

26th November, 2024

**Mr. Shri Akhilesh Kumar Trivedi,
Advisor (Networks, Spectrum and Licensing),
Telecom Regulatory Authority of India (TRAI),
New Delhi.**

Sub: BIF's Counter-Comments on the TRAI Consultation Paper on "The Terms and Conditions of Network Authorisations to be Granted Under the Telecommunications Act, 2023", dated 22nd October 2024

Dear Sir,

With reference to the subject mentioned, please find enclosed BIF's counter-comments on the above-mentioned Consultation Paper.

We earnestly request your kind consideration in this regard.

Best Regards,



T.V. Ramachandran,
President,
Broadband India Forum.

BIF Counter-Comments to TRAI Consultation Paper on Terms & Conditions of Network Authorisations to be granted under the Telecommunications Act 2023

Broadband India Forum thanks TRAI for the opportunity to present its counter comments based on the submissions that have emerged from the TRAI consultation on the Terms & Conditions of Network Authorisations to be granted under the Telecommunications Act 2023

We submit that these counter comments should be considered in addition to the comments given earlier by us.

In our review of the comments, few stakeholders have inaccurate and misleading views on the following issues:

I. Introduction of DCIP Authorisation [Q1-3]

Certain stakeholders have claimed that introduction of DCIPs is not required, is unnecessary given the substantial investments already made by telecom industry in faster network rollout. They contend that proposal for DCIP with light touch regulatory framework, minimal security conditions and no license fee obligations or QoS obligations will be detrimental to orderly growth of telecom sector as it would create regulatory imbalance and serious level playing field related issues.

A stakeholder has argued that allowing such arrangement of regulatory arbitrage will result in many TSPs obtaining DCIP authorization and creating their network under such DCIP authorization instead of the service authorizations.

A stakeholder has argued that if DCIP is brought, the authorised entity should be subject to license fee.

BIF's Counter-Comments:

At the outset it is submitted that the above-mentioned comments of these stakeholders do not pay any heed to the state of poor digital connectivity in the country and the interests of consumers. It must be borne in mind that the primary objective of telecom regulations is improving service quality and accessibility for consumers. And the introduction of DCIP would serve this very objective. It is important to have regulatory frameworks that ensure fairness without stifling competition or innovation.

The opposition against creation of DCIPs is a clear indication to cement the monopolistic positions of these stakeholders in the highly consolidated telecom market. This is both anti-competitive and against public interest. Any argument against the introduction of DCIPs is an attempt to prevent the entry of new players in the market and delay the implementation of the government's vision of "Broadband for All".

As the name of DCIP suggests, it is an authorisation for Digital Connectivity Infrastructure and at its core is the provision of infrastructure for the enabling digital connectivity with the ability to offer specialized passive and active infrastructure. **DCIPs are envisioned as neutral third-parties responsible for infrastructure creation at infra and network layer, which will be utilized by other entities to deliver services. We submit that creation of DCIPs will lead to reduction of infrastructure costs through infrastructure sharing which will enable reduction in overall cost of digital connectivity to the end consumers, help improve network efficiencies for the service provider, attract investment, strengthen the service delivery segment, and catalyze proliferation of 5G services for Industry 4.0.** Also, the DCIP authorisation is warranted in order to effectively operationalize TRAI's Rating of Buildings or Areas for Digital Connectivity Regulations.

The critical need for DCIPs is underscored by the fact that close to 80-85 per cent of the data traffic and 70 per cent of the voice traffic happens within buildings and built-up environments, and the current quality of service experienced by consumers in built-up environments is nowhere near desired level. Especially with the progress to 5G and with future generations of 6G, it must be borne in mind that these higher frequencies are incapable of penetrating inside buildings and so the need for DCI inside buildings is extremely important. **Apart from the angle of providing consumers a good quality of experience indoors, it should be noted that good digital infrastructure inside buildings is extremely important from the point of view of economic development.**

