will adversely affect the quality of internet services.

Park also informed us that since the imposition of SPNP, South Korea has seen a rise in transit fees. According to him in 2017 (a year after SPNP was implemented) Seoul, South Korea’s capital, had an IP transit fee of \$3.77 this is significantly higher than other global capital cities such as Paris where the IP transit fee was \$0.45. He pointed out that high transit fees and hosting charges suppress innovation stating that it is the reason why South Korea has not seen an internet startup turn into a unicorn after Naver and Kakao.

Net Neutrality

Reliance Jio: “We submit that a flexible approach that allows TSPs to increase their investments in infrastructure and help OTT players benefit from the rollout of additional infrastructure depending on the optimization of their traffic volumes will ensure the public internet remains affordable and equally available for everyone. We submit that such an approach will be within the principles of Net Neutrality and there will be no impact on prevention of unreasonable discrimination of internet traffic based on content, nature of service etc.”

Our response: We believe that TSP should remain neutral, and any prevention of VoIP services by the TSP would be a violation of Net Neutrality, and potentially the TRAI’s differential pricing rules. Policy should allow every Indian citizen to create a new bundle of services, whether for commercial or non commercial purpose, integrating VoIP without needing permission.

In its order on “Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016”, the TRAI said that no service provider shall offer or charge discriminatory tariffs for data services on the basis of content. Any charging of network fees on the basis of content or type of service would violate this order.

Vodafone Idea: “To support innovation and also while meeting net neutrality principles, the licensing and regulatory framework should apply to large OTT CS providers, based on a

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certain threshold of active subscribers. This will help smaller OTT CS providers by providing them ground to continue to innovate and also meeting the principles of net neutrality.”

Our response: Principally, charging any platform, irrespective of size, is violative of net neutrality. Going to the point of charging specific “larger” platforms, we would like to establish that online services operate in a market with infinite competition. It’s rare for an online service to remain dominant for an extended period of time, despite network effects. A platform that is popular today, might gradually lose its user base in favor of another platform. This has happened to platforms like MSN Messenger and AOL which used to be extremely popular in the early days of the internet only to gradually be replaced by the platforms like Discord that we see today. So who has to comply with a network usage fee regulation will constantly keep changing.

We believe any collaborative arrangement will undo unbundling of Internet access. The internet flourishes because access is unbundled from what users access on the Internet. An attempt was made in the past, by CDMA service providers, to bundle handsets and services, and content and services. The market rejected it in favour of the unbundled option of an open Internet, and the usage of devices. The competition in both the Internet and devices have allowed for the growth of Internet usage in India, and the benefits arising to the nation from digitisation. The TRAI should not undo this by recommending collaborative arrangements. Additionally, as argued earlier because of the infinite competition in the market we cannot determine who/which is the biggest traffic generator.

Issues Related to Selective Banning of OTT Services

These have already been addressed in our previous submission.