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Sent: Friday, September 29, 2023 4:04:26 PM
Subject: RJIL's counter comments on TRAI's Consultation Paper on OTT communication services and Selective Banning of OTT services

Dear Sirs & Madam,

Please find attached RJIL's letter No. RJIL/TRAI/2023-24/190 dated 29th September 2023 enclosing therewith **RJIL's counter comments on TRAI's Consultation Paper dated 07.07.2023 on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"**, for kind consideration please.

Regards,

Rakesh Kumar Gujral
Head TRAI Coordination - LEADER



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RJIL/TRAI/2023-24/190

29th September 2023

To,

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

Mahanagar Doorsanchar Bhawan
Jawaharlal Nehru Marg, New Delhi - 110002

Subject: RJIL's counter comments on TRAI's Consultation Paper dated 07.07.2023 on "Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services".

Dear Sir,

Please find enclosed the counter comments of Reliance Jio Infocomm Limited (RJIL) on the consultation paper dated **07.07.2023** on **"Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services"**.

Thanking you,

Yours Sincerely,

For **Reliance Jio Infocomm Limited**

KAPOOR SINGH
GULIANI

Digitally signed by
KAPOOR SINGH GULIANI
Date: 2023.09.29
13:18:19 +05'30'

Kapoor Singh Guliani

Authorized Signatory

Enclosure: As above

**Reliance Jio Infocomm Limited's Counter Comments on TRAI's
Consultation Paper On "Regulatory Mechanism for Over-The-Top (OTT) Communication
and Selective Banning of OTT Services"**

1. At the outset, Reliance Jio Infocomm Limited (RJIL) thanks the Authority for giving us the opportunity to respond to stakeholders' comments on the Consultation Paper (**'CP'**) on **'Regulatory Mechanism for Over-The-Top (OTT) Communication Services, and Selective Banning of OTT Services'**.
2. We have had the opportunity to go through the responses submitted by the various stakeholders and the stakeholder's comments can be divided into the following broad categories:
 - A. **The need for defining the OTT services and more importantly OTT communication services.**
 - B. **The need for a Regulatory Framework for OTT Communication services.**
 - C. **The issue around Fair share contribution by OTTs in telecom infrastructure.**
 - D. **Issues related to Selective barring of OTT services.**

RJIL's issue wise response is provided in the following paragraphs:

A. The need for defining the OTT services, their classification thereof and more importantly, on defining OTT communication services.

3. A majority of stakeholders have proposed definitions for OTT Services and OTT Communication services that are functionally similar. However, a minority opposes defining OTT services altogether.
4. One common thread of arguments on this issue is that, defining OTTs will prevent innovation and restrict growth of OTT services. **The argument is rooted in the premise that many OTT services integrate a range of offerings into a unified market presence. The contention is that defining and subsequently regulating a subset of these services could inhibit innovation.** One stakeholder goes on to state that many OTT service providers take a long time in finding a best market fit and therefore defining may limit the options. It is important to note that while the scale and scope of services offered by OTT service providers might evolve with time, the true nature of their services remains unchanged – WhatsApp, Skype, & Telegram were launched and continue to operate as communication service providers; Netflix (in its digital avatar), Disney Hotstar & JioCinema were and are streaming service providers; and Dropbox, Box by Microsoft and Google Drive have always been used as cloud storage services.

5. We submit that the said premise is false, and the surrounding arguments lack concrete evidence and are unsubstantiated. **There is an inherent obligation to comply with the applicable rules and Regulations and law of the land for operating any commercial services in any global jurisdiction and one cannot avoid it by merely stating that this will hamper innovation.**
6. The hollow nature of this argument is further demonstrated when the same stakeholders acknowledge their adherence to the IT Act, Intermediary guidelines, and the Digital Personal Data Protection Act, 2023 (DPDP Act), among others. These regulations have already categorized OTTs into categories like Significant Social Media Intermediaries without hindering their innovation or growth. **So, why should there be any contention if a telecom regulator is seeking to bring OTTs under its purview of better governance and consumer interest?**
7. Clearly, these counterarguments lack substance. The purpose of licensing/regulating the OTTs as Communication Services Providers is different from regulating any entity from DPDP and IT Act (Intermediary guidelines). Neither IT Act (intermediary guidelines) nor DPDP Act governs and/or regulate any Communication Service, whether provided over its own network or provided over the internet acting as bearer for such communication services. The different purpose and scope can also be ascertained from the fact that the communication service providers licensed under the Indian Telegraph Act are also required to comply with the provision of IT Act and DPDP Act. Therefore, the applicability of the Telegraph Act, 1885 and IT Act/DPDP Act are not mutually exclusive but inclusive. Every entity doing business in India are supposed to follow all relevant laws/regulation and cannot seek exemption on the ground of applicability of some other law/regulation for different purpose.
8. At present, neither **IT Act- 2000** nor **DPDP, 2023** governs any entity providing the communication services from the perspective of:
 - (i) Quality of services of any communication services such as voice, video and messaging, including audit of QoS by regulatory bodies.
 - (ii) Non-discriminatory tariffs/charging plans, their reporting to the authority and publishing such tariffs on their website.
 - (iii) Interconnection.
 - (iv) Making provisions for lawful interception and monitoring of voice, video and messaging services provided by them.
 - (v) Location based services.
 - (vi) Availability of the CDRs for voice, video and messaging including providing their geographic location for each call/message to an accuracy prescribed in license.

- (vii) KYC for providing voice/video and messaging services, they rely on the KYC done by the underlying bearer service provider, whereas their communication services are not locked/tied to the bearer services and can be used through the bearer service provided by any other service provider.
- (viii) Paying any license fee (revenue share) to Government as provided by the licensed communication service providers on their revenue from these services.
- (ix) Telecom Commercial Communications Customer Preference Regulations, 2018 (TCCCPR-2018) regulation to control spam calls and messaging
- (x) Installation of core infrastructure related to authentication, accounting, authorisation within the licensed area in India.
- (xi) Providing any information required by licensor/Government from time to time and many more.

All such requirements are applicable to any entity who is providing voice, video and messaging services and are not particular to an entity who is engaged in installation, operation, and maintenance of the bearer network.

9. Therefore, in our views, in addition to being regulated under other laws of the land including IT Act and DPDP, 2023, the Authority should recommend licensing of OTT communication service providers and regulate them from telecommunication services perspective as explained above.

10. In the context of regulating OTT service providers, the categorization proposed by RJIL in its comments to the consultation paper might be the most appropriate. The proposed categorization also addresses the concerns of OTTs that use communication, as incidental service.