The Authority in its [Recommendations on 'Introduction of Digital Connectivity Infrastructure Provider \(DCIP\) Authorization under Unified License \(UL\)' dated 08.08.2023](#), noted that **the scope of IP-1 providing only for passive infra has its own limitation as not all TSPs may be willing to share their resources with their competitors.** Hence, there is a need for DCIPs that could provide for both passive as well as certain network layer active infrastructure, as neutral third-party entities. Further, the authority noted as follows:

"There is also an urgent requirement of a new infrastructure provider for the creation of passive and active DCI, as an intrinsic part, in the buildings/ complexes such as Airports, Ports, Road & Rail Transportation Hubs, Metros, Universities, Technological Parks, commercial and residential complexes, etc. Once such infrastructure is created as part of building development itself, the Service providers get the last mile connectivity ready for providing telecommunications services. It will save a huge amount of capital expenditure for Service Providers as major access network costs are associated with complex last mile connectivity. Also, it will save a lot of time and effort. The Authority is of the opinion that if active as well as passive DCI is to be created as an intrinsic part of the building development plan, this will require

such players in the market that will be specialized in creation of active and passive DCI and are authorized to do so."

Given the above reasons, there is a need for authorizing DCIPs under the Telecommunication Act, and Section 3(1)(b) mandates that such entities be authorised thereunder.

With respect to the arguments given by some stakeholders on regulatory arbitrage and cost and compliance advantages in relation to DCIP, it is as if the sole determinant of fair competition is equal regulatory burdens. However, we submit that the goal of telecommunications regulations (especially in this case) is to enhance service quality and accessibility, not necessarily to preserve existing business advantages, which will close the competition, increase cost to serve and stifle quality and innovation. This has been the case in the in-building coverage and hence the need for more players.

Further, any argument that the creation of DCIP authorisation would lead to regulatory arbitrage is completely misleading as DCIPs would not have core network elements or provide end-to-end bandwidth to consumers. Therefore, any apprehension on the arbitrage arising out of the same is ill-founded.

The other arguments by TSPs that creation of DCIPs would lead to external control over QoS or pricing and result in less innovation are also incorrect. There is no clause in the proposed DCIP authorization that will expect any TSP to mandatorily hire services from DCIPs/IP-1s. **Moreover, the authorization of DCIP will be on a non-exclusive basis without any restriction on the number of entrants.** TSP can have its own network built either on its own or with the DCI of DCIPs. **There would be different entities providing network & infrastructure, and the presence of different entities in the market would keep the price reasonable and competitive. This competition among different players will likely result in more innovation in the market.**

Finally, we submit that no license fee should be imposed on DCIP. Akin to IP-1s, DCIP's scope of work involves creation of digital infra for sharing amongst other entities and does not involve direct service provision to end consumers. Imposition of any license fee on DCIP would, in fact, create arbitrage given that IP-1s do not pay any license fees, which are also telecom network infrastructure providers. Therefore, the question of any license fee on DCIPs does not even arise.

II. Sharing of Infrastructure by DCIPs [Q1-3]

One of the stakeholders has stated that DCIPs should be bound to lease/rent/sell their infrastructure to TSPs only. They state that this infrastructure can and should be established only on behalf of TSPs to ensure non-exclusive, non-discriminatory access to all TSPs.

BIF's Counter-Comments:

We submit that this kind of restriction on DCIPs for leasing or sharing or infrastructure to only TSPs would discourage expansion of telecom infrastructure and hinder the growth of the digital economy as well as competition in the market. We believe that such a restriction on DCIPs would have the impact of making the introduction of DCIPs effectively meaningless.

Restricting DCIPs to share infrastructure only with authorised service providers and TSPs would have the adverse effect of entrenching the monopoly created by these TSPs, ultimately reducing the choices available to end-consumers. The creation or sharing of digital infrastructure should not be the sole preserve/right of only the TSPs.

We reiterate that in order to harness the true potential of digital telecom infrastructure and the economic benefits it brings, DCIPs should be allowed to share relevant infrastructure with both authorised and non-authorised non-telecommunication entities like Data Centers for captive private use on a non-exclusive and 'light -touch' basis. In this regard, we rely on our comments made in response to Q1-3 in the Consultation Paper.

