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Mural
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30th December, 2015

Dear Ms. Kotwal,

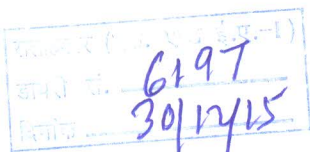
Sub. : Submission on TRAI Consultation Paper on "Differential Pricing for Data Services"
dated 09 December, 2015

Greetings of the season.

Please find attached my submission on the TRAI Consultation Paper on "*Differential Pricing for Data Services*", which was released on 09 December, 2015. This submission may be considered by the TRAI whilst formulating its regulations on Net Neutrality and/or any Discussion Paper produced as an outcome of this consultation.

The following points are for the TRAI's perusal:

1. The cabalization of the Internet by TSPs is a clear and present danger. It is the most important objective for Net Neutrality to tackle, because, as is visible in the TV and media sector, this power once created is impossible to reverse or regulate.
2. The regulation of Net Neutrality today will decide the future structure of Internet which is increasingly a valuable commercial market place with many opposing commercial interests attempting to increase their control/influence on it.





I would also like to make the following suggestions to improve the consultation process adopted by the TRAI:

- a) This consultation seems to focus only on wireless access providers to the Internet and leaves out the issue of Fixed Internet access providers. Fixed Internet Access Providers are important stakeholders who will be impacted by Differential Pricing, and the issue should ideally also have been examined in the light of their role in the Indian internet landscape.
- b) TRAI's response to Net Neutrality will shape the discourse around regulation and consumer rights in the future into a more mature and reasoned one – moving away from the current shrill debate that is characterized by suspicion and lack of trust about most players, amongst consumers. This could be addressed by TRAI seeking disclosures of commercial interest in all submissions during such consultations. Undisclosed commercial interests tend to be used to distort consultations such as this.

Indian consumers await the TRAI's conclusions on this important and vital issue which relates to them, and I would advise you to arrive at these at the earliest, after giving due consideration to my submissions.

Sincerely,

RAJEEV CHANDRASEKHAR

Ms. Vinod Kotwal

Advisor (F&EA)

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Responses to TRAI Consultation Paper
dated 09 December, 2015
on “Differential Pricing for Data Services”

30 December, 2015

RAJEEV CHANDRASEKHAR
Member of Parliament

A. PREAMBLE:

My Views on Net Neutrality and Differential Pricing:

In recent months, there has been considerable deliberation and debate on the issue of Net Neutrality - driven largely by Internet consumer groups and activists. The debate on Net Neutrality is amongst the other important issues relating to consumer rights - emerging from a growing demand for consumer rights - a need for a Magna Carta for the Internet and Telecom space that includes issues of call quality, Internet access and speed standards, free and fair competition, privacy, freedom of expression etc.

The TRAI must take cognizance of this and be responsive to the issue of Consumer rights, if necessary, sometimes co-operating with regulators like Competition Commission, which has the domain capability on sophisticated economic issues like competition and market dominance/abuse.

The Net Neutrality debate is a critical one - as the Internet fast transforms from a global network of networks and medium of connectivity to a valuable and commercial market place while maintaining its connectivity objectives. As I have said many times before - Regulating the Internet and the technology space needs to be innovative and creative - balancing the rights of consumers versus the need to ensure regulation does not stifle the innovation and creativity that is the hallmark of the Internet.

There have been some attempts to characterize Net Neutrality as a complex issue, a utopian ideal of sorts. This, however, is inaccurate. I believe Net Neutrality, on the contrary, is a very simple issue to understand, define and regulate, and do so without harming the core character of a free internet and an innovative internet.

Key Principles to defining and regulating Net Neutrality that needs TRAI's consideration:

- 1. Net Neutrality is one of a basket of Consumer rights issues. Regulation must be simple and targeted.**

Net Neutrality is one of the many issues that are core to consumer rights to a free, fair and open Internet. Regulation of the Internet must be sophisticated and separate the various issues that need regulation, and not lump everything into one regulatory approach. The need to work together in conjunction with other regulators like CCI is also important to ensure all consumer rights issues are fairly and transparently regulated for.

- 2. Net Neutrality is not the same as Competition regulation**

Net Neutrality must be regulated independently from Competition regulation for Market power, distortions in Market place etc. Consumer concerns of Facebook Free Basics, Google's search neutrality or any pure web entity relating to market power or competition issues on the web must and can be exercised through competition regulation.

Competition law squarely and completely applies to all web entities and must be enforced wherever applicable on entities that violate the basic principles of free and fair competition.

