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To,

December 29, 2015

**Ms. Vinod Kotwal**  
Advisor (F & EA)  
Telecom Regulatory Authority of India  
Mahanagar Doorsanchar Bhawan  
Jawaharlal Nehru Marg  
New Delhi 110 002

**Re: Response to the TRAI Consultation Paper on Differential Pricing for Data Services dated December 9, 2015 (No. 8/2015)**

Dear Sir,

We refer to the captioned Consultation Paper, and enclose herewith the joint comments of the following organizations:

- (a) Society for Knowledge Commons, New Delhi
- (b) Delhi Science Forum, New Delhi
- (c) Free Software Movement of India, Hyderabad

We would also crave your indulgence to provide further submissions / responses to TRAI during the counter comments submission phase.

We would like to thank the TRAI for ensuring that opinion from stakeholders/the general public is sought prior to creating or adopting any new framework for regulation of the online space in India, a sector that is vital for the continued development of a vibrant democracy and flourishing economy.

Yours sincerely,

**(Rishab Bailey)**

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**Response to the TRAI Consultation Paper on Differential Pricing for Data Services dated December 9, 2015 (No. 8/2015) (the “Consultation Paper”)**

The Internet is already an integral part of today’s economy and society. As more and more services, content and applications are made available on the Internet, we are only likely to see the further use and therefore growing importance of this resource. It must however be kept in mind that the primary purpose or imperative of the Internet is not necessarily commercial – but rather to enable free communications and exchange of knowledge. This is why the Internet is often referred to as the greatest innovation of humankind – in that it enables unimaginable social benefits and efficiencies through connecting every person. TRAI must approach any regulation of the Internet keeping this basic principle in mind.

At the outset we would like to point out that the current consultation paper issued by TRAI restricts the Consultations to determining the tariff for different data pricing models without explicitly enunciating net neutrality principles, as it would apply to these models. Though the Consultation Paper does deal with the implications of violating net neutrality, it does so using the existing principles of tariff regulation i.e. the principles of Non-Discriminatory, Transparent, Not Anti-competitive and Non-Predatory pricing. While we recognize that these principles are certainly essential in their applicability to the telecoms regulatory regime in general and possibly broad enough to address the issue of data services, a clear definition in India of net neutrality and setting of relevant high level principles would be invaluable in providing certainty to the issue and would reduce arbitrariness that may otherwise occur in addressing violations on a case by case basis.

Prior to examining the specific issues raised by the Consultation Paper, we believe it is vital to also understand the emerging trends in the Internet economy, in order to be able to put in place a policy that is forward looking and progressive.

The Internet provides access to those who want to “consume” content (users) or those who offer content (the content being websites, services, applications, etc.). Both sides -- those who ‘view’ the Internet or provide content or services have contracts with their relevant Internet Service Providers (ISP's) that permit them access to the ‘public Internet’. This ensures that any content provider, or those looking to access content, are able to reach each other without the ISP's on either side playing a gatekeeping role. This is the core principle of net neutrality. This is what has led to the explosion of content and applications on the Internet. If content and service providers had to pay an additional ISP (i.e. the ISP of the user), this enormous expansion of the Internet would have been stillborn.

What distinguishes the architecture of the Internet is that it was conceived as a flat communications structure which allowed anybody with a computer to connect to anybody else, provided both sides had access to the Internet. It can provide one-on-one communication (single cast), one to many (multicast) or even broadcasting to a very large audience, all using the same mechanism. This is in contrast to all other forms of mass communications, which are all platforms for broadcasting content of a few entities to the mass of passive consumers.

In the initial phase of the commercial Internet, telecom companies (telcos) already had massive market power (often having monopolistic power) and huge subscriber

bases. They saw the fledgling Internet as another source of revenue as only they would provide access to users and therefore could assert a gatekeeping function. They demanded that popular sites pay a variant of what in telecom language would be called a termination fee to reach their subscribers. This was the first set of net neutrality battles that pitched telcos against Internet companies and netizens. The massive public outcry (both in India and abroad) finally forced the telcos to back off, retaining the current architecture of the Internet.

With the growth of Internet and the growing market power of the incumbent Internet giants, there has been a significant shift in the strategic situation as far as the online market is concerned. Today, big Internet monopolies are teaming up with telcos to form different kinds of cartels. Their attempt is to use the monopoly that the telcos have over their own subscribers and create a discriminatory/unequal market place. Telcos will also be increasingly forced to form such alliances with Internet giants merely in order to survive.

While this may not immediately create revenues for the company performing the gatekeeping role, the battle in the Internet space is for eyeballs and commodification of personnel data. The creation of a platform that others cannot match would mean long term benefits as the data of all those who are on platforms such as “Free Basics” would be with Facebook. Facebook already has more than 125 million users in India. Analyzing its revenue model would show that Facebook generates a revenue \$5 to \$25<sup>1</sup> per Facebook user. Permitting supposedly altruistic projects such as Free Basics would essentially be akin to the regulator permitting large scale harvesting of Indian user data – which is both a security concern and problematic from the perspective of equitable access to content.

