

TRAI Consultation Paper
dated 09 December, 2015
on "Differential Pricing for Data Services"

Counter Comments

14 January, 2016

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1. Level Playing Field:

Some Telcos have argued that Voice Over Internet Protocol (VoIP) Services and Over The Top (OTT) services creates a non-level playing field between licensed TSPs providing voice services and OTT charging of underlying data services:

- a) Bharti Airtel and Vodafone India have stated in several sections of its submission, that the principle of “Same Service, Same Rules” should be followed, and thereby, Differential Pricing strategies, *including those involving commercial quid pro quos between Telcos and Content Providers* must be permitted.

Counter Comments:

This consultation is examining the issue of Differential Pricing for Data Services. At the very outset, it must be said that the vague responses and claims made by Telcos with regard to “Level Playing Field” are irrelevant to this question and can be ignored.

At the same time, it is important to understand the argument that the Telcos are making: The claim regarding the threat to their viability (which is primarily driven by the intention to create barriers to innovation and competition) contradicts all available evidence in their quarterly financial reports which point to significant revenue growth.

Their call for Differential Pricing is with a view to ensure that they are permitted to cabelize the internet through gatekeeping.

The need for a free, open and fair internet, however must supersede this desire of Telcos to misuse control, and increase profits. Internet based innovations are disruptive to the internet landscape, but bring a host of transformative benefits to citizens and the economy. These cannot be denied to consumers because of Telcos who are interested in maintaining the status quo. Their comments, therefore, may be considered in this light.

I reiterate what I have stated in my submission to TRAI with regard to Differential Pricing arrangements involving Telcos and Content Providers in a commercial arrangement, including Sponsored Data, differential speeds etc.

Telcos cannot be permitted 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 the “cabelization” of the Internet.**

2. Differential Pricing has “Societal Benefits”:

Vodafone India, has in its submission to the TRAI stated :

“Differentiated pricing also has societal benefits, ensuring that communications and internet services are accessible, affordable and available. Differentiated pricing for data content expands participation in online content. Increasing internet access has been shown to increase productivity, support enterprise and innovation, increase employment and economic growth.”

Counter Comments:

This claim by Vodafone amounts to a Telco suggesting that the cabelization of the internet and vesting Telcos with gatekeeping powers delivers several societal benefits. This is false and the reverse is true. Allowing gatekeeping and cabelization will cause medium to long term disadvantages to Consumers, Technological Innovation and Entrepreneurship.

(Read also my counter comments to Question 1).

As stated in my submission to the TRAI, Differential Pricing can only be permitted if there is no commercial quid pro quo between Telcos and Content Providers like Sponsored data, or if it is to Zero Rate a government mandated service. This however, is very different from a bland assertion that all forms of Differential Pricing are acceptable and deliver societal benefits.

It is amusing to note that Telcos, with obvious vested commercial interests in the cabelization of the internet, and a highly questionable track record with regard to consumer rights and Quality of Service, are camouflaging their intentions to control the internet under the guise of “societal benefits”.

As I've stated in my counter comments to Question 1 above, Differential Pricing arrangements involving commercial quid pro quos are an inverse form of predatory pricing, and should not be permitted, as it will lead to the cabalization of the internet by Telcos.

Telcos should not be permitted to exercise any control on the consumers' right to surf the net, and must not have any say in pricing or network management. The real "societal benefits" listed by Vodafone in its submission can only be accrued by deploying net neutral strategies that do not place fetters on the rights of internet consumers, and without affecting its open, accessible character.

These include, amongst others:

- a. 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.
- b. 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.
- c. Customer Subsidy Mechanisms: Subsidy schemes as adopted under the flagship Government schemes such as MGNREGA could be adopted to provide free data to the customers. Free internet coupons can be given to consumers who can select which apps or websites to use.
- d. Time Based Model: Operators can provide hourly and daily passes for access to its WiFi network
- e. Freemium Models: Under this model, the service providers can offer managed service for public locations (e.g., coffee shops, hotels, airports, stadiums, railway stations) that want to provide free access to their customers and employees.
- f. Wholesale Model: Internet providers can form partnerships with venue owners so they could propose WiFi networks with a discounted or free model to the end customers. In this model, the operator shares the investment costs and revenue with the venue partners.
- g. Community Hotspots: This model is popular in western countries where the WiFi connections at home hubs enable users to share their WiFi signals with others. In Transit Model: Public transport such as bus, train and cabs can be WiFi enabled.

3. Differential Pricing is a Legitimate Business Practice:

Telcos such as Idea and Reliance India have stated in their submissions to TRAI that “Differential Pricing is a legitimate business practice and does not in any way hinder consumer choice or innovation, as consumer choice is contingent on “free will of consumers” and the “appeal of the innovative product”.