- a. **OTT communications services** –These services provide person to person communication like telecommunication services provided by the licensed TSPs. The services are provided to the users as applications carried over the internet using the network infrastructure of TSPs. Such communication services are already covered under the provisions of the Indian Telegraph Act,1885 (“Act”) and are also covered in the scope of the Unified License (“UL”) granted under the Act.
- b. **Other OTT services** – This would include the OTT services with main product beyond the OTT communication space. This category would include media service with video and audio content being streamed, shared and/ or downloaded over the internet, Gaming e-commerce, Banking, other trade and commerce, internet services, among others.

11. **We further submit that well-defined OTT definition and categorization of OTT will instil clarity and regulatory assurance for emerging businesses. This, in turn, will spur innovation, contrary to the misleading assertions made by a handful of stakeholders.**

B. The need for a Regulatory Framework for OTT Communication services.

12. We submit that a large number of respondents have supported the requirement of a regulatory framework for OTT services, especially OTT communication services and have sought that these services should be regulated to ensure compliance with the **'Same Service Same Rule' Principle; to ensure compliance with National Security, Data Privacy, and privacy of Customer Communication requirements.**

13. We reiterate our submissions in our comments to the CP that the OTT Communication Services are valid and functional substitutes to the Voice, Video and Messaging services that require a license under Section 4 of Indian Telegraph Act and for which the TSPs have been granted the license. Therefore, in order to have a level playing field between the two set of entities providing such substitutable services, it is essential to implement the principle of 'Same Service Same Rules' and to regulate the OTT communication Services providers at par with the Telecommunication Services providers licensed under the Act.

14. Below are our counter-comments, addressing the arguments of certain stakeholders who advocate for maintaining the current regulatory state of OTT services.

a) "Same service same rules" is a competition principle, but OTT services and TSP services are not part of the same relevant market- CCI judgement in Vinod Kumar Gupta Vs. WhatsApp Inc

15. This is a very clever misrepresentation used to create an impression of legal sanctity to self-serving arguments. We submit that the reference is taken totally out of context. **The Hon'ble Competition Commission of India was not ruling on the substitutability of OTT communication services and TSP services.** It was instead examining alleged abusive behaviour by WhatsApp and Facebook in using changes in privacy policy to obtain sanctity for sharing WhatsApp data with Facebook and alleged predatory pricing by WhatsApp to undermine other instant messaging apps in India. We are extracting and reproducing relevant paras of the order for your ready reference:

Based on the above submissions, the Informant has inter alia prayed the Commission to enquire into the above said abusive conduct of the OP and pass order(s) accordingly, prohibit the OP from sharing users' data with 'Facebook' and direct the OP not to discontinue its services to those users who have not agreed to 'opt in' the change in its privacy policy.

*The Commission notes that as per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets. In regard to the relevant product market, the Commission notes that 'WhatsApp', an instant communication app for smartphones using standard cellular mobile numbers, is a platform for communication through texting, group chats and voice and video calls. **It is noted that instant communication apps cannot be compared with the traditional electronic communication services such as text messaging, voice calls etc. as provided by various telecommunication operators. It is so because unlike traditional modes of communication, instant messaging using communication apps are internet based and provide additional functionalities to the users.** For example, users of communication apps can see when their contacts are online, when they are typing or when they last accessed the application. Further, instant communication apps can be used through smartphones only whereas traditional electronic communication services can be used through any mobile phone. There are also differences in the pricing conditions in both the abovesaid modes of communication. 'WhatsApp' is a free to download communication application which does not charge any fee from its users for providing the services and just uses internet connection on the device to send instant messages, connect voice calls etc. Further, text messaging through traditional modes can be done between people who do not use the mobile service of the same service provider, whereas instant messaging services typically require you and your contacts to be on the same communication application platform. Thus, the Commission is of the view that the relevant product market in this case may be considered as 'the market for instant messaging services using consumer communication apps through smartphones'.*

16. Clearly, the **Hon'ble Commission has not considered defining the relevant market for communication services as it was examining an information, particularly with regards to abusive and predatory conduct by the instant messaging OTT apps.** Further, the referred comment is followed by a statement that notes that instant messaging OTT apps offer much more functionalities than the traditional telecom services, which would mean that functionally, the communication services provided by OTT players are same or more than the communication services provided by the licensed communication service providers. Therefore, such service providers need to be regulated for atleast the functionality that is equivalent to the functionality/service provided by the Licensed Service Provider. **It also clearly establishes that the OTT communication services can substitute the TSP services, as has already been done in case of Voice, Video and SMS services.**

17. It is also worthwhile to bring the Authority's kind attention to a subsequent Order of Hon'ble Commission dated 24th March 2021, in the matter *Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*. Pertinently, **the order is replete with reference to**

the OTTs and Social Media company's unwillingness to comply with the procedural and legal requirements set out in Indian Legal and Regulatory framework, which is one of the major reasons warranting that these entities should be brought under regulatory framework. We are extracting and reproducing some of these references as herein below:

The Commission has given careful consideration to the response filed by Facebook and notes that the same is not only evasive but is in clear non-compliance with the directions issued by the Commission vide its order dated 19.01.2021.

The Commission has gone through the response of WhatsApp also and is constrained to note that despite an opportunity having been granted by the Commission, WhatsApp has not only failed to comply with the directions of the Commission but has also taken the pleas which are ex facie untenable.

The authorization is conspicuously silent about signing of pleadings. The Commission finds the contention of WhatsApp that compliance with such requirement is a "cumbersome obligation" and "may result in a delay of proceedings before the Hon'ble Commission", as rather egregious and being inconsistent with the General Regulations.

b) Consumers have limited choice in switching between the telecommunication networks because of associated switching costs whereas in OTTs realm there are no limitations on using multiple services at the same time. It is also easy to switch between different OTT apps.