### *Is there a need to regulate data pricing?*

The first issue that must be addressed is whether this indeed a need to regulate data pricing in India. Taking into account purchasing power parity, data rates in India are relatively high. Further, India faces a huge shortage of available bandwidth – which can only be overcome by greater investments in infrastructure and connectivity. TRAI must therefore approach any regulatory practice from the perspective of lowering costs for users including by ensuring greater infrastructure development – which we believe can only occur if the policies are such that service providers are encouraged to build infrastructure and increase bandwidth instead of pitting place business models based on creating and exacerbating an artificial scarcity of a precious resource. Permitting service providers to act as gatekeepers of the Internet (as differential pricing practices would do) would hamper development of infrastructure and consequently will stunt bandwidth availability to users. It is in the service provider’s interest to create an artificial scarcity of bandwidth. This permits it to charge differential rates for different content – thereby adding a perverse incentive

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<sup>1</sup> Cotton Delo, “How Much Are You Really Worth to Facebook and Google?”, Advertising Age, May 7, 2014, <http://adage.com/article/digital/worth-facebook-google/293042/>; Matt Petronzio, “How Much is the Average Facebook User Worth”, Mashable, April 25, 2014, <http://mashable.com/2014/04/24/facebook-average-worth-chart/#gjnOUWSV2Eq3> and Forbes Magazine, George Anders, “A Twitter User is Worth \$110, Facebooks’ \$98; LinkedIn’s \$93”, Forbes Magazine, November 7, 2013, <http://www.forbes.com/sites/georgeanders/2013/11/07/a-twitter-user-is-worth-110-facebooks-98-linkedins-93/>

to a notionally egalitarian market and ensuring that service providers will not have an incentive to invest in network and infrastructure growth.

Given the massive amounts of revenue<sup>2</sup> being generated by service providers on account of growth in data usage (and noting the anticipated increase in data usage as pointed to by various studies), as well as the increasing instances of unethical practices in the market (which breach the non-discriminatory aspect of net neutrality regulation) and adversely affect public interest – we believe that TRAI can and must regulate data pricing.

As referenced in the Consultation Paper itself, this must primarily be to promote competition, protect the openness of the medium and ensure the rights of the users are protected (through the application of consumer protection principles including transparency related principles).

The pricing of data services – as in the case of any other economic good – is a key to the growth of the Internet and its use as a public utility. However, this must be done in an open and non-discriminatory way. Any principle that in the short term, may supposedly help poorer set of subscribers to access certain “basic” sites, could in the long run, also be used to charge high data rates for certain kinds of websites and services. The choice of what should be the policy in order to enable low-end consumers to connect to the internet has to be well thought out so as not to skew the growth of the internet in the future or create disadvantages for a certain set of subscribers. Failure to adopt an appropriate regulatory approach (or one that empowers service providers to act as gatekeepers of the Internet) would create additional barriers to entry to the Internet, stifle innovation and reduce the choice of consumers to access content of their choice.

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<sup>2</sup> It may be noted that the industry’s revenues reportedly grew by as much as 10.1% across the market in the previous financial year (2014) as compared to an 8.6% growth rate previously. Various industry and investor reports also paint a rosy picture of the telecom industry. Notably, a BNP Paribas Securities India report from last year clearly states that EBITDA margins are improving, revenues from data growth are rising and that while spectrum auctions would reduce profitability temporarily, the telecom industry as a whole was actually in improving health. “TRAI Data Shows Turnaround Happening in the Telecom Sector”, The Hindu Business Line, June 10, 2014, available at <http://www.thehindubusinessline.com/features/smartbuy/tech-news/trai-data-show-turnaround-happening-in-telecom-sector/article6101702.ece>

Even looking at companies performance on an individual basis, one sees that not only are some of the telecom companies making massive profits, these are only set to continue to increase in the near future – largely on the back of growth of data services (as well as addition of subscribers).

For instance, Airtel has earned revenues of over 140,000 Crores over the last 2.5 years which equates to a profit of approximately 16,000 crores in the same period. Nikhil Pahwa, “A Response to Airtel’s Justification of Its Net Neutrality Violation”, Medianama, December 27, 2014, available at <http://www.medianama.com/2014/12/223-a-response-to-airtels-statement-justifying-net-neutrality-violation/>

Similarly Vodafone is also doing exceedingly well and has declared record profits for a couple of years now - backed by growth in its subscriber base, higher call rates and increased data usage. Business Standard, “Vodafone Posts First FY Profit in India”, May 21, 2014, available at [http://www.business-standard.com/article/companies/vodafone-posts-1st-fy-profit-in-india-114052001237\\_1.html](http://www.business-standard.com/article/companies/vodafone-posts-1st-fy-profit-in-india-114052001237_1.html)

