



Society for

Knowledge Commons

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January 14, 2016

To,

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

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

Dear Sir,

Apropos of the captioned Consultation Paper and further to our initial responses / comments submitted to TRAI on December 29, 2015, we enclose herewith the joint Counter Comments of the Society for Knowledge Commons, Delhi Science Forum and the Free Software Movement of India.

While we would like to place on record our appreciation regarding the transparent public consultation being carried out by TRAI, we would request TRAI to kindly ensure that in future consultations, the time given to submit counter comments be notified based on the number of comments received by TRAI in the initial phase of public comment. One issues such as the present one, given the large number of comments received by TRAI, it is difficult for smaller organisations and indeed individuals to peruse the entire set of comments / submissions made to TRAI within just a few days.

Yours sincerely,

(Rishab Bailey)

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

Joint Submission by the Society for Knowledge Commons, Delhi Science Forum and the Free Software Movement of India

At the outset, we would like to affirm and reiterate the comments made in our original response to the TRAI Consultation Paper, submitted to the TRAI on December 29, 2015, by e-mail and in hardcopy (hereinafter the “Original Comments”). For the sake of brevity, we have not reproduced / restated each argument and relevant data already presented in our Original Comments and the same may kindly be read as part of the present Counter-Comments.

- 1) **The Internet is unlike other media (including cable television), TRAI must act with urgency to preserve the Open Internet and accordingly must address the issue of net neutrality in a holistic manner by putting in place high level principles:** We believe that TRAI must act urgently to protect and maintain the Open Internet, as is being done in numerous other jurisdictions, including through the use of appropriately framed network neutrality regulation. 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. TRAI must act with urgency to ensure that barriers are not placed in the ways in which the public in India is able to access the Open Internet. India needs to connect people not to a limited set of content¹, but to open them up to the possibilities afforded by the freedom of the Internet. TRAI must act in public interest and impose appropriate regulation that will ensure that users, particularly new and first time users are not cheated of a proper / full Internet experience. The Internet is unlike other mediums such as television and must not be allowed to become the same. TRAI must accordingly adopt a position that aims to primarily protect the interests of the common citizens of the country by permitting universal, non-discriminatory and affordable, access to a global public good (rather than structure the regulatory regime to permit private gain to be made at the cost of public welfare). This will however mean that TRAI must adopt a proactive stance in preventing the possibility of gatekeeping by TSPs/ISPs.
- 2) **There is a positive obligation on the Regulator to administer the Internet / telecom infrastructure and facilities in public interest. TRAI must therefore take a rights based approach to regulation as opposed to solely examining competing economic interests.** In this respect it is worth remembering the positive obligation cast on the Government of India (and indeed on the sectoral regulator) to ensure that citizens in India, specifically those who are still unconnected have access to the complete range of opportunity provided by the whole public Internet (not merely a specific portion thereof as would occur in the case differential pricing is permitted on grounds of content viewed by the user). In addition to obligations cast by the Constitution of India (it is arguable that denying users the opportunity to access the full Internet is a violation of a citizens right to free speech and expression²) and the TRAI Act, India has also signed a number of international agreements

¹ We use the term “content” to refer broadly to the series of websites, applications and services available on the public Internet. The term subsumes the different types of such applications and services that comprise the Internet.

² The Supreme Court of India has read into Article 19 of the Constitution that citizens have a right to plurality of information (which includes the right to receive information from a multiplicity of sources). Notably, in *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, the Supreme Court held that “The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an ‘aware’ citizenry.

that cast an obligation on it to ensure unfettered access to the whole Internet. In this regard one may refer to numerous international instruments such as the Universal Declaration of Human Rights / ICCPR³, the WSIS Tunis Agenda⁴, the Sustainable Development Goals⁵, the ITU Constitution,⁶ etc. It must therefore be kept in mind that while market-priorities and access to information are important, it is an equally important principle embedded in the Indian constitution as well as numerous international instruments that no entity, not even the government, can control the nature of information that citizens are able to access. Given that TSPs/ISPs are essentially performing a public function in giving citizens the access to telecommunication services, TRAI must put in place an appropriate public facing regulatory regime.

- 3) **The Internet is more than a marketplace, TRAI must therefore approach the issue from a holistic and rights based perspective keeping in mind the fact that the Internet is a general use / general purpose technology.** Many of the comments made to TRAI by ISPs/TSPs treat the Internet primarily as a place for commerce. However we believe that TRAI must not approach this issue from the myopic perspective of looking at the Internet only as an economic marketplace. The Internet is far more – it is place for exchange of ideas, a repository of human knowledge etc. As pointed out by the Supreme Court recently in the *Shreya Singhal* judgment⁷, the Internet is a ‘market place of ideas’. Similar comments were made for instance by the UN Special Rapporteur Frank la Rue, who stated in his May

Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly — whether the monopoly is of the State or any other individual, group or organisation...”. Accordingly, we believe that permitting zero rated and similar platforms may be problematic as this would restrict the right to freedom of expression as it will encourage monopoly control over the information available to a large number of citizens.