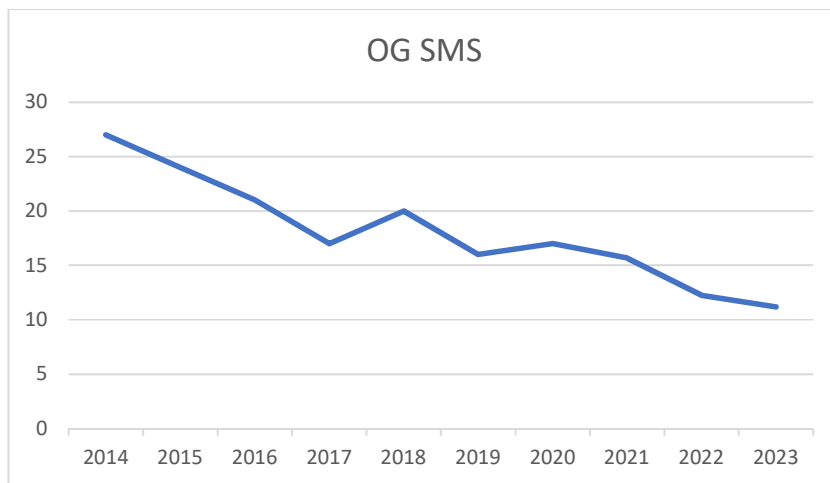
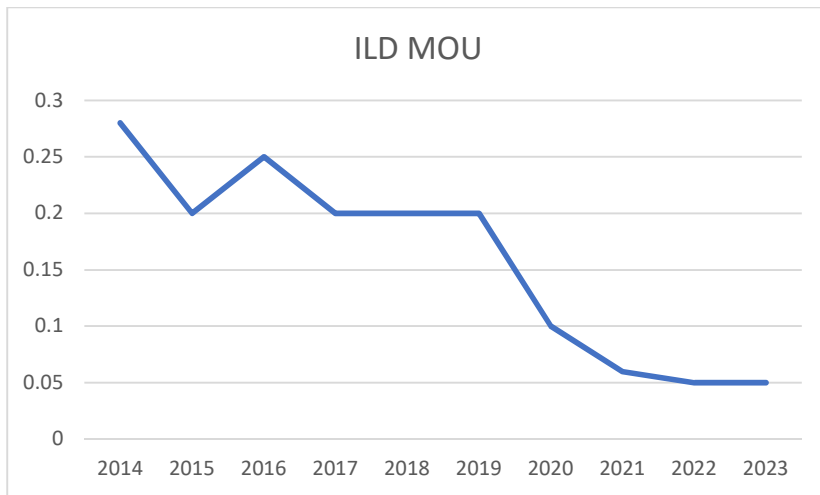
18. This portrayal is fundamentally flawed and is absolutely incorrect. While there is a well-established provision for mobile number portability (MNP) for mobile customers that enables them to take their number and all related details from one operator to another at no cost and continue experiencing seamless communication services. **Conversely, OTT communication platforms neither support portability nor facilitate seamless data migration from one application to another i.e., one cannot migrate one's data from WhatsApp to Signal or Telegram and vice versa.** Further, the lack of interconnection prohibits the user to move from one OTT to the other as its contacts may not have subscribed to the other app. Thus, it is surprising that the OTT communication service providers are misrepresenting on such basic facts known to each and every user and therefore need to be rejected by the Authority.

c) For determining substitutability, same layer of operation and cogent functional similarity is required.

19. We concur that functional substitutability is an essential criterion for treating two services to be substitutable. We reiterate that OTT voice, video and messaging services are complete and perfect substitutes. The Voice, Video and Messaging Services provided by

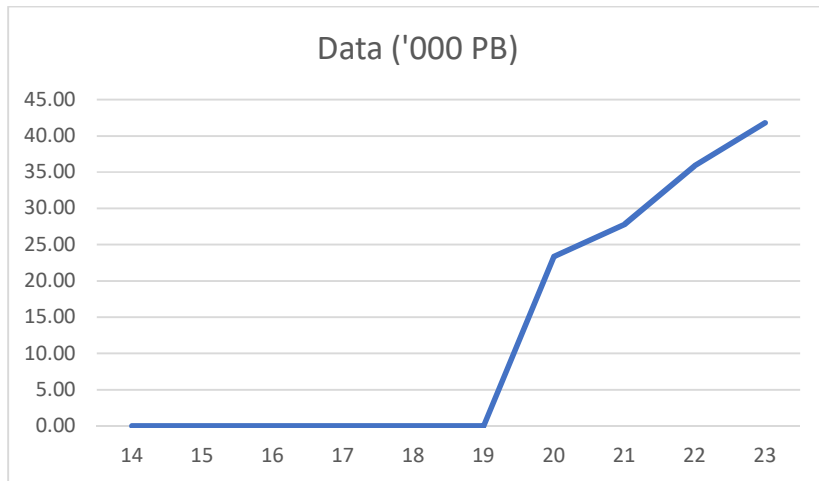
both licensed TSPs, and OTT communication providers are in the same layers of communication. The only difference between the service provisioning system is that the OTT communication providers use the network layer (Layer 1, 2 and 3) i.e., Internet provided by any other TSP/ISP, whereas the licensed communication service provider use the network layer (Layer 1,2 and3) created by themselves.

20. The displacement of TSP’s SMS revenue and ILD voice revenue is self-evident from below charts of monthly outgoing SMS and ILD MOUs over last 10 years. Evidently, when all revenues and usage metrics were expanding these metrics were on constant decline.



Source: TRAI Quarterly performance indicator reports for quarter ending March of the year

21. On the other hand, the data traffic of the TSPs have increased multifold and is shown in the below graph:



22. The above data graphs clearly shows that while the network usage has increased multifold, the communication services have decreased because of availability of substitutable communication services provided by OTT service provider. We submit that if the non-substitutability arguments by the stakeholders were to be accepted, the picture would have been much different.

23. It is further submitted that the comparisons drawn by stakeholders, emphasizing the increase in Average Revenue Per User (ARPU) and TSP revenue, are skewed, selective, and omit material facts. **While it is indisputable that the revenue for data services has increased post launch of 4G services in the country, however, the TSPs have invested considerable large amount in acquiring the spectrum and building infrastructure to deliver data services. Hence, the revenue alone cannot be considered in isolation. The industry's spectrum cost since 2010 has been over Rs. 5.58 Lac crores, of which 1.5 lac crores were spent in 2022 alone. In no case, any increase in revenue, even the profit, of the licensed service provider does not justify the provisioning of same services by OTT communication service provider without obtaining any license or being regulated at par with the TSPs for communication services.**

24. A more holistic assessment would compare the revenue trajectories of OTTs during this period against TSP revenues. We delve deeper into this in a subsequent section, discussing the "Fair Share contribution in the digital network backbone by OTTs". However, the overarching sentiment remains — the substitutability of TSP voice and messaging services by OTTs is irrefutable.