Idea too is doing exceedingly well from a business perspective. Their Profit After Tax was up last FY by over a 100% from the previous year to 1689.3 crores (total income stands at something like 26,179 crore). Notably Idea has paid dividends to shareholders for the last 2 years. The Economic Times Idea Cellular Ltd company financials, May 3, 2015, available at <http://economictimes.indiatimes.com/idea-cellular-ltd/profitandlose/companyid-3154.cms>

We now have data to show that the revenue stream from data has seen the fastest growth in recent times. Currently, there are 300 million users (June, 2015 figures, TRAI) of mobile Internet services, and this is growing at a rate of about 25%. We have added 60 million new users in the last year alone. This may be compared to the growth of mobile voice users, whose growth is now about 7%.

While this rate of growth can be considered to be satisfactory, it still leaves out another 650-700 million mobile users. Given the importance of the Internet, it is important that we quickly provide Internet access to all. The question therefore is how do we provide access to this segment without creating long-term problems for the sector.

We would submit that providing low-end consumers access to a few sites – as is being proposed by projects such as Free Basics -- would be the wrong approach to this problem. It would create the principle that net neutrality can be violated for an ostensibly “good cause”, and will lead to a set of subscribers believing that Facebook and a few other sites are the entire Internet. In Indonesia, studies show that 70% of the users believe that Facebook is the Internet<sup>3</sup>. It will also deprive these users the economic benefits of using the Internet.

One alternate approach would be to bring down the cost of data services drastically, particularly for 2G Edge services, where no new investments are being made by the telecom players. Data plans can provide for either a zero cost for the first slab of data usage, or a very low cost, to lower the threshold for accessing the Internet. This will allow the full Internet to be accessed and not just a few websites, pretending to be the “basic Internet” (this suggestion is in addition to other models of subsidized access discussed further on this response).

Though TRAI has till now practiced forbearance on these services, it is necessary in the public interest, to examine the issue of data tariffs. We need to see the disaggregated costs of such services from the point of view of their actual costs, and also consider telescopic/progressive tariff plans to encourage more mobile users to access the internet, particularly those using 2G and 3G services.

#### Differential Data Pricing:

While it may be convenient to defend differential pricing on the grounds that “some” Internet access is better than “no” Internet access – this tradeoff does not reflect the nature of the situation at hand. The real tradeoff is between expanding Internet uptake, lowering data service prices and setting a precedent that will make it harder for users to freely access the Internet.

Permitting differential pricing, even on purportedly ‘open’ platforms will exacerbate problems of monopolization / centralization of online services. This will permit big companies (such as for instance, Facebook) to act as a repository of all user data. Presently, given the multiplicity of services on the Internet, data is collected

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<sup>3</sup> Quartz, “Millions of Facebook Users Have No Idea They’re Using the Internet”, February 9, 2015, <http://qz.com/333313/millions-of-facebook-users-have-no-idea-theyre-using-the-internet/>



differently by each service provider. Big Internet companies want to ensure that they can become centralized repositories of user data (which they can then monetize). This can be accomplished by ensuring that people can only access content through single platforms – such as that provided by Facebook. Essentially, Facebook will subsidise market access for certain content players, in exchange for user data that their service and content offerings collect. This will therefore increase the market power of big Internet companies and may in fact lead to the creation of private Internets – each associated with a particular service provider. To also be kept in mind that per statistics each user is worth between 5 and 25 USD to Facebook.<sup>4</sup> Permitting Facebook to allow it to take advantage of its market share and thereby force even more people into its platform (both content providers – who will need to in order to access users and users – who will due to the irrational pricing, network effects etc.) is essentially permitting the harvesting of Indian user data by a select few Internet companies in order to report even greater profits than they already do. This is not a position that TRAI should encourage or support.

The use of such differential pricing options is indicative of a new form of cartelization emerging in the Internet economy – with service providers and existing Internet monopolies acting so as to ensure all competing providers are kept out of the mainstream market. This poses a threat to the Internet economy in the medium to long term and will lead to service providers basically carrying a ‘bouquet’ of websites / applications, thereby reducing the Internet to cable TV and thereby limiting user choice and reducing the potential benefits that the Internet as a public network can offer.

One must also consider the effects such deals will have on increasing the centralization of online services (and consequent social and consumer problems that could be raised such as effects on privacy). For instance, using *Free Basics* may require one to sign into Facebook thereby permitting Facebook to track your activity on all applications and services offered on the platform.