III. Regulation of CDNs [Q5]

Some stakeholders have contended the following regarding CDNs:

1. CDNs should be brought under authorisation framework;
2. QoS Compliances should be imposed on CDNs;
3. Content should always be blocked by issuing orders directly to the concerned CDN or platform hosting the content in India or to the content providers;
4. Inclusion of mandatory encryption standards and quarterly security audits, especially for CDNs handling sensitive data would be desirable;
5. CDNs should be mandated to set up their infrastructure in tier-2 and tier-3 cities based on a defined criterion (viz. quantum of traffic); Large content providers and OTT platforms should be required to set up their own CDN infrastructure, especially in regions where they have high user traffic;
6. Data-sharing transparency guidelines should be imposed on CDNs obliging them to provide clear information on data flow and interconnection with TSPs/ISPs;
7. Recommend introduction of operational guidelines for CDN operators to collaborate with ISPs for efficient bandwidth utilization, incentivizing them to use regional IXPs instead of routing data internationally;
8. CDN and ISP agreements should be made available to DoT and TRAI.

BIF's Counter-Comments:

At the outset, it is pertinent to mention that neither the stakeholders nor the Consultation Paper address or explain how CDNs are "telecommunication networks". Instead, they have circumvented this central issue and relied on the

pre-emptive conclusions or recommendations of TRAI, overlooking the fundamental fact that unless CDNs are established as telecommunication networks, they cannot be regulated under the Telecommunication Act, 2023.

It is submitted that a CDN is not a "telecommunication network" as defined by the Telecommunication Act 2023. CDNs cache and deliver content to the networks and are not part of the network itself. CDNs do not manage bandwidth or provide direct internet connectivity to end-users and therefore, they are different from telecommunication services. CDNs should remain outside the purview of any kind of registration requirements under an authorisation framework that is intended and designed for telecommunication networks and services.

We reiterate that TRAI's "Recommendations on Regulatory Framework for Promoting Data Economy Through Establishment of Data Centres, Content Delivery Networks, and Interconnect Exchanges in India" dated 18.11.2022 which required registration of CDNs lack legal basis under the Telecommunication Act 2023, and their implementation would be regulatory overreach into areas reserved for telecommunications.

Further, the quality of service of telecommunication services and net neutrality and other obligations are applicable only on authorised entities, i.e., those providing telecommunication services or establishing/operating/maintaining/expanding telecommunication network. Given a CDN system is not eligible to be authorised under the Telecommunication Act 2023, it would not be appropriate to have the above-mentioned obligations imposed on them. In this regard, we rely on our comments made in response to Q5 in the Consultation Paper.

It has been contended that there is a need for registration of CDNs to foster competition, drive down costs and improve service quality. We strongly disagree with this as the regulation of CDNs would set a problematic precedent and classifying CDNs as telecommunications network would lead to unnecessary regulatory burdens that could impair their operations. Any sort of registration or regulatory conditions on CDNs would go against global best practices as CDNs generally operate without licensing or registration requirements in other jurisdictions. In fact, imposing registration conditions for interconnection or peering in India would contradict the widely accepted global standard of unregulated peering.

Over the past couple of decades, the internet has flourished due to the "laissez faire" approach adopted by Governments across the globe. This has promoted innovation of online products and services, as well as the manner in which they are delivered to end-users. This has resulted in the adoption of technologies such as CDNs, which has enabled localized and efficient exchanges of traffic. Introducing a registration regime would deter the same. Moreover, IXPs already utilize CDNs to manage local exchange of traffic effectively. If interconnection (in

terms of traffic exchange) in India were restricted to only “registered” CDNs, it would impede the ability to serve traffic locally and also prevent CDN operators from responding to evolving market needs.

With respect to content blocking requirements sought to be imposed on CDNs, it is submitted that CDNs do not exercise control over content being transmitted on their networks and also may not have the necessary capacity to evaluate the legality of content they cache or of blocking orders itself. Moreover, any suggestion to issue blocking orders to CDNs fall outside the scope of the present Consultation Paper and go beyond the purview of TRAI and the Department of Telecommunications (DoT).