3 Which notable states that “a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression” and that “the public also has a corresponding right to receive media output”. On ICTs in particular, a comment on the International Covenant on Civil and Political Rights (ICCPR) by the UN Human Rights Committee in 2011 says that signatories “should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.” Refer OHCHR Human Rights Committee: General Comment 34 on Article 19, available at www2.ohchr.org/english/bodies/hrc/comments.htm

4 In particular, refer paragraphs 10 (“We recognize that access to information and sharing and creation of knowledge contributes significantly to strengthening economic, social and cultural development, thus helping all countries to reach the internationally agreed development goals and objectives, including the Millennium Development Goals. This process can be enhanced by removing barriers to universal, ubiquitous, equitable and affordable access to information. We underline the importance of removing barriers to bridging the digital divide, particularly those that hinder the full achievement of the economic, social and cultural development of countries and the welfare of their people, in particular, in developing countries.”), 17 (We urge governments, using the potential of ICTs, to create public systems of information on laws and regulations, envisaging a wider development of public access points and supporting the broad availability of this information. and in particular paragraph 18 which states that “We shall strive unremittingly, therefore, to promote universal, ubiquitous, equitable and affordable access to ICTs, including universal design and assistive technologies, for all people, especially those with disabilities, everywhere, to ensure that the benefits are more evenly distributed between and within societies, and to bridge the digital divide in order to create digital opportunities for all and benefit from the potential offered by ICTs for development.”

5 Goal 9 is a commitment to provide “universal and affordable access to the Internet” (emphasis added). Transforming our World: The 2030 Agenda for Sustainable Development, United Nations, See http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.85&Lang=E

6 Which recognizes the right of the public to access international telecommunication services with specific conditions specified under which access can be barricaded – refer Article 33 and 34 of the ITU Constitution available at www.itu.int/net/about/basic-texts/index.aspx

7 Judgment of the Supreme Court of India dated March 25, 2015, in WP (Cr) No. 167/2012, *Shreya Singhal v. Union of India*.

2011 report⁸ that “*the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression.*” The aforementioned report further refers to the Internet as a “*catalyst for individuals to exercise their right to freedom and expression, the Internet also facilitates the realization of a range of other human rights*”. 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 mankind – in that it enables unimaginable social benefits and efficiencies through connecting every person. Accordingly, TRAI must approach any regulation from the perspective of ensuring protection of and access to this space as a common public resource. Given the importance of the Internet as an enabler of rights and economic and social progress, TRAI must adopt a rights based approach to providing access to the Internet and not reduce the debate to merely a question of balancing economic efficiencies.

It must be kept in mind that the Government (and the sectoral regulator) are to act in public interest – airwaves, spectrum etc. are administered by the Government in trust for the citizens of India.⁹ Accordingly, the primary motivating factor in any regulation must be maximization of public welfare and not the maximization of private profit. Providing universal and holistic / complete Internet access meets an obvious social need and serves public good. TRAI must accordingly act to fulfill its statutory and constitutional obligations in ensuring that Indian citizens are not denied access to the range of content that is currently available on the Internet in favour of permitting TSPs/ISPs to become gatekeepers of this vital resource.

- 4) **The attempt by TRAI must be to provide cheaper / affordable access to the entire Internet not a portion thereof.** TRAI must attempt to foster an atmosphere where innovation is supported - which is best served by trying to increase the size of the pie (in terms of bandwidth availability etc.) rather than trying to dice the existing pie more finely. TRAI must attempt to put in place a regulatory regime that will encourage Telecom and Internet Service Providers (TSPs/ISPs) to invest in infrastructure and network development rather than put in place an atmosphere where such companies will thrive by creating an artificial scarcity. Differential pricing incentivizes the creation of a scarcity of bandwidth – thereby ensuring that TSPs/ISPs will not invest in infrastructure and network development but will rather look to ensure that the existing pie is fought over by more and more people (thereby pushing up profits). 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

⁸ http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

⁹ The Supreme Court has held in the Cricket Association of Bengal Case (cited previously) that since airwaves are a scarce public resource, they must be administered in the best interests of society. Telecommunications infrastructure is recognized by Indian law as a public resource / public utility of strategic importance – notably in the Delhi Science Forum case (1996) 2 SCC 405. Further, in the 2G Case (Centre for Public Interest Litigation v. Union of India – (2012) 3 SCC 104), the Supreme Court recognized spectrum as a scarce natural resource, and applied the public trust doctrine to explain that the state must protect such resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

it to charge differential rates for different content – thereby adding a perverse incentive to a notionally egalitarian market and ensuring that service providers will not have an incentive to invest in network and infrastructure growth.