Various zero rating platforms have stated that they are ‘open’ and will host any services (that meet certain conditions). Even in such situations however the platform provider can decide what services to host on the platform – thereby skewing the internet economy, limiting consumer choice and ensuring that the Internet is turned largely into a commercial enterprise rather than a space for exchange of knowledge. This is the equivalent of a benevolent dictator deciding to not tax his populace for a certain time – even if initially welcome, any such decision is colored being subject to the whims and caprices of a single unelected authority. In this context it is also worth questioning the claim of platforms such as Free Basics that claim they will carry all content submitted to them – the Internet comprises over a billion webpages – should every developer/content provider submit their content to Free Basic it appears

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<sup>4</sup> Cotton Dalo, “How Much Are you Really Worth to Facebook and Google?”, Advertising Age, May 7, 2014, <http://adage.com/article/digital/worth-facebook-google/293042/>; Matt Petronzio, “How Much is the Average Facebook User Worth?”, Mashable, April 25, 2014, <http://mashable.com/2014/04/24/facebook-average-worth-chart/#gjnOUWSV2Eq3> and George Anders, “How Much is a Twitter, Facebook and LinkedIn User Worth?” Forbes Magazine, November 7, 2013, <http://www.forbes.com/sites/georgeanders/2013/11/07/a-twitter-user-is-worth-110-facebooks-98-linkeds-93/>

unlikely that the platform will agree to subsidise access to all such content (i.e. the full Internet).

In this context it is useful to refer to the comments made in the Report on Net Neutrality of the Department of Telecommunication dated May 2015, which states quite unequivocally that *“At the same time large organizations with market power have started creating closed ecosystems which protect their business model in the long run. Also new business models are being devised by large organizations to increase their user base, but unfortunately some of these initiatives are considered non-competitive, restrictive and in conflict with Net Neutrality principles. The Committee was conscious that the market for content provision indicates that clear market leaders emerge in a short-while and if such market leaders are able to dictate the path to specific content, then the principles of non-discriminatory access from a user view-point can be compromised leading to distortions emerging in the content provision market and consequent implications for the larger Internet economy and emergence of new innovations. **The Committee, therefore, is of the firm opinion that content and application providers cannot be permitted to act as gatekeepers and use network operations to extract value, even if it is for an ostensible public purpose. Collaborations between TSPs and content providers that enable such gatekeeping role to be played by any entity should be actively discouraged.** If need be, Government and the regulator may step in to restore balance to ensure that the internet continues to remain an open and neutral platform for expression and innovation with no TSP /ISP, or for that matter any content or application provider, having the potential or exercising the ability to determine user choice, distort consumer markets or significantly controlling preferences based on either market dominance or gatekeeping roles.”*

Differential pricing deals as proposed by the Free Basics project also raise privacy and other concerns. For instance, per Facebook terms and conditions, Facebook will gain a royalty free worldwide license to use any content provided by the user. Further, they will track users through their entire use of the Internet.org / Free Basics platform. This raises serious concerns about privacy, ownership and usage of data – will poor and first time users (whom such platforms largely target) be in a position to either understand or mitigate such concerns?

It is also worth questioning whether government services / e-governance programs etc., will be forced to ride on such private platforms. Will the government and citizens be required to share user and other data with private corporations running such platforms, given that most terms and conditions are extremely one-sided (for instance Facebook’s terms confer a royalty free worldwide license to Facebook to use all information shared on the service).

In the circumstances, we believe that the arguments provided for permitting such differentiated data pricing, including the practice of zero rating are indeed harmful (to consumers in general and society at large) and do not actually empower the underprivileged (as erroneously contended) as explained below.

It is contended that allowing consumers access to certain limited array of content would enable the underprivileged to access at least some portions of the Internet – which they would otherwise not be able to. This would further have the advantage of

“expanding and accelerating Internet access, as first-time users of the free internet could experience its benefits and start paying for full access”

We believe this argument is misplaced. While on the face of it, it would appear that permitting customers access to limited content would be beneficial, it must be kept in mind that the content so provided is generally speaking, chosen by the service provider. This not only hampers the exercise of free speech (both by users as well as marginalized content providers) but also creates an unequal Internet, without a level playing field both for users as well as content providers (who will face an additional barrier to access their consumers / users base). While undoubtedly users will get a limited benefit of being able to access some content for free, it must be kept in mind that this provision of free access is not to the Internet, but to a limited array of services and content – as recognized by TRAI, there are therefore problems with monopolization and its effects. TRAI has also noted the critical issue of ensuring plurality of media and what happens to smaller players who cannot afford to enter into similar agreements. It is largely for this reason – i.e. the uncompetitive effect of such practices and their effect on plurality of content that various jurisdictions have held such agreements to be unlawful. To be kept in mind that differential pricing is not merely a question of whether or not such deals contain exclusivity clauses – i.e. whether they explicitly exempt others from participation in the platform, but what the effect would be on content providers who cannot afford to pay even supposedly nominal charges to access providers to ensure their content is carried on such a platform (in addition to any technical barriers or costs – such as for instance ensuring appropriate browser updates in order to access the service etc). One must keep in mind that at present, a content provider of any size merely has to get a single internet connection in order to provide his or her services to the public. Zero rating will create an environment where start ups and smaller businesses will have to enter into such additional agreements in order to reach their user base. In situations where their content is accessed through different service providers (say in different telecom circles), this could lead to huge costs on account of having to sign agreements with many service providers. This could also lead to situations where users are driven to certain specific service providers as content providers may not choose to enter into deals with all service providers (due to costs) but may instead opt only to enter into agreements with those service providers who already have large market shares. This will therefore hamper the business of smaller ISPs who will not be able to offer a content provider as much bang for the buck as a large ISP (in terms of number of people viewing the content providers content for free) and will consequently see its existing market share reduce as customers opt for ISPs who provide them free services. Such a system would also create a tiered Internet with some services available for ‘free’ – something that is clearly a problem from the perspective of ensuring diversity of content and competition in the online market.