Suggestions for imposing certain QoS standards on CDNs or requiring large content providers / OTT platforms to establish their own CDN infrastructure or mandating the deployment of CDNs in tier-2 and tier-3 cities are not only legally impermissible but also economically unviable. The existing market dynamics and highly competitive nature of this industry naturally incentivizes high-quality service in the sector. The existing CDN ecosystem, driven by specialized providers, already optimizes content delivery through partnerships with OTT platforms. Moreover, CDNs are already naturally [expanding beyond metro cities to other](#) cities such as Jaipur, Bhopal, Indore, Bhuwaneshwar and Guwahati, as the demand for traffic grows.

Lastly, we submit that subjecting CDNs to any kind of authorization or regulation in India could result in migration of CDNs to nearby countries. CDNs store copies of web content in data centers around the world, called point of presence (POP) locations. When a user visits a website, the CDN routes the request to the nearest available server, which is usually closer to the user than the website’s original server. This reduces the distance data has to travel, which speeds up page load times and improves the user experience. Thus, a CDN can be present anywhere in the world and still provide services in India. Therefore, any kind of authorization or regulation of CDNs could lead to them being placed outside the country, ultimately resulting in poor QoS to Indian users.

The suggestion that large content providers and OTT platforms should be required to set up their own CDN infrastructure for regions where they have high user traffic has no basis in the Telecommunication Act or the legal framework, especially given that neither OTTs nor CDNs fall within the ambit of the Act.

IV. Regulation of IXPs [Q6]

Some stakeholders have contended IXPs should be regulated under a separate authorisation.

Some other stakeholders have stated that IXPs should be brought under ISP authorisation, and the scope of the services are already covered by the ISP license.

A few stakeholders have sought the following in respect of IXP authorisation:

- Enforce transparency in IXP operations, with requirements for IXPs to publish performance metrics, network health information, and details on peering agreements;
- Set minimum standards for reliability, load balancing, and redundancy in IXP operations;
- Mandate stringent cybersecurity protocols, including regular audits and data protection standards, to safeguard data integrity and protect against cyber threats.

BIF's Counter-Comments:

At the outset, it is submitted that IXPs are neither "telecommunication network" nor "telecommunication service" as defined by the Telecommunication Act 2023. They do not transmit, emit, or independently receive data; rather, they facilitate inter-change of traffic without participating in the transmission of telecommunication services, in this regard, they act like managed service providers.

We submit that IXPs should neither be brought under a separate class nor should be covered under ISP license. First of all, it must be mentioned that ISP license is a license issued for provision of internet service to end-consumers. IXPs do not provide bandwidth, internet services, or IP transit services to end users. The functions of IXPs are grossly distinct from those of ISPs.

ISPs provide services to retail end customers and are required to fulfil several license conditions which may not be relevant for IXPs and subjecting them to onerous license conditions that are applicable for ISPs will impact the growth of the IXP market and will create barriers for entry of smaller players and start-ups.

Most importantly, the scope of ISP license has already been recommended by TRAI in the Recommendations on Service Authorisation Framework dated 18 September 2024, and it does not include IXPs. So, the inclusion of IXPs in the scope of ISP licensees does not even arise.

There is no reason to impose regulatory or licensing obligation on IXPs since the core activity of such entities extends to merely providing traffic interchange points. In this regard, we rely on our comments made in response to Q6 in the Consultation Paper.

V. Satcom Network Related Authorisations [Q7-9]

Some stakeholders have stated that SESG authorisation should not include owning and operating radio equipment like Baseband, that will require the assignment of spectrum.

A stakeholder has suggested that Satcom Network Authorisation can be subsumed in the Long-Distance Service Authorisation considering satellite bandwidth as an

alternate media for X-haul to cater connectivity requirements of the terrestrial networks.