25. The level of competition is a function of consumer demand and market adaptability. The existence of 4 fully functional TSPs offering 2G/4G/5G services on national basis provides sufficient competition in telecom market. This level of competition is also in line with global benchmarks. Pertinently, the things are not that dissimilar in OTT communications space, many OTT communication services have been launched over the years, but the

dominant 2-3 OTT communication services continue to control the market share. Thus, the demand for no regulatory regime as there is sufficient competition is equally irrelevant. In fact, the regulation of OTT communication is imminent due to customer's lock-in, un-availability of portability of number/identity or data, networking effect and due to lack of interconnection amongst the OTT communication players.

d) While 'Quality of Service' (QoS) is a concept relevant to the functioning of TSPs to ensure adequate quality of telecom services, extending the same to OTTs is arbitrary and unfair.

26. It is very surprising that the stakeholders, who themselves claim to be driven by the consumer demand and innovation, are taking such a position. **Any commercial service provider offering direct services to Indian consumers and monetizing it through direct revenue i.e., subscription charges or indirect revenue i.e., advertising or customer data, should be responsible for providing assured Quality of Service to its customers.**

27. In addition, a responsible and accountable consumer grievance redressal mechanism is also a mandatory requirement. All the claims of self-governance need to be tested against the minimum acceptable standards of service and time bound resolutions.

28. Tech-driven companies should ideally embrace, not shirk from, QoS mandates. After all, they often tout their investments in Content Delivery Networks (CDNs) to optimize content and service delivery, and they champion their efficient systems and processes. **If these claims are true, they should be open to independent verification of such consumer centric services. Additionally, they always have the option of peering with TSPs to deliver assured QoS. Like TSPs/ISPs, monitoring and enforcement of minimum standards of quality of services will require OTT providers to make sufficient investments in their platforms, CDN and peering to meet the quality standards. The peer-to-peer service such as Voice, Video and messaging cannot be left on best effort basis and each service provider must meet the quality standards such as Quality, call drop, message delivery time etc and audited by the regulatory bodies in the same way it is done for the licensed TSPs.**

e) Subscriber Verification: OTP based verification is compliant with requirements under Intermediary Guidelines. Reference is made to CERT-In requirements on mandatory customer verification have also only been imposed on specific entities.

f) Certain OTT services cooperate with regulatory authorities to identify situations where users continue to use OTT services with disconnected numbers, and in this regard, require users to re-verify these numbers.

29. **We submit that there is visible unwillingness to cooperate with subscriber verification requirements and wilful non-compliance with the requirements of Law Enforcement Agencies (LEAs).**
30. The contentions that the OTP based verification is sufficient, is completely irrelevant in the current age of cyber-crimes. The OTT services are not bundled/tied to the bearer service provider's identity and post OTP based verification; these services can be used using the internet bearer provided by any internet service provider which makes tracing of such users almost impossible. Further, being the communication service provider providing the security sensitive voice, video and messaging services, they are supposed to carry out their own KYC and cannot solely rely on the KYC done by the TSPs that too without any explicit arrangement to share such KYC details with the underlying TSP.
31. The need for valid subscriber verification is further emphasised when many OTT players like "Telegram" allows use of fictitious identities leading to misuse of such platform for illegal activities and cyber frauds. Other OTT communication providers also have similar lacunas/loopholes leading to the cyber frauds. Such frauds reduce the consumer trust and dissuade the user from further adopting the digital/internet service and hence the overall loss to the TSPs as well.
32. Therefore, we reiterate our submissions that like licensed TSPs, **the OTTs players must carry out their own KYC and keep all such record and provide to LEAs within the prescribed timelines to protect the users from financial and non-financial crimes.**
33. Further, under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 the verification of accounts is voluntary by the user of a significant social media intermediary. Further such KYC requirement is not direct but can be performed indirectly through OTP based verification: -

"

A significant social media intermediary and an online gaming intermediary who enables the users to access any permissible online real money game shall enable users who register for their services from India, or use their services in India, to voluntarily verify their accounts by using any appropriate mechanism, including the active Indian mobile number of such users, and where any user voluntarily verifies their account, such user shall be provided with a demonstrable and visible mark of verification, which shall be visible to all users of the service:

"

The verification of user is only mandatory for online gaming intermediary for the purpose of accepting any deposit. Further, such verification is also done through OTP which is not

100% reliable as the user can use different mobile/fixed line internet post OTP based verification.

“

An online gaming intermediary shall, before accepting any deposit in cash or kind from any user for a permissible online real money game, identify such user and verify his identity: Provided that the procedure required to be followed by an entity regulated by the Reserve Bank of India for identification and verification of a customer at the commencement of an account-based relationship shall apply, mutatis mutandis, in identification and verification of the users of such online gaming intermediary.

“

34. We've previously emphasized in our submissions how prominent tech companies, including OTT communication service providers, exploit the lack of a regulatory framework to sidestep compliance with Indian regulators. As mentioned in our comments, the Parliamentary Standing Committee on Finance, in its 59th report on '**Cyber security and rising incidence of cyber/white collar crimes**' found that these companies refuse to cooperate with Indian regulators like Reserve Bank of India, LEAs on measures to ensure security for Indian customers. The committee has consequently recommended for enhanced overseeing and regulatory powers over such companies. The relevant extract of the report is reproduced below.

(i) Regulation of Service Providers: Enhance regulatory powers to oversee and control third-party service providers, including Big Tech and Telecom companies, by implementing comprehensive guidelines and standards. This includes ensuring stringent security controls, thorough vetting processes, better eKYC verification, and regular audits of their cyber security practices. During the Committee hearings, RBI provided evidence that Big Tech companies have refused to make various modifications to their mobile operating systems to make the OTP based two factor authentication protocol even more secure. Such invaluable input from key regulators should not be disregarded by Big Tech companies...

35. Similar concerns were highlighted in our comments to the Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services dated 12th November 2018, as to how the non-compliances by OTTs to the LEAs request in direct violations to the Sections 69, 69A and 69B of the IT Act, impacts the operations of LEAs. Further non provisioning of KYC details and interception is also in violation to Section V of Indian Telegraph Act, 1885.
36. We refer to the affidavit submitted by the Additional Commissioner of Police, Central Crime Branch, Greater Chennai, which is a part of the order of Madras High Court in Writ

Petition numbers 20774 and 20214 of 2018. We are once again reproducing the relevant parts for ready reference:

"(i)It is submitted that there are complaints being received on cyber-crimes such as data theft, defamation, cyber stalking, identity theft, transmission of obscene material in electronic form, cheating by impersonation through computer resource etc. Any complaints received against any activity involved in Facebook, Gmail or twitter or other such social activity sites, this respondent is dependent on the information that is provided from the said company. Further only after receiving the details from the said company it is possible for this respondent to take next step, i.e. to analyse the IP logs, to send request to ISP for getting user details etc.