Differential pricing gives service providers the power to unilaterally tilt the market in favor of specific applications and to ‘pick winners and losers’ on the Internet.” Tilting the market could stifle competition from local social networks, apps developers and content providers who cannot afford to pay providers to provide their content and cheaper rates or who do not have the market share or eyeballs on their products to make it attractive to operator to provide cheaper data for their services.

As discussed previously, such practices merely enable the creation of a captive



audience for certain giant Internet content providers / service providers who can use their market power to cartelize and ensure that other smaller players in the market are denied access to consumers / users.

Further, the argument that the underprivileged (who are the primary target of zero rated plans) will be empowered enough to start paying for additional services after a while, appears illogical. Providing a poor person access to say, Facebook for a limited duration will not mean that the person will be able to start affording regular Internet access thereafter – however much he or she may want it. Permitting differential pricing has the capacity to shut low income and other underprivileged groups into a ‘walled garden’ of cutting them off from free information and full participation” on the Internet. This would merely create new digital divides, something the regulator must be wary of, given increasing evidence that shows the existence/presence of second generation digital divides even in relatively well connected countries such as the US.

It must also be kept in mind that such practices by service providers also lead to consumers being duped (as recognized by the Consultation Paper) when they are directed to paid portions of the Internet, despite being on zero rated plans (and without adequate notice).

Given that a large proportion of our connected populace is new to the Internet and not necessarily tech savvy – it is essential that TRAI approach regulation from the perspective of ensuring user rights are protected.

In this context, it is useful to refer to the findings of various studies that have found that large proportions of people, particularly in developing countries, have no idea that they are actually using the Internet while using Facebook i.e. Facebook is becoming synonymous with the Internet (largely as Facebook has worked hard to ensure it is the only accessible content option to many users – including through the use of zero rating deals). This of course has huge implications for the continued growth and usage of the Internet. Not only is this a competition related issue – it is also likely to limit the potential uses to which the Internet can be put and will lead to an unhealthy centralization of online services. Already services are starting to move away from the open web and to Facebook – businesses for example are increasingly flocking to Facebook as large parts of their customer base only use this one platform. If people ‘decide’ to largely use one service, it follows that content, advertisers, and associated services also will flow to that service, possibly to the exclusion of other venues.

There is increasing pressure on telecom regulators around the world to permit differential data pricing and particularly zero rating. Expansion of this practice would merely turn the Internet into a service similar to cable TV – with different content-based packages being subscribed to by users. This would completely destroy the Internet as we know it today. Evidence shows that permitting such pricing packages, even in limited commercial instances, only leads to more and more of the big service

providers launching similar competing services – thereby ensuring that a large proportion of a countries users have only limited Internet access.<sup>5</sup>

Finally, it is worth pointing out that the Indian government cannot and should not outsource its duty to ensure adequate connectivity to the private sector. While certainly private sector involvement and expertise is a must, the state cannot side-step its responsibility in ensuring basic rights of the citizen to access the free and open Internet are not met.

*Applicability of the Tariff Order of 1999 to data pricing:*

It is noteworthy that through this consultation paper TRAI is *inter alia* attempting to regulate the relationship between content providers and those that provide access – namely the telcos/ISPs. The issue of tariff however, is something that concerns consumers / users and their service providers or telcos. Regulation of the relationship between a content provider and service provider is clearly a net neutrality issue, one that requires appropriate regulatory principles to be framed in order to be adequately addressed. The Department of Telecom has already produced a report (of May 2015) in which it has accepted the importance of implementing principles of net neutrality and we are of the firm opinion that this Report should have been used as the basis of developing the relevant principles further with a view to implementing appropriate regulation.

That said, while an argument could be made that price differentiation ought to be permitted on the lines of that permitted for voice etc. in terms of the Tariff Order of 1999, it is worth pointing out that the said Order does not deal with identical issues as the issue of Net Neutrality. The said Tariff Order is in consonance with the principle of common carriage and *we believe a similar analogy in the context of the Internet would be permitting differentiation based only on bandwidth offered/provided, or the usage of data.*

As stated in the TRAI Consultation Paper itself, *“differential tariffs results in classification of subscribers based on the content they want to access (those who want to access non-participating content will be charged at a higher rate than those who want to access participating content). This may potentially go against the principle of non-discriminatory tariff. Secondly, differential tariffs arguably disadvantage small content providers who may not be able to participate in such schemes. Such providers may have difficulty in attracting users, if there exist substitutes for free. This may thus, create entry barriers and non-level playing field for these players stifling innovation.”*

Permitting service providers to differentiate between users based on the content they may wish to access is akin to voice service providers charging consumers differently based on the topic of conversation and is clearly illogical and perverse. Such classification would go against the terms of the Tariff Order as being arbitrary and unreasonable.