- 3. Telecom Service Providers (TSPs) are not the Internet. They provide the access to Internet and could become powerful gatekeepers to the Internet and so require regulation.**

TSPs are limited in their numbers by spectrum and licenses and predictably need more robust regulation than websites or web applications. Further, the conduct of TSPs on other consumer-related issues like call drops etc. is evidence for Regulatory intervention

and regulation. The relation between TSPs and the Internet is that of access providers, and lack of regulation of this role can easily allow the TSPs to become a gatekeeper to the Internet. Since competition is still limited and will always be finite, the threat of TSPs becoming gatekeepers is real. The threat of TSPs entering into Financial contracts with certain websites to provide preferential access/Speed is real distortion and discrimination and most important for Net Neutrality regulation to address.

4. **The objective of Net Neutrality regulation must be to prevent cabelization of the Internet, i.e., no gatekeeping by TSPs, while Competition regulation must address market power and dominance issues of websites/apps.**

The most important way to ensure Net Neutrality is that Access providers of the Internet (TSPs) do not exercise any control on the consumers' right to surf the net without pricing or network influences.

There is substantive evidence in India of the market power of cable operators, and of the misuse, pricing abuse and distortions that helpless consumers have to suffer when access providers start controlling and influencing access to content. This Gatekeeping power of the access providers is unique because of the finite number of access providers in competition, and creates permanent distortions which even regulation can't manage today. This, in turn, creates a situation where rampant price gouging and/or poor quality is inflicted upon consumers, leaving them hapless except for upgrading to more expensive options. Cabelization of the Internet causes vertical integration which would lead to TSPs owning parts of the net and impacting consumer choice and competition in the long term by making web-only entities unviable and unable to compete. There is ample evidence of that in the Indian Television and Media sector where vertically integrated entities have distorted choice and innovation, and have created market power concentration.

Core to regulating Net Neutrality is the preservation of fair, open, innovative and equal character of the internet – i.e. an internet that is bereft of any form of gatekeeping by TSPs.

The issue of distortions to the free and open nature of the Internet being impacted by website entities (not TSPs nor those with interests in TSPs) like Facebook & Google, must be regulated by Competition regulation. Competition Law in India is effective and has been tested successfully in various sectors.

The need to regulate TSPs or broadband access providers has been recognized as key to Net Neutrality even by US Regulator FCC. In February 2015, the FCC passed the Open Internet Rules which upholds free expression and innovation on the Internet and allows consumers to go where they want and when they want. It allows the regulator to **ensure transparency in the operation of broadband services**, and also establishes a legal framework positioning the regulator to address issues like content prioritization. The FCC Order explicitly states that:

“...Broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no “fast lanes.” This rule also bans ISPs from prioritizing content and services of their affiliates...”

5. TRAI’s Regulation for Net Neutrality should not just cover wireless TSPs, but also cable and other broadband/fixed Internet service providers

The consultation paper issued by TRAI is silent on and seems to exclude the Fixed Internet Service Providers.

B. RESPONSES TO QUESTIONS IN TRAI CONSULTATION PAPER ON DIFFERENTIAL PRICING FOR DATA SERVICES

This current Consultation makes more specific enquiries pertaining to the issue of “Differential Pricing for Data Services” – a key principle of Net Neutrality.

Question 1: Should TSPs be allowed to have differential pricing for data usage for accessing different websites, applications or platforms?

This question has to be responded to with care, and TRAI must note the two very different scenarios emerging from this broad question – as both scenarios represent very different regulatory responses.

In one scenario - referred to as promotion/price-off/Government-mandated sites scenario - TSPs could be free to zero-rate or offer discounted access to websites as part of promotion or improving affordability or mandated by Government for public service. But this cannot be on the basis of financial arrangements or Interests between websites/apps and TSPs, i.e., No financial benefit must accrue to TSPs by providing cheaper tariffs to access some parts of the net. TSPs must also have no financial interest (including direct or indirect equity/ownership) in the sites that are being offered price-offs or any form of evidence or action of subsidy.

Tariffs for data in this scenario would be either zero-rated or below the cost of production of a data packet and no financial benefit can accrue to TSP or website due to this price-off/zero rating. Any competition and predatory pricing implications of such tariffs should be examined by Competition Commission before being permitted by TRAI. This is the fundamental principle to allowing price-offs/promotion-led tariff differentiation.

In a second scenario where the differential pricing could be to increase data rates for certain apps or part of the net - that is to be prohibited. This is an inverse form of Predatory pricing. Further, for purposes of clarity, TSPs cannot be allowed to increase tariffs to access some parts of the web or apps. This is a deliberate effort to make access more expensive to some parts of

the Internet, thereby pricing out the app/site from the consumer. This will amount to gatekeeping and abuse of power by TSPs to discriminate against certain apps. This will eventually lead to islands on the internet that TSPs will make artificially too expensive for the consumer. This will limit choice and is adverse to consumer interest. This will lead to cabalization of the Internet.

This is a very different scenario from the one envisaged above which is a price-off/discounted access, because there is no financial benefit accruing to any party in that scenario.