(ii) It is submitted that during the year 2016 to 2018, the Chennai City Police, Cyber Crime Cell had sent about 1940 requests to such online social media companies. Among which 885 requests were sent to Facebook, 101 requests were sent to Twitter, 788 requests were sent to Gmail, 155 requests were sent to You tube and 11 requests were sent to WhatsApp. Out of which, IP logs details were received for only 484 requisitions. Out of the said replies, 211 replies received were from Facebook, 1 reply from twitter, 268 replies from Gmail, 4 replies from YouTube and no reply received from WhatsApp. It is necessary to state that remaining 1456 IP requisitions were rejected by social media companies.

37. Further, the Authority in its **Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector dated 16th July 2018** had also noted the urgent need for regulating entities of the digital eco-system from the perspective of consumer's privacy and data security. The relevant para is reproduced herein below.

*....It has enabled delivery of rich consumer experience but has also resulted in higher vulnerabilities to user's privacy and data security. Earlier, the service providers used to maintain users information in the form of call data records, records of access to internet etc but today, users data in the form of browsing history, call logs, location data, contact details etc are captured by the devices, browsers, Operating systems, and Applications also. **Since these entities are not governed by the license conditions, applicable for Telecom Service Providers, the need for regulation of these entities of the digital eco-system to ensure protection of consumers' privacy and data security is urgent and inescapable....***

38. It's clear that, due to their position outside of the licensing purview, OTT Communication providers are exempt from various security requirements including lawful interception, furnishing call details, providing traceable identity of the user of the communication, data / server localization etc. They also do not have any comparable obligation to offer

consumer grievances redressal mechanism and maintenance of the required QoS. These anomalies can only be corrected by bringing them under the licensing framework.

39. On the other hand, the TSPs have dedicated Nodal teams to cooperate with the LEAs on 24X7 basis. In view of that, we reiterate our submissions that the only way to ensure complete compliance with LEA requirements is to bring the OTTs under suitable regulatory regime, as submitted in our comments. The continued non-compliance by the OTT communication service providers to LEA requirements leads to situations where the Government is compelled to issue service barring instructions that lead to major hardships to the customers by disrupting normal life.
40. We further reiterate our submission that **OTT Communication Services should be brought under the licensing and regulatory framework by introducing a new chapter in Unified License as UL (OTT Communication) through which such** service providers are required to comply with the security and data privacy requirements prescribed in Unified License.
41. We also reiterate that the Authority should extend the principle espoused by it in its **Recommendations on License Fee and Policy Matters of DTH Services dated 23rd August 2023**, on the **need for equal treatment to all service providers (regulated as well as unregulated) to ensure level playing field. The same principle should be extended to communication services** by mandating same licensing and financial obligations for TSPs and OTT Communication services.

C. Fair Share Contribution in Network infrastructure

42. The rapid surge in global data consumption has given rise to novel challenges and considerations. The investments to deliver higher and better data speeds with newer technologies is ever increasing. **In India, we have moved from 3G to 4G and now to 5G in a span of just about a decade, whereas the movement from 2G to 3G alone took over 15 years. This massive pace of change in communication technologies has introduced new problems in the communication services economy.**
43. The TSPs are investing on continuous basis to implement new technologies, obtain new spectrum, install more and more towers, densify, fiberize the network, and optimize the connectivity services to meet the data requirements, while simultaneously keeping the broadband affordable for all. 5G alone has increased the requirement of number of towers by over 3.5 times, 6G will be another story.
44. On the other hand, we have unregulated OTT sector of internet economy, that owes its existence to the data networks installed by TSPs. It survives on the TSP networks, invests only to support app providing its own services, and **keeps on increasing the capacity**

pressure on the network by pushing higher definition content and unwanted advertisements and monetizes on massive and unparalleled scales through direct and indirect revenues, but wants to continue having a free ride on the networks.

45. Ericsson Mobility Report 2023¹ notes that *Average data traffic per smartphone in the India region is the highest globally, together with GCC. It is projected to grow from 26 GB per month in 2022 to around 62 GB per month in 2028 – a CAGR of 16 percent. Total mobile data traffic is estimated to grow from 18 EB per month in 2022 to 58 EB per month in 2028, growing at a CAGR of 22 percent.*

46. **This threefold increase in total capacity combined with the globally lowest data tariffs would imply that the pace of growth in revenues and ARPUs cannot keep pace with the investments requirements to meet the projected data capacities. This situation will become more acute as we move towards ubiquitous 5G with 6G on the horizon.**

47. Inevitably, the second end of the internet pipe i.e. the OTTs that cause the traffic on networks (such as OTTs- Communication, streaming, gaming and social media companies) with little or no economic contribution to the development of national telecom networks **will have to bear the burden of network costs to deliver on the country's ambitious goals of Digital India, Broadband for all and to have a robust digital backbone to meet the aspirations of 1.3 billion people. This is especially important as it is the OTT players who earns more revenue from the advertisers as well as from the customers when more and more data is made available in a ubiquitous manner. Therefore, there is no justification to not share the advertisement or subscription revenue when the key factor behind such revenue is the expansion of 4G/5G network.**

48. **We have already submitted in our comments to the CP that the contribution of OTTs to network costs can be based on assessable criteria like volume of traffic generated by OTT player, turnover threshold, number of users and other criteria and this levy may be imposed only on well-defined significantly large OTT players only.**

49. **We urge the Authority to mandate significant OTT contributors to share in the network costs, a financial burden currently shouldered entirely by TSPs. A "Fair Share" contribution principle should be adopted, with specific costs determined through mutual discussions between OTTs and TSPs.**

50. Further, both parties should ensure that the OTT services on TSP network are made available to the subscribers in full compliance with guiding principles of Net Neutrality and there should be no discrimination, restriction, or interference in the treatment of content

¹ <https://www.ericsson.com/49dd9d/assets/local/reports-papers/mobility-report/documents/2023/ericsson-mobility-report-june-2023.pdf>

including practices like blocking, degrading, slowing down or granting preferential speeds or treatment to any content.

51. We reiterate that Fair Contribution towards network costs to be paid by OTT service providers to compensate for the network costs caused by their excessive data is being discussed globally. We have already provided the global experience in our comments and are not repeating the same here for the sake of brevity.