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<sup>5</sup> Ariel Futter, Alison Gillwald, “Zero Rated Internet Services: What is To Be Done?”, Policy Paper 1, 2015:Broadband Africa, September 2015, [http://www.researchictafrica.net/docs/Facebook%20zerorating%20Final\\_Web.pdf](http://www.researchictafrica.net/docs/Facebook%20zerorating%20Final_Web.pdf)

Similarly, classification of content providers into different categories by a service provider (and thereafter providing users with differentially priced access to each category) would also violate the letter and spirit of the Tariff Order.

If we accept TRAI's position that the matter under consideration is a tariff issue pertaining to the classification of different types of subscribers and differential tariffs, we do not find that a contract between the telco/ISP and a platform such as Free Basics can be used to classify subscribers (i.e. a classification based on the content viewed or platform subscribed to by the user). This is an entirely arbitrary method of classification and based on an extraneous consideration – a contract by the ISP with a third party – and cannot be used as a basis of classifying subscribers. A differential rate of tariff, including data services is possible on the basis of usage, time of day, bandwidth, or even the *subscriber* being given a choice of a certain number of free websites (not to be confused with a platform like Free Basics – which forces users to submit to its choices of content).

The ultimate aim of TRAI should be to ensure a larger number of people have access to the full Internet. The single biggest push to this would be in reducing access costs to the Internet itself - accordingly we believe an alternate approach would be to bring down the cost of data services drastically, particularly for 2G Edge services, where few investments are being made by telcos. Data plans can provide for either a zero cost for the first slab of data usage, or a very low cost, to lower the threshold for accessing the Internet – similar to say how water or electricity – other essential public utilities are distributed in India. This will allow the full Internet to be accessed and not just a few websites, pretending to be the “basic Internet”.

#### Transparency:

We note that ensuring transparency in the provision of services is a key component of ensuring non-discriminatory and appropriate Internet access to consumers and accordingly believe that TRAI must put in place strong measures to improve the current standards of disclosure (and seeking consent) as followed by service providers.

It must be kept in mind that service providers are usually a single source of information for consumers, content providers and indeed for TRAI regarding all aspects of the provision of services. Further, agreements between content providers and service providers are private arrangements and not subject to public scrutiny. Should projects such as Free Basics be permitted, TRAI must ensure that all contracts between the ISP and Facebook are made public.

Accordingly, most consumers of Internet services are not in a position to determine whether they are being provided the services they have paid for or whether they are being cheated by their service providers.

Ensuring appropriate regulation, including through the imposition of transparency related provisions, is therefore necessary to ensure certainty in the market, ensure informed decision making by users, prevent malpractice by access providers and to create a level playing field for all users and indeed access providers. Permitting differentiate pricing (which would consequently encourage content providers and

service providers to enter into private arrangements to regulate access) would only act as a further barrier to transparency in the provision of Internet services for consumers.

In addition to the above, we also need to point out that Facebook's naming its platform 'Free Basics' is misleading. In the campaign that it has launched using Facebook itself, it says, "Unless you take action now, India could lose access to free basic internet services, delaying progress towards digital equality for all Indians. Tell the TRAI you support Free Basics and digital equality in India." Clearly, it is seeking to confuse the Facebook users and making them believe that Facebook is offering is "basic internet services", not a few websites that are partnering Facebook, which misleadingly called "Free Basics".

In light of the discussion above, our responses to the specific questions raised by TRAI are interleaved.

- 1) *Should the TSPs be allowed to have differential pricing for data usage for accessing different websites, applications or platforms?*

Response:

No. Service providers must not be permitted to implement differential pricing for data usage based on the content being accessed / platform being used to access the content.

















The disruption to the Open and neutral Internet environment created by differential pricing – both from the perspective of users and content providers creates perverse incentives in an otherwise reasonably egalitarian network. It must be kept in mind that permitting differential pricing can also increase the incentive for service providers to charge application providers to provide subsidies access. Service providers would have an incentive to lower monthly bandwidth caps or increase the per-byte price for unrestricted Internet use in order to make it more attractive for application providers to pay for prioritized / cheaper access to their content being provided by the service provider.<sup>6</sup> This would have the effect of hampering Internet access dramatically and making general Internet access far more expensive for users (as opposed to the specific content provided at a subsidized rate).