Another stakeholder has stated that scope of GSaaS falls under the definition of Telecom services and these are essentially access services. So same conditions as applicable to Access Service Providers, such as financial conditions, security conditions etc should be applied to them.

BIF's Counter-Comments:

We strongly oppose the above-mentioned comments.

As regards SESG authorisation, it is important for TRAI to consider allowing SESG authorisation holder to deploy baseband for the NGSO operator/their Indian entity (who has been assigned frequencies) since provisioning of appropriate service as a neutral third-party host can only be done if SESG is permitted to operate the baseband, while utilising the assigned frequencies/spectrum of the respective satellite service provider. Through a Common Gateway with access to shared Baseband infrastructure, the SESG can facilitate service provisioning by multiple operators using their respective spectrum allocations.

It is important to mention that unbundling/delinking of Ground Infrastructure from the Network of a Satellite Operator and that of the Service Provider would lead to accrual of benefits like sharing of Infrastructure, thereby leading to lower costs and improved efficiencies. The creation of a separate network layer for satcom services would also addresses service monopolization concerns. We submit that Satcom Network Authorisation or GSaaS are the network and infrastructure layer which provides support to satcom services. Also, by virtue of these being Shared Digital Infrastructure Network, they cannot be considered as a part of the Access Service Authorisation or Long-distance Service Authorisation.

It must be noted that the authorisation so proposed in the Consultation Paper for Satcom Network deals with satellite networks which are essentially "telecommunication networks" and cannot be authorised as a "telecommunication service". Hence, Satcom Network Authorisation must be a standalone Network Authorisation albeit a 'light touch' one as they are not providing end consumer facing services.

With respect to GSaaS, it cannot be equated to access services. It is not similar to other satcom services like a VSAT or GMPCS service. We believe introducing a separate and additional authorisation framework for GSaaS earth stations, over and above that of IN-SPACE, will hinder the broader aim of enabling a vibrant space and satellite communications industry, and should be avoided.

We submit that any suggestion that confuses or disturbs the distinction between "telecommunication service" and "telecommunication network" goes against the spirit of the Telecom Act, which provides for distinct authorisation for each under Section 3(1)(a) and 3(1)(b).

In relation to this confusion which is being created by some stakeholders [i.e., seeking GSaaS to be considered an access service or seeking inclusion of IXPs in ISPs authorisation (refer to Point IV above)], we reiterate the clarification sought in this regard

reiterate our request the Authority to clarify the following:

1. Does the Act intend to keep Service and Network Authorisations distinct from each other?

Given the distinct definitions provided for “telecommunication services” and “telecommunication networks” in Section 2(d) of the Telecommunications Act, 2023, and the requirement for separate authorisations under Sections 3(1)(a) and 3(1)(b), does the Act intend to permit service and network authorisations to operate independently?

2. Does the Act require both authorisations for an entity intending to provide telecommunication services to end consumers by using its telecommunication network?

If an entity intends to operate a telecommunication network and also provide telecommunication services to end consumers, does the Telecommunications Act, 2023, require that the entity obtain both a service authorisation (under Section 3(1)(a)) and a network authorisation (under Section 3(1)(b))?

If the above is the case, which will be the relevant provisions under the Telecommunications Act, 2023 that indicate a single authorisation for an entity providing telecom service as well as operating telecom network?

3. Does the amendment to TRAI Act, under Section 59 of The Telecommunications Act, 2023 limit TRAI’s recommendatory role to telecommunication services and corresponding service authorisations only?

Whether the amendments under Section 59 of the Telecommunications Act, 2023, which amend the definitions of “licensee” and “licensor” in the TRAI Act now mentioning “telecommunication services” limit TRAI’s role regarding recommendations to service authorisations under Section 3(1)(a)?

If so, what implications does this have for the TRAI’s recommendations dated 18.9.2024, which dealt with service authorisation under Section 3(1)(a) of the Telecommunications Act, 2023 to the extent it covers telecommunication network?

A clarity on the above will ensure that the regulatory approach aligns with the statutory framework of the Act, providing certainty and promoting a robust, competitive telecommunications market.