52. Thus, a timely intervention on this issue, without impacting the consumers and generally available internet would ensure that the growth story of Indian telecom continues on its path unhindered. **Therefore, there is a need for giving a big push to the Big Tech to contribute their Fair Share in network costs. Our argument wise counter comments on the issues raised by a few stakeholders against Fair Share contribution are in following paras.**

- a. **TSPs earn revenue from OTT services, and the reverse is not true.**
- b. **OTT services have created a new source of revenue for TSPs. Building transmission pipes without anything to transmit is not a viable business, and developing content without transmission capability is not viable either.**

53. Video streaming has expanded the data consumption beyond the wildest of assumptions by telecom Industry post availability of 4G and subsequently 5G networks. **The revenue from OTT and Video streaming in India had risen six-fold from \$ 0.3 Bn in 2018 to \$ 1.8 Bn in 2022 and is expected to further double by 2027².** Indian TSPs have invested over \$ 27 Bn³ for spectrum alone in 2021 and 2022 auctions to provide the connectivity on which these OTTs operate. Thus, to say that OTTs do not earn increased revenue from TSPs investments is completely incorrect. In addition to the spectrum cost, **billions of dollars are being invested in building mobile broadband networks with costs spread over telecom gear, fiberization and network densification. These costs are incurred to support the astronomical requirement of data by the OTT players. In absence of corresponding investment in the network, the increase in OTT's revenue would not have been possible.**

54. There is no denying that the impact of OTT proliferation on TSP revenues, the data consumption has increased and so have the revenues, however, **the concern is not that TSPs are not earning, it is that despite the steady growth in ARPUs, the revenues will not be able to keep pace with the expense outlays due to paying capacity of consumers which is further severed by the subscription charges levied by the OTT players. Thereby creating a conundrum of how to fund the Broadband network expansion for both the**

² [India: OTT and video revenue 2022 | Statista](#)

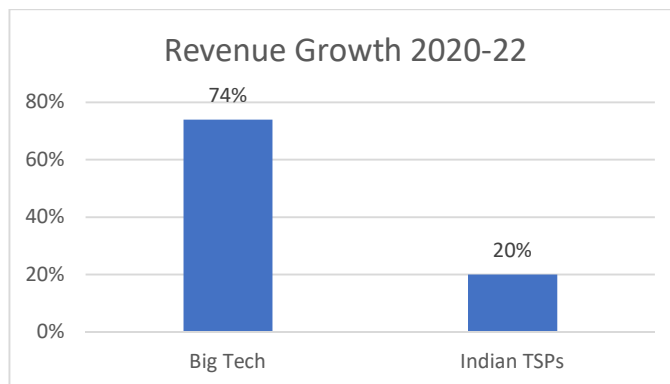
³ <https://dot.gov.in/spectrum>

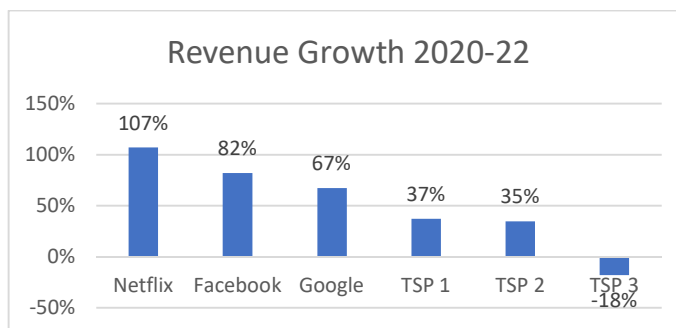
TSPs and Governments alike when the lion's share of additional revenue to the combined ecosystem goes to OTT players in the form of advertisement and subscription revenue.

55. The issue is complicated by the fact that prevailing Internet pricing model, which is one-sided, with only the end-user of the internet access service pays to TSP, while on the other side the content provider is able to earn revenue from both sides i.e., from advertiser or from customer in the form of subscription revenue and has full flexibility to maximize their revenue due to two sided revenue model.

56. High-speed internet has led to OTTs and video streaming applications becoming primary traffic drivers. Despite negligible incremental revenue, TSPs are required to be compliant with exponential and evolving QoS requirements of increased traffic requirement. The QoS norms are once again under review and the Authority is proposing to further tighten the QoS requirements and the only way for TSPs to continually meet these requirements is by making more and more investments in spectrum and networks without any proportionate revenue from the customers which leaves the TSPs to demand a fair share from OTT revenue. Further, the requirements around Net Neutrality also compel the TSPs to keep investing to ensure that **these capacity guzzling applications also get same priority on networks as generally available internet, however, this situation is not sustainable and needs to change very soon in case we wish to continue providing the highest quality of services to all customers at all times.** There is a need to add additional revenue stream for TSPs as they do not have much opportunity to generate extra revenue from consumers.

57. The content providers are making massive revenue in India and would only gain from the robustness and proliferation of broadband networks, even more than the TSPs, as is being suggested by the data. The revenue growth of big three tech companies in India, vis a vis Indian TSPs has been massive.





Source: Statista data⁴ and TRAI published data

58. In order to continue this growth path, it is all the more important for the tech companies to contribute towards the robustness of networks. As mentioned in our comments, the South Korean law does not involve setting fees but seeks to bring parties on table and negotiate on delivery of traffic. **It leads to transparency and mutual understandings and meets the requirements of fair, reasonable, transparent, and predictable conditions for network traffic exchange and can be an important step to fulfil the global efforts to meet the digital network costs** like the reported shortfall of €300 billion in EU. Our request to the Authority is to provide a similar framework in India as well, to close the digital divide.