Data from Europe shows that by using differential pricing mechanisms, and subsidizing their own content services, service providers *"are foreclosing the mobile internet video market by placing all other competitors (e.g. Netflix, Vimeo) at a disadvantage. Watching third party Internet video over their open*

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<sup>6</sup> An example can be found in Germany where in 2013, Deutsche Telekom announced a plan that will cap the volume of fixed internet access connections but it will exempt its own IPTV (zero-rated) video service. The reaction from German authorities was swift. A German court blocked Deutsche Telekom's plan on the basis of consumer protection law while the German telecom regulator Bundesnetzagentur carried out an investigation and warned Deutsche Telekom that zero-rating could infringe net neutrality. Antonio S Drossos, "The Real Threat to the Open Internet is Zero Rated Content", World Wide Web Foundation and Digital Fuel Monitor/Rewheel, 2015, [http://dfmonitor.eu/downloads/Webfoundation\\_guestblog\\_The\\_real\\_threat\\_open\\_internet\\_zerorating.pdf](http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf)

*mobile internet plans instead of the zero-rated ones would eat up the monthly data allowances in the matter of hours or set them back few hundred EUR per month. Consumers are therefore left with really no choice but to opt for the service provider's content offering – thereby skewing the market (or ensuring that content providers are forced to partner with a service provider). Further, service providers are foreclosing the Internet video market by overpricing general Internet data while prioritizing their own services.”*

 <b>DIGITAL FUEL MONITOR</b> <small>MONITORING MOBILE CONNECTIVITY COMPETITIVENESS</small> <small>by Rewheel</small>				 <b>T-Mobile TV</b>	  
Operator group	EU market	Price & Gigabytes <small>Smartphone plan with unlimited mins &amp; SMS</small>	Price <small>additional Gigabyte</small>	Telco zero-rated video (TV/films)	Open internet video <small>(max allowed time to watch HD video in open internet plans)</small>
 TeliaSonera	Finland	€25 (50 Gigabytes)	€0.2	No	Practically unlimited ✓
 Hutchison 3	Austria	€36 (14 Gigabytes)	---	Yes (Unlimited 24/7)	5 hours per month <small>Not allowed to buy more!</small> 
 Orange	Spain	€40 (5 Gigabytes)	€10	Yes (Unlimited 24/7)	2 hours per month <small>(€30 per additional hour)</small> 
 Deutsche Telekom	Hungary	€45 (5 Gigabytes)	---	Yes (Unlimited 24/7)	2 hours per month <small>Not allowed to buy more!</small> 
 TELEKOM AUSTRIA	Bulgaria	€55 (10 Gigabytes)	---	Yes (Unlimited 24/7)	3 hours per month <small>Not allowed to buy more!</small> 
 Vodafone	Romania	€59 (6 Gigabytes)	€10	Yes (Unlimited 24/7)	2 hours per month <small>(€30 per additional hour)</small> 
 TELECOM Italia	Italy	€86 (13 Gigabytes)	---	Yes (Unlimited 24/7)	5 hours per month <small>Not allowed to buy more!</small> 

**Telecom groups are foreclosing the internet video market by overpricing mobile internet Gigabytes while prioritizing (zero-rating) their TV/film services!**

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(source: Antonio S Drossos, “The Real Threat to the Open Internet is Zero Rated Content”, World Wide Web Foundation and Digital Fuel Monitor/Rewheel, 2015, [http://dfmonitor.eu/downloads/Webfoundation\\_guestblog\\_The\\_real\\_threat\\_open\\_internet\\_zerorating.pdf](http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf))

Digital Fuel Monitor has shown in November 2014 that in many OECD markets where mobile operators launched zero-rated film stores and TV services, consumers are either not allowed to buy more than a few (5-10) gigabytes at all or most likely, they cannot afford to buy more because the price of additional gigabytes is prohibitively expensive (e.g. € 10 per gigabyte). Consumers are harmed because their choice of internet video services is severely restricted.<sup>7</sup>

Data shows that during the fourth quarter of 2014, several OECD mobile operators that have launched zero-rated video services have at the same time hiked the price of open mobile Internet usage.<sup>8</sup> It is also argued that the spread of zero rated and other such differential pricing mechanisms has been mirrored

<sup>7</sup> Antonio S Drossos, “The Real Threat to the Open Internet is Zero Rated Content”, World Wide Web Foundation and Digital Fuel Monitor/Rewheel, 2015, [http://dfmonitor.eu/downloads/Webfoundation\\_guestblog\\_The\\_real\\_threat\\_open\\_internet\\_zerorating.pdf](http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf)

<sup>8</sup> *Id.*

by the global decline of unlimited data plans, with only 1% of operators offering such deals in 2014, when they represented 35% of plans in 2012.<sup>9</sup>

Service providers operators have a fundamental conflict of interest in selling both open internet access and as well their own or their selected partners' online content. If price discrimination such as zero-rating is not banned, service providers have an incentive to favour their own services by zero-rating the usage (selling gigabytes at zero cost) while collectively overpricing the gigabyte usage of all other internet services. The economic problems likely to be caused by permitting differential pricing are described particularly well in a letter written to the FCC by 36 noted American scholars (including Lawrence Lessig, Tim Wu and Barbara van Schewick) available at <https://cyberlaw.stanford.edu/downloads/ProfessorLetterToFTC-20150129.pdf>.