In summary:

Scenario 1: Price-off, discounted tariffs/Zero ratings should be permissible subject to No Financial compensation or interest from or in the website/app that is being discounted AND prior examination of it by CCI for any market abuse issues. Only if regulation can ensure this should price-offs be permitted.

Scenario 2: Tariff differentiation should be prohibited.

Question 2: If differential pricing for data usage is permitted, what measures should be adopted to ensure that the principles of non-discrimination, transparency, affordable internet access, competition and market entry and innovation are addressed?

Discriminatory Pricing for data usage can only be permitted, if it fulfills the following criterion as described in Scenario 1 in response to Question 1.

In that promotion/price-off/Government-mandated scenario, TSPs could be free to zero-rate or offer discounted access to websites as part of promotion or improving affordability. But this cannot be on the basis of financial arrangements or Interests between websites/apps and TSPs, i.e., No financial benefit must accrue to TSPs by providing cheaper tariffs to access some parts of the net. TSPs must also have no financial interest (including direct or indirect equity/ownership) in the sites that are being offered price-offs or any form of evidence or action of subsidy.

Tariffs for data in this scenario would be either zero-rated or below the cost of production of a data packet and no financial benefit can accrue to TSP or website due to this price-off/zero rating. Any competition and predatory pricing implications of such tariffs should be examined by Competition Commission before being permitted by TRAI. This is the fundamental principle to allowing price-offs/promotion-led tariff differentiation.

In summary - Price-off, discounted tariffs/Zero ratings should be permissible subject to No Financial compensation or interest from or in the website/app that is being discounted AND prior examination of it by CCI for any market abuse issues. Only if regulation can ensure this should price-offs be permitted.

Question 3: Are there alternative methods/technologies/business models, other than differentiated tariff plans, available to achieve the objective of providing free internet access to the consumers? If yes, please suggest/describe these methods/technologies/business models. Also, describe the potential benefits and disadvantages associated with such methods/technologies/business models?

Regulation must encourage all forms of increasing access. There are several other ideas that are being discussed and Regulations must permit/encourage all such models - of course, subject to caveats and conditions mentioned in my response to Question 2 above.

1. **Using USO and Equal Rated Plans:** Experts have highlighted that access can be improved by the government through “equal rated” plans that are deployed by the Government. The unused Universal Service Obligation funds could be tapped for this purpose.

Corporations such as Mozilla are experimenting with this sort of model in multiple African and Middle Eastern markets, where users purchasing a US\$40 Klif phone receive unlimited talk, text and 500 MB a month for 6 months.

Another possible way of “equal-rating” content so it is free-of-charge to the user is a model where people watch ads in order to access other sites. Mozilla has been exploring this model in a partnership with Grameenphone (owned by Telenor) in Bangladesh, where users can receive 20MB of unrestricted data per day after watching a short ad in the phone’s marketplace.

2. **Offering of low speed internet plans with Caps:** Further, TSPs can also offer 2G data services which are capped at 10/20 MB a month which could obviate the need for price-offs and differential pricing. Such measures could improve access and give millions of Indians access to the Internet.

Question 4: Is there any other issue that should be considered in the present consultation on differential pricing for data services?

The cabalization of the Internet by TSPs is a clear and present danger. It is the most important objective for Net Neutrality to tackle, because, as is visible in the TV and media sector, this power once created is impossible to reverse or regulate.

The regulation of Net Neutrality today will decide the future structure of Internet which is increasingly a valuable commercial market place with many opposing commercial interests attempting to increase their control/influence on it.

For India and its vision of Digital India - the structure of the Internet must be one:

- i) Where TSPs do not and cannot exercise any power of gatekeeping to the net/web for commercial interests.
- ii) Where Competition on the web is free and fair through effective intervention and examination by, and joint regulation with Competition Commission and TRAI.

The Internet needs simple regulations that are based on fundamental consumer rights, innovation and connectivity. The TRAI has, for many years, been less than responsive to consumer needs, and this is an opportunity for TRAI to demonstrate both its regulatory maturity to regulate on issues like Net Neutrality, Competition and Market power without stifling creativity and innovation, as well as regulate for Internet consumers' rights and greater access to the unconnected. While these may seem objectives difficult to align, good regulation can ensure this. Effective co-regulation on issues of competition and market dominance along with CCI is also an area that must be institutionalized.

C. SUGGESTIONS TO IMPROVE CONSULTATIONS

This consultation seems to focus only on wireless access providers to the Internet and leaves out the issue of Fixed Internet access providers.

TRAI's response to Net Neutrality will also shape the discourse around regulation and consumer rights in the future into a more mature and reasoned one – moving away from the current shrill debate that is characterized by suspicion and lack of trust about most players amongst consumers.

TRAI must seek disclosures of commercial interest in all submissions during such consultations, especially from NGOs and activist groups.