- 5) **On what basis should price differentiation be permitted?** The primary issue at hand in the present consultation paper is that of whether TSPs/ISPs may classify users according to the content they view on the Internet (and accordingly charge them at different rates). We believe that such a basis for classification is wrong, impractical and arbitrary.
- a. Charging differently based on what specific content a user accesses would kill the Internet as we know it today. It would privilege certain content thereby defeating the flat nature of the Internet – and would deny millions of users the ability to reach other users.
 - b. At the telecom layer, it is a recognized principle the world over, that all data packets must be treated similarly. This is the basis of the net neutrality principle. It is relevant to note that under our present system of licensing of telecom services, the entire Internet is treated as a single service / entity and TSPs/ISPs are licensed for providing data services – they transmitted data packets generated by the users, or more correctly, users' computers. What is within the data packets is treated as content – video, audio, text or pure data -- and generally not subject to telecom regulations. The carrying of data is the service provided by the relevant licensee. This is also the principle on which the International Telecom Union works and is the same system as anywhere else in the world. Accordingly, in India, an applicant may seek, say an ISP license to provide access to the public Internet. Notably Clause 2.1, Chapter IX of the UASL¹⁰ provides that “The subscriber shall have unrestricted access to all the content available on Internet except for such content which is restricted by the Licensor/designated authority under Law.” This framework of treating the entire Internet as a single service is one of the primary reasons why permission less innovation is possible in the context of the Internet. Separating the Internet into different services – each of which can be charged for differently – is an attempt to change an existing structure that is globally followed. We do not believe there is any pressing need to make such a far reaching, or for that matter impractical change to the regulatory structure – which will only have the effect of stunting Internet penetration, raising costs for the user, and limiting the growth of content / services / applications on the Internet.
 - c. It is impossible to disaggregate and precisely pigeon hole content/services in the context of the Internet. The advent of Web 2.0 around the turn of the century has ensured that a majority of online content is interactive in nature. This is what has lead to the explosion of Internet usage over the last decade or so. The increasing use of HTML 5 will only mean greater interactivity and converged services. This however means that online services are either converged or extremely difficult to disaggregate and classify based purely on traditional conceptions of function. For instance, any blog, any comments section on a website or even a document management program such as Google docs can practically be used as a replacement for SMS – in that they all provide the ability to communicate in real time using text. In this context attempting to classify content into predefined boxes and permitting differential charging according to the type of content makes little practical sense and would merely result in opening Pandora’s box. Such a system where TSPs/ISPs are allowed to charge based on the type of content accessed is also likely to be practically unworkable given the vast quantity of content, services and applications present on the Internet as well as the pace of online innovation.

¹⁰ <http://www.dot.gov.in/sites/default/files/Unified%20Licence.pdf>

- d. Permitting such a practice would also create privacy related concerns given the possible use of deep packet inspection and other such invasive techniques by TSPs/ISPs to implement such differential pricing packages.
- 6) In light of the arguments advanced above as well as in the Original Comments, we believe that differential pricing based on content viewed by the user must not, as a general rule, be permitted. However, we do recognize that in public interest certain specific and well-defined exceptions may need to be made. Specifically we believe that exemptions can be made for the following (i.e. such content can be priced differentially):
 - a. Emergency services, similar to how voice service providers are required to provide access to police and ambulance helplines;
 - b. Designated public services (that are not commercial in nature) in order to provide government services to the poor and marginalized etc.
 - c. Specifically defined Enterprise Solutions (as discussed later on in this document).
 - 7) **Zero-rating is neither the best nor the only model of providing subsidized access.** It is contended by numerous TSPs/ISPs that zero rating content is the best mechanism of providing cheaper / affordable Internet access. This is patently untrue. Many of the submissions, have in fact provided alternative models of providing subsidized access, including through direct subsidies, through viewing of advertisements by the consumer, creation of publicly usable hotspots, public provisioning at municipal offices, post offices, suvidha kendras, use of community networks for last mile access etc. In particular, we believe that the regulator must examine the use of community based models of access that are being utilized world over to provide cheap and easy access to citizens, including in areas traditionally left unserved / unconnected by big telecom companies.

We believe that TRAI must, in recognition of the fact that the Internet is a public utility, put in place a tariff regime that adopts telescopic / progressive rates – much as in the case of other public utilities such as water, electricity and gas. TRAI must look to bring down the costs of data drastically. 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”.

- 8) **While differential pricing is used across different industries, it is the grounds of differentiation that is the contentious issue.** It is contended by numerous TSPs / ISPs in their comments that differential pricing is a common method of market segmentation used in several industries. Certain comments have provided literature on the economic efficiencies of differential pricing.