59. We reiterate that there is a need to address the skewed and disproportionate economics of networks, where only a handful of global players dominate network traffic and revenue while nations struggle to recover costs for next generation broadband investment and close the gaping digital divide. As a result, the customer in remote and rural area gets deprived of superior connectivity, as the limited resources with TSPs get exhausted in chasing the ever-increasing traffic created by these OTT players. **Therefore, there is a legitimate and expanding interest in broadband cost recovery to ensure that the digital dividend is available to all at reasonable service charges.**

60. The Big Tech contention that TSPs are obliged to accept their traffic for free regardless of the cost, volume, or negative impact is flawed, as just like their content, networks are not created out of thin air. And in bi-directional market, if one end is not paying its fair share, the cost would have to be transferred to other end i.e., the end consumer, who does not have much elasticity. **Consequently, there is a need to break the status-quo, otherwise the whole structure will become vulnerable and can collapse with smaller and financially fragile networks failing, which in turn will also adversely affect the content consumption.**

⁴ [Google India: revenue 2022 | Statista](https://www.statista.com/statistics/612276/netflix-streaming-revenues-india/)
<https://www.statista.com/statistics/612276/netflix-streaming-revenues-india/>
[In '22, India fastest growing market for Netflix, revenue up 25%, says Sarandos | Technology News - The Indian Express](https://www.thehindu.com/news/national/india-in-2022-india-fastest-growing-market-for-netflix-revenue-up-25%,-says-sarandos-technology-news-the-indian-express/article28444447.ece)
<https://www.statista.com/statistics/1241348/facebook-india-revenue/>

61. The reality that the content providers may have to contribute to service delivery is not a new or novel concept. Reports indicate that some content providers like Netflix pay carriers in US and Japan to ensure content delivery. On another level, Axon Research, in its report on **Europe's internet ecosystem: socioeconomic benefits of a fairer balance between tech giants and telecom operators** makes an interesting comment *"It is interesting to note that even Netflix accepts contributing directly to the cost of its service delivery to consumers: we understand that in the U.S. areas with insufficient broadband coverage, which cannot support streaming services, Netflix delivers its content on DVDs. In those cases, customers pay Netflix for the DVDs, but Netflix pays the U.S. Mail for the DVDs' delivery to its customers"*. Basis its analysis in Europe, **the report⁵ concludes that €20 billion yearly participation from OTTs in the costs of usage of the telecommunications infrastructure in the EU would bring positive economic, social and environmental benefits to the European ecosystem with Improved QoS levels for fixed and mobile broadband (the higher the contribution, the higher the impact on QoS). Indirect improvement of the innovation capabilities of EU countries, while reducing the energy consumption by 28% and carbon footprint by 94%.**
62. The concept of seeking share of revenue (fair share) from content provider is not new in India. A parallel exist in broadcasting sector, in which the network operators such as DTH/Cable TV operators gets either the share of subscription revenue to the tune of 20% to 35% in case of pay channel or get carriage charge in case of free to air channels or both in some cases. Such revenue share is in addition to NCF (Network Capacity Fee) charged to the customer against providing the bearer service on their network. A similar arrangement of fair share of revenue in internet-based OTT domain in which the internet provider gets revenue share from the content provider is fully justified.
63. Hence, the argument against the fair share of revenue for TSPs, on the ground that they are already charging for network/data from their consumer, are not justified and should be discarded.
- c. **Consumers pay for higher-tiered services that offer faster speeds and greater bandwidth, which TSPs price at a premium.**
64. The argument presented is misleading. The import of the prevailing regulatory regime in the country is that the best effort internet access should be available to all customers at equal level. Further, the higher speed-based services are currently a feature of only wire-

⁵ <https://axonpartnersgroup.com/europes-internet-ecosystem-socio-economic-benefits-of-a-fairer-balance-between-tech-giants-and-telecom-operators/>

line services and has not been implemented so far in the 5G networks by the way of network slicing and cannot be used as an argument to avoid Fair Share contribution.

d. Fair Share is not optimum as per reports of Analysys Mason and WIK Consult.

65. An Analysys Mason report on “The impact of tech companies’ network investment on the economics of broadband ISPs” has been cited by many to substantiate the position against Fair Share contribution by Big Tech companies in network costs. We submit that the mentioned report has been criticized by various other analysts like Strand Consult⁶ on among other issues, the following grounds.

- i. There are a lot of half facts and opinions presented as facts in the report.
- ii. The theory of adverse consumer effect of Fair Share contribution is not backed by any academic references or empirical evidence.
- iii. The numbers used in the report are not from publicly available reports but are “estimates”, leaving a lot to be desired on the veracity of analysis.
- iv. These numbers are also based on Analysys Mason's own definitions and calculations (esp internet infrastructure investments – no such category of expenses in the audited financials, which are purportedly the source of AM’s findings).
- v. These estimates derived from the definition of a new category are compared against the audited numbers of TSPs to forcefully substantiate the conclusions of the report.
- vi. The Analysis of even these numbers is reported to indicate that in US, while TSPs spend more than one-quarter of their annual revenue on internet infrastructure, the comparable investment number for Big Tech is 1% of their revenue.
- vii. The claims on savings by TSPs due to Big Tech spending are unverified and unsubstantiated.
- viii. The claims of cost recovery harming investment and end users, in South Korea is also similarly based on assumptions.
- ix. The primary purpose of Analysys Mason's report seems to advocate for maintaining the current policy status for Big Tech.
- x. The report also seems timed to counteract global efforts for broadband cost recovery.

Some of the claims by Analysys Mason appear to be based on unique definitions and models, lacking universal applicability or verification from independent sources. As the debate on Big Tech's role and responsibility in the broadband ecosystem continues, it is crucial to have transparent, evidence-based discussions.

⁶ <https://strandconsult.dk/fact-check-on-analysys-masons-claims-on-big-tech-investments-and-arguments-against-broadband-cost-recovery/>

The above is often equally true for other reports used to substantiate similar claims. There are a few more false claims that have been busted in the following section on Myths and Reality.

e. Myths vs. Reality

Myths propagated by OTT Lobby	Facts
<p>OTTs / CAPs (Content and Application Providers) are not traffic generators, it's end users by requesting services.</p> <p>and</p> <p>Online services do not utilise spectrum, consumers do.</p>	<p>This statement is incorrect at so many levels at the same time for following reasons:</p> <ul style="list-style-type: none"> ➤ The end user does not decide on the quality of video i.e., whether HD, FHD, 4K or more, instead the moment the consumer is on a better connection, he/she is moved to higher level of video. ➤ The OTTs/CAPs define the compression technique and its application. In solitary cases, when higher subscription is charged, the customer is given control. ➤ OTTs invent and implement features like auto-play, continuous-play without user consent. ➤ They push advertising and compel users to watch in-app advertising, video content leading to significant impact on traffic. ➤ They make decision on how to optimize the content delivery even in case of network congestion by adjusting the quality of the streaming, or by over-provisioning without consumer having a say.