Essentially, however, “if price discrimination such as zero-rating is banned, service providers are commercially incentivized in pushing down the price of open internet (or conversely push the monthly volume caps as high as possible) in order to encourage the carefree usage of, first and foremost, their own video and cloud services.”

“In the Netherlands, where zero-rating is banned, KPN just doubled (free of charge) the mobile internet volume caps to encourage a carefree usage of its online videos. KPN's action is the first empirical evidence of the pro-competitive benefits of real net neutrality rules that ban zero-rating and all other forms of price discrimination”.<sup>10</sup>

- 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?*

Response:

The principles of non-discrimination, transparency, affordable internet access, competition and market entry and innovation are best addressed by ensuring that service providers are not allowed to act as gatekeepers of the Internet.

Permitting differential pricing for data usage on grounds of the type of content accessed by the user would violate the principles of the Tariff Order as well as general principles of non-discrimination and promotion of plurality in the media / content space.

- 3) *Are there alternative methods/technologies/business models, other than*

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<sup>9</sup> “Access's Comments to the Brazilian Government on Zero Rating and Marco Civil”, Access, [https://s3.amazonaws.com/access.3cdn.net/7f755440a612008202\\_evm6b93it.pdf](https://s3.amazonaws.com/access.3cdn.net/7f755440a612008202_evm6b93it.pdf)

<sup>10</sup> Antonio S Drossos, “The Real Threat to the Open Internet is Zero Rated Content”, World Wide Web Foundation and Digital Fuel Monitor/Rewheel, 2015, [http://dfmonitor.eu/downloads/Webfoundation\\_guestblog\\_The\\_real\\_threat\\_open\\_internet\\_zerorating.pdf](http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf)



*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?*

Response:

As recognized by TRAI there are alternate models that can be used to provide free or subsidized Internet access to the general populace. We strongly urge TRAI to consider the first option suggested in paragraph 19 of the Consultation Paper viz. delink free internet access from specific content, and instead limit it by volume or time. This would ensure user choice, a neutral and competitive Internet market place and would also meet the aim of enhancing Internet access.

There are many different models in vogue across the world today (notably in Africa, the Middle East and certain Asian countries) that provide subsidized access without breaching principles of net neutrality.

Mozilla's Mitchell Baker has pointed out alternatives<sup>11</sup>:

- subsidizing Internet access for users by showing them advertisements;
- companies offering free data in the form of coupons, on the basis of the usage of their website;
- donation of money to subsidise Internet access for the poor;
- instances of citizens with expensive data plans being charged a nominal fee which can be used to subsidise Internet access for the poor.

We understand that Mozilla and Orange have experimented with data bundled with handsets in Africa, and in Bangladesh<sup>12</sup>, Grameenphone, along with Mozilla, allows users to get data if they watch ads. For instance, Orange clients in Africa are offered free talk, text and 500 mb of data per month for 6 months when buying a 40\$ phone sponsored by Mozilla. In Asia, Telenor's clients get 20m of data per day free in exchange for watching a 30 second advertisement.<sup>13</sup>

mCent, a service from Boston start-up Jana, makes it possible for any app developer to underwrite a user's cost of downloading and using an app.<sup>14</sup>

Separately, we believe that TRAI could consider exempting certain specific

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<sup>11</sup>Neutral Web, "Internet Access Alternatives to Internet.org for the Digitally Excluded. Don't Let Access Providers Become King Makers", Medium.com, May 6, 2015, <https://medium.com/@inw/internet-access-alternatives-to-internet-org-for-the-digitally-excluded-don-t-let-access-providers-7aa481c03569>

<sup>12</sup> Mitchell Baker, "Zero Rating and the Open Internet", May 6, 2015, <https://blog.lizardwrangler.com/2015/05/06/zero-rating-and-the-open-internet/>

<sup>13</sup> Access, "Policy Brief: Access's Position on Zero Rating Schemes", [https://s3.amazonaws.com/access.3cdn.net/d812d59f706c3e8a75\\_w0m6iipn5.pdf](https://s3.amazonaws.com/access.3cdn.net/d812d59f706c3e8a75_w0m6iipn5.pdf)

<sup>14</sup>David Talbot, "Facebook's Controversial Free App Plan Gets Competition", MIT Technology Review, May 6, 2015, <http://www.technologyreview.com/news/537201/facebooks-controversial-free-app-plan-gets-competition/>

public / government services from any restrictions imposed on regular content providers / service providers – however these exemptions must be on a case-by-case basis and purely on public interest grounds (as opposed to commercial interests).

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

Response:

See introductory comments above.