VI. Regulation of OTT communication services under Authorisation framework [Q22]

A stakeholder has yet again rehashed the settled debate over the regulation of OTT service providers and sought that OTT service providers be brought under the Authorisation framework citing a regulatory lacuna, broad definition of telecommunications under the Telecom Act, same nature of services, security, privacy and consumer protection concerns, and other reasons.

BIF's Counter-Comments:

It is pertinent to note that the debate over the regulation of OTT services under the Telecommunication Act has been settled and it is clear that it is not covered under the Telecommunication Act 2023 and also cannot be classified as either a telecommunication service or a telecommunication network.

The position under law is clear – that OTT platforms are not going to be regulated under the telecom laws. To elaborate, Ministry of Communications had [clarified](#) during the enactment of the Telecom Act in 2023, that “OTT has been regulated by the IT Act of 2000 and continues to be regulated by the IT Act. There is no coverage of OTT in the new telecom bill passed by the Parliament.” The position adopted by the Government is also in line with the [Allocation of Business Rules, 1961](#).¹

More specifically, the present Consultation Paper deals with the terms and conditions for telecommunication networks. And any question pertaining to regulation of OTT communication services is neither part of the present Consultation Paper nor DoT's reference, and hence, any suggestion to that effect cannot be considered.

Further, only one stakeholder has wrongly raised the issue of regulating OTT communication services under the Telecom Act. These stakeholders are trying to somehow bring in this issue again and again, while knowing fully well that the argument of bringing OTTs within the ambit of TRAI regulations or the Telecom Act 2023 has been rejected time and again by the Ministry of Communication as well as TRAI. **In fact, in the recent consultation on the framework of service authorization, the issue of OTT regulation was raised again and the same was rightly not considered by TRAI in the Recommendations issued on 18 September 2024.**

It is not appropriate for these stakeholders to revisit the issue of OTT regulation when TRAI has already issued its Recommendations on Service Authorisation

¹ The Ministry of Communication / Department of Telecommunication's powers are limited to policy and allied matters relating to telegraphs / telephones / wireless / and even administration of the TRAI Act. On the other hand, the MEITY that is empowered to regulate matters relating to the internet (which can include services operated / offered on the internet – such as OTT services) and the IT Act.

Framework granted under the Telecommunication Act 2023. Without prejudice to the above, in order to counter the comments made by the stakeholder, we place reliance on our comprehensive submissions made in the counter comments to the TRAI Consultation Paper on the Framework for Service Authorisations to be Granted Under the Telecommunications Act, 2023. The relevant part of our submissions are reproduced in **Annexure 1**.

ANNEXURE 1

COMMENTS OF SOME STAKEHOLDERS ON REGULATION OF OTT COMMUNICATION

Comments of a few stakeholders:

- One stakeholder, representing the cellular operators, has mentioned that as per their understanding, OTT Communication services are covered under the new Telecom Act as an access service.
- Another stakeholder has mentioned that the definition of “Message” and “Telecommunication Service” under the newly enacted Telecommunication Act, 2023 includes all form of telecommunication services including the communication services provided over the top (OTT) using the platform/ servers/ switches hosted in the public internet. The argument is that in order to ensure same rules for same or similar services, it is important to bring such Over the Top (OTT) communication service providers under Access Services authorisation.
- Similar comments have been given by two other stakeholders who are cellular operators and few other stakeholders.

Counter Comments by BIF:

1. All such statements by these few stakeholders are incorrect, and are motivated by their narrow commercial interests, and are devoid of any basis. Majority of stakeholders have not even mentioned this as an issue for discussion. The **TRAI CP also has no reference to this as these are not telecommunication services.**
2. It is important to note that the Telecommunications Act 2023 is an Act to amend and consolidate the law relating to development, expansion and operation of **telecommunication services and telecommunication networks**; assignment of spectrum; and for matters connected therewith or incidental thereto.
3. It is relevant to note the following provisions of the Act to understand how OTTs are not intended to be covered under the Act:
 - Section 3 (1) states that any person intending to—
 - (a) provide **telecommunication services**;
 - (b) establish, operate, maintain or expand telecommunication network; or
 - (c) possess radio equipment,

shall obtain an authorisation from the Central Government, subject to such terms and conditions, including fees or charges, as may be prescribed.

