

USISPF RESPONSE TO THE CONSULTATION PAPER ON

UNBUNDLING OF DIFFERENT LAYERS THROUGH DIFFERENTIAL LICENSING

Members of the US-India Strategic Partnership Forum welcome The Telecom Regulatory Authority of India's leadership in seeking inputs on the Consultation Paper on Unbundling of Different Layers through Differential Licensing.

Please find below our submissions on the same:

I. Harmonious construction of the NDCP as a policy document

The National Digital Communication Policy (NDCP) deals with a variety of subjects from enhancing connectivity and penetration to amending the existing legislative framework and overhauling the licensing structure for the telecommunications sector in India. In this regard, we would like to highlight the following objectives:

- i. Enabling Infrastructure Convergence of IT, telecom and broadcasting:
 - a. Amending the Indian Telegraph Act, 1885 and other relevant acts for the purpose of convergence in coordination with respective ministries; &
 - b. Restructuring of legal, licensing and regulatory frameworks for reaping the benefits of convergence.
- ii. Fostering an Intellectual Property Rights regime that promotes innovation, by: implementing key recommendations in the National IPR Policy pertaining to Digital Communications, including a review of the legal regime around copyright, patents and trade-marks.
- iii. Recognising the need to uphold the core principles of net neutrality:
 - a. Amending the license agreements to incorporate the principles of non-discriminatory treatment of content, along with appropriate exclusions and exceptions as necessary; &
 - b. Ensuring compliance with net neutrality principles, by introducing appropriate disclosure and transparency requirements.
- iv. Enabling unbundling of different layers (e.g. infrastructure, network, services and applications layer) through differential licensing.

As the above objectives and prescriptions are part of the same policy document, they must be read in a cohesive and coherent manner and interpreted in ways that would be harmonious and yield a unified comprehensive conclusion. Therefore, the abovementioned policy objectives must be read in conjunction to mean that the goal of the NDCP is to unbundle the framework for different layers in a differential manner depending upon whether they are subject to a license or not and in a way that respects and upholds the intellectual property ("IP") rights of the respective holders while

maintaining network neutrality. Simply put, it would play out in the following manner for different layers:

- a. Infrastructure and network layer – These are subject to licensing requirements under the Telegraph Act and subject to regulations under the TRAI Act. Hence, reforms for them shall have to be carried through as such.
- b. Services layer – Depending upon the kind and manner of service that is being provided, the regulatory constructs will differ. For example, services falling within “other service providers” (“OSPs”) and “virtual network operators” (“VNOs”) are licensed and hence all regulatory reforms must be carried for them through these channels. However, software and software-based services (i.e. IT & ITeS) fall within the purview of the IT Act, not requiring any statutory license and thus must be governed as such.
- c. Applications layer – Digital content applications, just like IT and ITeS services, are subject solely to the provisions of the IT Act and do not require any statutory license. Moreover, they are protected under the relevant provisions of the Copyright Act and Patents Act with respect to source code, object code and databases. Also, it must be considered that for certain segments within the application layer, they are already moving towards self-regulation, which has been recognized by the government (MIB) and there is no separate regulatory framework required.

We strongly believe that a harmonious construction of the provisions of NDCP can help avoid interpretational landmines and ensure that differential segments of the digital economy are in fact treated differentially in a legislatively sound manner and in compliance with the constitutional mandate under Article 14 to respect the differentiation and any regulatory prescriptions to have nexus with the policy objective sought to be achieved. Basis the said principles underlying Article 14, no onerous requirements should be placed upon digital applications which are not susceptible to any licensing requirements.

We would also like to draw your attention to the principle of interpreting telecommunications legislative and licensing frameworks in consonance with the goals, objectives and mission of the NDCP.

II. Harmoniously constructing the Telegraph Act and TRAI Act with the provisions of NDCP

The principle seeks to uphold the applicability of the Telegraph Act and the TRAI Act and the consequent telecommunications license(s) and the regulatory provisions in conjunction with the goals and aims of the NDCP.

As discussed above, the NDCP seeks to amend the provisions of the Telegraph Act to usher in greater “*infrastructure convergence*” which ultimately would reflect in the telecommunications licenses that are issued under the said statute. However, it expands that statement by clearly reflecting the intent to do the same in “*coordination with other*”

ministries". This clearly reflects the intent to take into account other Ministries and their administrative ambits such as Ministry of Electronics and Information Technology ("MEITY") which governs the IT Act and the Department of Industry and Internal Trade ("DPIIT") which looks after all IP laws. Moreover, the NDCP clearly states that mandates and goals of other policies such as the National Intellectual Property Rights Policy, 2016 have to be upheld.

Hence, the only way to implement the objectives of the NDCP with respect to Telegraph Act would be to ensure that the said amendments avoid impinging upon the layers, i.e. digital applications layer and the protections available to it under the IT Act and the Copyright Act. Thus, the amendment can only seek to use the carriage infrastructure and networks belonging to IT and broadcasting sectors for improving broadband penetration.

Similarly, any future amendment to the TRAI Act with respect to Section 2(1)(K) laying down the contours of telecommunications services shall have to avoid any reference to digital applications as the same are subject to the IT Act and the Copyright Act.

Moreover, even in the present scenario, the definition of telegraph as contained in Section 3(1) of the Telegraph Act is restricted to mean any "*appliance, instrument, material or apparatus*" that can be used for transmission and therefore steers clear of any digital application, software or IT and ITeS services which are subject to IT Act and applicable IP laws. This reasonable differentiation when read in conjunction with the objectives of the NDCP can only mean that this separation and distinctiveness in legislative and regulatory frameworks can never be dimmed and must be respected even if amendments to the Telegraph Act are carried out in the future.

III. All license unbundling must be based on the well-accepted principle of network neutrality

The industry has always welcomed the Authority's strict insistence on network neutrality and continuous support of the same through its Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, and the recommendations on net neutrality and the recent recommendations on OTT communication services. The industry is also heartened to see the public support of the principles of network neutrality by the former Chairman¹ himself when he went on to say on 27 September 2020 that neutrality is must for platforms, app stores and devices lest they become the new "*gatekeepers*". As already stated, NDCP also vociferously supports this position.

Accordingly, it is trite that all amendments to the Telegraph Act (and any license(s) issued under it) and the TRAI Act must reflect this difference between the infrastructure and network layer and the applications layer, i.e. the differential treatment of content and carriage must be maintained and legislative, policy and regulatory frameworks applicable on one should never be mis-applied on the other. Such an approach would not only uphold the objectives of the NDCP but also be in conformity with Article 14 of the constitution requiring differential treatment of disparate products and services.

¹ <https://www.businesstoday.in/sectors/telecom/neutrality-platforms-app-stores-trai-chief-rs-sharma/story/417130.html>.

IV. Principles governing intellectual property must inform all regulatory formulations seeking to implement NDCPs' provisions

The NDCP is unequivocal in its support for complying with the mandates of National IPR Policy, 2016, which *inter alia* seeks to harmonize sectoral regulatory frameworks with the applicable IP laws. Thus, it would be appropriate for the present exercise to unbundle different layers to reflect the same.

This can be simply achieved by stating upfront in the recommendations and the subsequent license formulations for infrastructure and network layer that its provisions must be read in a manner which is harmonious with the rights of the holder under the applicable IP laws. In the same spirit, services and applications layer subject to IT Act should not be subjected to telecommunications/carriage layer licensing and/or regulatory frameworks.