	<p>Thus, clearly the OTTs control the decision making on consumption of traffic and not the consumers.</p>
<p>OTTs have their own associated costs such as costs associated with content delivery networks and other forms of infrastructure.</p>	<ul style="list-style-type: none"> ➤ OTT investments are focussed on cutting the cost of delivery of their content over international bandwidths, therefore, they invest in submarine cables, CDNs and caching servers to manage this cost, however, this is minimal against the costs of mobile access network and do not have any significant impact on data traffic. ➤ These investments neither replace nor complement the TSPs investments in networks, which are massively impacted by the higher data traffic caused by OTTs.
<p>Fair Share will impact Net Neutrality</p>	<ul style="list-style-type: none"> ➤ The claims of Fair Share impacting Net Neutrality are fallacious and based on the incorrect understanding by a few stakeholders. ➤ The Fair Share contribution will not lead to any unreasonable blocking, throttling or paid prioritization. On the contrary this will ensure high quality generally available internet is available to all customers in India irrespective of being in rural or urban areas. ➤ This contribution in network costs will help the TSPs meet the Government target of Broadband for all in a faster and better manner. Further, it would reduce

	<p>the cost burden on the ordinary consumers who can watch the content at affordable consumer tariffs.</p> <ul style="list-style-type: none"> ➤ In India, Net Neutrality had been institutionalized by TRAI recommendations, a TRAI regulation, and a License Amendment, thus, legally it cannot be affected by Fair share contribution arrangements. ➤ It is to be reiterated that Fair Share contribution does not affect generally available Internet access and all Indian customers will continue to have access to an open and free Internet. ➤ There will be no impact on accessibility of content and download speeds on generally available Internet. ➤ The Data tariff will not alter on the basis of content.
<p>Fair Share will impact consumers and cause lower quality and tariff hikes for internet usage.</p>	<ul style="list-style-type: none"> ➤ On the contrary Fair Share contribution will help deliver ubiquitous high quality without higher tariffs. ➤ An efficient Fair Share policy will lead to faster and wider network roll-out. ➤ This may eventually lead to reduction in consumer prices and digital divide.

<p>Demand of network fee from OTTs / CAPs is merely a strategy to extract monopolistic rents, negatively impact the trajectory of innovation being pursued by the OTTs / CAPs and impose higher data costs indirectly on the end-customers. The experiment had opposite effect in South Korea.</p>	<ul style="list-style-type: none"> ➤ It is interesting to note that entities that mandate and take high percentage share for business done on their operating systems feel that the demand for Fair Share contribution is a strategy to extract monopolistic rents. Nevertheless, we reiterate that the Fair Share can be determined on basis of assessable criterion and can be mutually negotiated between TSPs and OTTs, therefore, there is no scope for misinterpreting it as monopolistic by any stretch of imagination.
<p>Smaller players may not be able to afford the NUF, making it difficult for them to compete with larger players who can afford to pay.</p>	<ul style="list-style-type: none"> ➤ As explained above and in our comments to the CP, Fair Share is not aimed at smaller players and is only meant for significantly large data consuming OTTs only. Thus, this will not affect the Startup ecosystem and will have no impact on innovations. The only contributors will be large OTT players.
<p>OTTs rely on the underlying infrastructure created by TSPs to provide their services on the application layer, and as such are customers with respect to TSPs' network services.</p>	<ul style="list-style-type: none"> ➤ We agree with this proposition that OTTs are B2B customers with respect to TSPs network services, however, are constrained to add that they are non-paying customers. They have had a long enough free ride and it is time to make Fair Share contribution in network costs.
<p>Demand for telecom services is entirely dependent on the ability of OTT services to attract users. Levying additional cost on OTTs, without providing any additional</p>	<ul style="list-style-type: none"> ➤ The Fair Share will not amount to double charging but would make the internet companies and OTTs make fair contribution to network

<p>services, would be akin to double charging of customers.</p>	<p>costs. Currently, they are more than double charging, the customer pays for subscription, then is forced to watch ads to provide another revenue source to OTTs, and at the same time OTTs have a free ride on TSP networks and are resisting to make Fair Share contribution in network costs.</p> <ul style="list-style-type: none"> ➤ Another incidence of Double charging is when OTTs/CAPs/Internet companies get paid by users and businesses at the same time e.g., App Store have a double dip from app developers and buyers / users of apps, or double dipping from users for content and businesses for ads. ➤ On the contrary, Fair Share contribution is done to meet the costs of network, so is not double charging. It just makes the traffic creators a stakeholder in network delivery.
<p>There is no evidence that Fair Share will lead to TSPs investing more in networks.</p>	<ul style="list-style-type: none"> ➤ Fair Share is the most credible and practicable solution, which will make only the high revenue CAPs to contribute on a mutually agreed terms and basis assessable criteria. ➤ This apprehension is a cost saving device only and no alternate mode of contribution is suggested.

D. Selective Barring of OTT Applications

66. Some stakeholders argue that there is no necessity for an additional regulatory framework specifically targeting the selective banning of OTT services. They believe existing Acts and Rules sufficiently address the need to block online content.
67. Interestingly, this perspective originates from stakeholder that claim that *Certain OTT services cooperate with regulatory authorities to identify situations where users continue to use OTT services with disconnected numbers, and in this regard, require users to re-verify these numbers. Evidently, the group is unwilling to commit that all OTTs will comply with this basic hygiene check to address abuse by their users and have taken unfortunate stand for no restrictions in national security situations.*
68. We reiterate our submission that irrespective of the claims and counter claims, national security and law and order maintenance should have primary importance and the service or internet barring is a legitimate tool for law enforcement. We have also submitted on the need for improving the implementation of these measures by using the same, only in most necessary cases and massive service disruptions and impact on all genuine users should be avoided. Therefore, we reiterate our submission that uniform instructions should be issued to all concerned authorities to use service barring powers judiciously and only for security related concerns and other methods should be used for non-critical requirements.
69. Further, the concept of selective barring of OTT applications and URLs instead of blanket ban on the internet services is a preferable solution. As blanket ban on data services has a debilitating effect on economy, as all critical governance and utility services are also barred. Therefore, the Authority should recommend measures for selective barring.
70. Furthermore, owing to the possibility of circumvention of barring restrictions by the miscreants using VPNs etc. the barring should be done at App level only. We reiterate that the objective of selective barring can be best achieved at the origination through OTT service providers, Search engines, browsers, and App Stores. As these OTT providers have the location of their customers to provide location-based services, they can easily block their application in a particular geographic location. This is also one of the prime reasons for bringing Communication OTTs under licensing regime, so that measures of national security like selective barring at App level can be enforced by the Government. Therefore, we submit that the Authority should recommend that selective barring should be implemented at App level only.