- Section 2(p) states **"telecommunication" means transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems**, whether or not such messages have been subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception.
- Section 2(s) provides **"telecommunication network"** means a system or series of systems of telecommunication equipment or infrastructure, including terrestrial or satellite networks or submarine networks, or a combination of such networks, used or intended to be used for providing telecommunication services, but does not include such telecommunication equipment as notified by the Central Government.
- Section 2(t) provides **"telecommunication service"** means any **service for telecommunication**.
- Section 2(g) states **"message"** means any sign, signal, writing, text, image, sound, video, data stream, intelligence or information sent **through telecommunication**.

4. There is a service for telecommunication, which is defined as 'telecommunication service' in the Act. This service is for transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems. Thus, the service for specific purposes (i.e. transmission, emission or reception of any messages) and by specific means (i.e. by wire, radio, optical or other electro-magnetic systems), is telecommunication service. Any service on or from or over telecommunication service cannot be telecommunication service.

5. Providing an access to Internet by enabling transmission, emission or reception of any messages by wire, radio, optical or other electro-magnetic systems is a service for telecommunication. Therefore, Access Providers or Internet Service Providers, who provide such access, will require authorisation under the Telecommunication Act, 2023. The Access Providers have tariffs for various services they want to offer like data, voice, sms, value added services. Internet Service Providers can only provide data services. However, in data services, Access Providers and Internet Service Providers are not permitted to differentiate between content in regard to tariffs (Prohibition of Discriminatory Tariffs for Data Services) and quality of service (Net Neutrality).

6. The Act's scope is for development, expansion and operation of telecommunication services and telecommunication networks; assignment of spectrum; and for matters connected therewith or incidental thereto. The provisions in the Act pertain to issues like radio waves, radio equipment,

National Frequency Allocation Plan, spectrum, merger, demerger or acquisition or other forms of restructuring, telecommunication identifiers, assignment of spectrum, reframing and harmonisation of spectrum, right of way for telecommunication network, standards and protection of telecommunication networks, Digital Bharat Nidhi, innovation and technological development in telecommunication, protection of users, dispute resolution mechanism, adjudication of certain contraventions, certification for operation of radio equipment on a vessel or aircraft, certification of amateur station provider and prohibition of use of equipment which blocks telecommunication, which can only be applicable to telecommunication service providers and not to anyone else like Internet Sites or APPs, including OTT.

7. In this context, the internet sites and APPs of all kinds, which include OTT, are not providing any access to Internet. Hence, internet sites or APPs, including their servers/platforms, are neither telecommunication nor telecommunication equipment nor telecommunication services nor telecommunication network.
8. We respectfully submit, if any other meaning is given, then all internet sites, APPs will come in ambit of telecommunication services, which will be absurd.
9. It is pertinent to mention that even the then Hon'ble Minister of Communication had issued a clear statement to the media on 23rd December 2023, clarifying that OTTs are not covered under the then Telecom Bill. Under the official Allocation of Business Rules, OTTs are regulated strictly by MeitY and under the extant IT Act. The Telecom Bill which had been passed earlier by the Parliament, received the Presidential assent and was Gazette Notified on 24th December 2023 to be termed as the Telecommunications Act 2023.
10. The confluence between telecom, broadcasting and IT sectors is seen in the Digital era but this confluence is not confined to these three sectors but sectors like banking, finance, commerce, health, gaming, manufacturing, service, food delivery, car rental etc. also have similar and respective role in such confluence in the Digital era. However, such confluence does not mean that these sectors are merging into one another. For instance, IT sector does not become broadcasting sector, nor does the broadcasting sector fall in ambit of telecom sector. Similarly, commerce will not be IT sector, and the banking sector does not become the technology sector. From the legislation perspective, there has to be a corresponding legislative framework for each sector. In other words, Telecommunication may be an enabler for IT Sector or vice versa but that does not mean that Telecommunication and IT sector are the same. The Telecommunications Act 2023 also does not envisage so.