Idea Cellular has quoted section 11 (2) of the TRAI Act, saying that Differential Pricing falls under its purview:

*“PROVIDED that the Authority may notify different rates for different persons or class of persons for **similar telecommunication services** and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.”*

Counter Comments:

Differential Pricing can only be considered a legitimate business practice if the cabalization of the internet is considered legitimate. Any attempt to overlay these so called “business practices” only end up distorting competition and consumer choice and will cabalize the internet. It will create a situation which becomes irreversible even with regulation and policy.

As evidenced in the cable industry, finite competition can lead to adverse impacts on consumer interests and shall create a situation that will be difficult, if not impossible to regulate.

(Please read responses to Questions 1 & 2)

This is an inaccurate and opportunistic legal interpretation of Section 11(2). This provision explicitly states that different rates may be charged for different persons for “**similar communication services**”

This assertion is false and blatantly ignores the fact that there is no similarity between services provided by Telcos i.e. providing *access* to the Internet, and services ON the internet i.e. applications and content that use these access pipes to provide innovative technological services.

This comparison of applications and content ON the internet, to the services provided by Telcos – which are essential pipes that provide access, is akin to comparing Apples and Oranges!

4. Existing Regulations are Adequate to protect Consumer Interests:

Some Telcos have stated in their submission that the current regulatory regime has served to adequately protect the interest of consumers availing of telecom and internet based services.

Vodafone India states, for instance:

“The competitive intensity of the market has resulted in largely self-regulatory mechanisms that have ensured the protection of consumer interests”

Idea Cellular states in its submission:

“The existing legal regimes provide sufficient protection against any monopolistic or distortive behavior by operators without stifling innovative offers that enable smaller competitors to enter the market.

All Internet transactions are governed by the same laws that govern other commercial transactions. Some of these safeguard laws include:

- i. Competition Act, 2002*
- ii. Information Technology Act, 2000*
- iii. Consumer Protection Act, 1986*
- iv. Indian Contract Act, 1872*
- v. Indian Penal Code, 1860*
- vi. Intellectual Property Rights (especially Copyright Act, 1957)*

It is thus felt that the principles of non-discrimination, transparency, affordable internet access, competition and market entry and innovation would be sufficiently addressed through existing statutes and laws”

Counter Comments:

I completely reject this view-point. Currently, many of the TRAI's orders that seek to protect consumer rights are being challenged by various Telcos across different jurisdictions across the country. The TRAI Act, in its current form, does not have enough teeth to adequately define and enforce consumer rights. There is significant evidence that due to the finite number of access providers and limited competition in the sector, there exists a pricing and QoS co-op. There is therefore a need for a strong set of legal consumer rights and a legislation that gives Indian consumers a fair deal.

As I've stated many times in the past, the TRAI has, in fact, had a dismal track record with regard to issues connected to Quality of Service and Consumer Protection.

The last year have seen several lapses on part of the TRAI and the Ministry of Communications & Information Technology, with regard to issues connected with internet consumer rights – as the ban on pornography, the draft encryption law, privacy and the one-sided consultation on Net Neutrality have demonstrated.

Two issues, therefore, require immediate addressing. These are concerns I have also explicitly stated in my submissions to the TRAI since 2008, and my speeches in Parliament:

1. Need for a Legislation on Net Neutrality, and inclusion of rules in the licensing conditions for Telecom Operators, vis-à-vis enforcing Consumer Rights:

An immediate measure to ensure that Net Neutrality principles are upheld by Telcos is to ensure that there is a clear legislation outlining the basic principles of Net Neutrality and a set of clear conditions that are binding on Telcos. Further, the licensing agreements for Telcos must include contractual clauses on differential tariffing and other Net Neutrality principles within the licence agreement for the provision of Internet Services by TSPs.

2. Amending the TRAI Act to increase the powers of the Regulator:

The regulator must also be vested with increased powers to regulate and punish breaches of Net Neutrality principles. This can be done by amending the Telecom Regulatory Authority of India (TRAI) Act, 1997 to expand TRAI's regulatory powers to include issues such as Net Neutrality, Privacy, QoS and Freedom of Expression. Currently, TRAI only exerts limited control over issues such as pricing and tariffs and QoS under section 11(b)(5) and section 11(c), respectively.

Further, there is also a need to build the capacity of the TRAI in order to ensure that the regulator is able to effectively handle any future challenges that may present themselves in the Indian internet landscape. The rights of Internet consumers, including Net Neutrality, Privacy, Freedom of Expression and Quality of Service will require an enabling framework – and shall pose a major regulatory challenge to India's technological future, unless addressed now.