11. In absence of any specific justification under the Telecommunication Act 2023, these stakeholders have mentioned issues like same service same rules and level playing field. In addition to the reasons above, the argument of “same service-same rules” and level playing field does not stand for the following reasons:

- As mentioned earlier, OTT Communication are not telecommunication services. Like any other Internet Sites and APP, OTT Communication is functioning over the telecommunication networks, which telecommunication networks are providing service for telecommunication. Internet Sites and APP, including OTT Communication are themselves not providing service for telecommunication.
- It is submitted that these stakeholders, who are Access Service Providers, may be referring to their voice and sms service in respect of same service same rules argument. At the outset, it is submitted that voice and sms can be provided only by Access Service Providers. Even the Internet Service Provider cannot provide voice and sms, Internet Sites and APPs, including OTT can be used on a Internet Access Provider Network, who is only providing internet access and is not providing voice and sms. Hence, same service same rules is not applicable at all.
- Access Service Provider or Internet Service Providers provide access to the Internet and are virtually the gatekeepers to the internet as well as to the OTTs themselves. The OTTs cannot access the internet without telecommunication services provided by Access Service Provider or Internet Service Providers. A user of any App, including any OTT App, needs to necessarily be a subscriber of any licensed Access Service Provider or Internet Service Providers network but a subscriber of telecommunication service may or may not be a user of an OTT App.
- Telecom networks and any application (APPs), including OTT applications, operate in different layers of OSI model. Telecommunication happens in (network- telecommunication layer and while various applications (APPs) work in application layer respectively). Application layer is not part of telecommunication / telecommunication network.
- Access Service Providers, who provide of telecommunication services, are licensees who possess unique and exclusive characteristics and rights viz. right to access, right to obtain interference-free spectrum, right to provide telecommunication service, right to set up telecommunication network, right of interconnection, right of way, right to obtain unique numbering resources (i.e telecommunication identifiers). OTT communication services are Content Rich Interactive Applications and offer plethora of innovative services and applications for consumers. Further, these OTT services have no such unique rights and characteristics like Access Service Providers.

- Same service same rules can apply in case of where one service is an exact substitute of the other. Substitutability has to be complete and in both ways. Substitutability stands as an essential criterion in considering comparable regulations. Moreover, in determining substitutability, several considerations including whether the technologies are operating in the same layer; whether the functional services are comparable; comparison of the nature of devices; and likewise, will have to be accounted for. In the absence of cogent functional similarity, it is misleading to compare OTT Communication to traditional voice, data & messaging services provided by the TSPs.
- Thus, there is no question, whatsoever, of same service same rules between voice and SMS of Access Service Provider and Internet Sites and APP, including OTT Communication.
- The argument of level playing field is fundamentally flawed. Art.14 of the Constitution of India guarantees equal treatment only to persons who are equally situated. This is well-established in law and is well supported by precedents. OTTs and TSPs have vast and critical differences between them and are not equally positioned, as explained above. Therefore, they cannot be treated as equals. Moreover, unequals are also required to be treated unequally as established in *St. Stephen's College v. University of Delhi* [(1992) 1 SCC 568]. Importantly, equal treatment to unequals is in fact a form of inequality. To put both categories at par is wholly unjustified, arbitrary, unconstitutional, being violative of Art.14 as held in *Onkar Lal Bajaj v. UoI* [(2003) 2 SCC 673]. This principle is further supported by *Govt. of AP v. Maharshi Publishers Pvt Ltd.* [(2003) 1 SCC 95]. These cases collectively affirm that treating fundamentally different entities as equals is a violation of the constitutional guarantee of equality.

We humbly submit that the comments of these stakeholder are driven by their commercial objectives and lack legal tenability. It has been abundantly clarified that OTT Communication are not telecommunication services, rather they are completely different and do not fall within the purview of Telecommunications Act 2023.