We believe that differential pricing is certainly a legitimate business practice. However, the key issue is the grounds on which such differential pricing is done or applied. The comments made, particularly by large TSPs/ISPs are merely an attempt to obfuscate and mislead in attempting to equate different methods of classification of consumers / products across industries.

Therefore examples are provided of differential pricing for different types of airline tickets, or for different models of a similar car. However, none of these examples are comparable to that of providing access to the Internet.

We see no problems with differential pricing on certain valid technical grounds – for instance guaranteed uptime, the type of connection provided (leased line, wi-fi etc.), or the

amount consumed.

The problem however, as explained previously, is with the basis of differentiation being the content accessed by the user.

It is incumbent on TRAI to ensure that differential pricing is done on only legitimate grounds and in accordance with appropriately defined criteria – and as explained previously we believe classification in accordance with the content viewed is arbitrary, anti competitive, against public interest and impractical for the regulator to implement/police.

- 9) **Openness of zero rated platforms will not address competition related and other problematic issues.** Various comments have stated that as long as zero rated platforms are ‘open’ i.e. they will host any services they will not have any anti competitive effect. 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.

Permitting differential pricing on the grounds of content viewed, 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 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.

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

- 10) **Differential pricing on the grounds of the content being viewed is not required for TSPs/ISPs to get commensurate returns on investment.** Various TSPs/ISPs have contended that differential pricing on grounds of the content viewed is essential for them to recoup investments and expand the network. We believe that this is mere eyewash. Given the massive amounts of revenue¹¹ being generated by service providers on account of growth

11 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

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.

- 11) **TRAI must act immediately to prevent TSPs/ISPs from assuming a gatekeeping function and prevent irreparable harm to the Internet architecture and ecosystem in India. Existing competition law is insufficient and inadequate to protect the Open Internet.** It is essential that the TRAI act with urgency to ensure that this public utility is not turned into a club good – with TSPs/ISPs acting as toll booth operators and determining how and what content / services users should access. Given the importance of the Internet we believe that TRAI must take proactive measures to ensure competition, innovation and consumer protection in the online space – TRAI cannot afford to and should not take regulatory steps only after the horse has bolted. The situation is similar to a doctor refusing to take ameliorative care and only wanting to conduct a post mortem on a patient.

In any event, despite the many claims that there is no evidence of market failure, we believe that not only are existing violations of the principle of net neutrality sufficient to enable the TRAI to make an evidence based determination of the harm done to the online environment, but that TRAI must in any case act on an urgent basis to ensure that no further incidents of violation or market failure occur.

<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

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>

As stated in our Original Comments, the use of zero rating and other such options is indicative of a new form of cartelization emerging in the Internet economy – with TSPs 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 TSPs 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.

In this context it is also noteworthy that essentially it is only the big / dominant TSPs / ISPs and Internet companies that have sought to implement a differential pricing regime on the grounds of content viewed by the user. The comments received by TRAI clearly show that smaller ISPs/TSPs, users and content providers all are against such a practice of differential pricing. In the premises, it is only too clear that there are certain specific big business interest that are driving the present ‘demand’ for differential pricing. This is as referred to above, only an attempt to consolidate their premier market positions and corner the Internet marketplace completely.

In addition to the above, we believe that permitting TSPs to take advantage of the irrational consumer choices made when a product is free at the cost of long and medium term social welfare is not a stance TRAI should subscribe to.

In this respect it is worth noting that market forces themselves have not prevented certain unethical practices from being followed (including as noted in the Consultation Paper itself – with reference to charging practices for consumers switching between zero rated/non-zero rated content). Further public opinion has not always succeeded in changing unethical practices followed by TSPs – which often function as cartels – in adopting anti-consumer practices en masse. It is worth noting that despite constant protestations¹² against for instance the imposition of Fair Usage Policies, these are becoming ubiquitous across the market.

Many comments have said that there is no need for special regulation and that existing competition regulations are sufficient to ensure public interest is protected. However, we believe that competition regulation on its own is insufficient to meet the needs of maintaining a truly Open Internet. As pointed out by 36 noted academics in their letter to the FCC¹³, there are 3 main concerns with paid prioritization of specific content. First, a service provider can harm competition by raising the costs of select edge providers (say those who are competing with its own services); second, a service provider can exploit its gatekeeper position or terminating monopoly to impose excessive charges on edge providers for access or preferential access to the service provider’s end users; third, a service provider would have the incentive to degrade or decline to increase the quality of service provided to normal traffic, including by slowing capacity expansion, in order to push edge providers to pay for a technically superior service and exploit its monopoly power more effectively. The service provider is similarly incentivized to set low monthly bandwidth caps in order to motivate edge providers to pay for exclusion from the cap. Each of these three threats raises competition concerns. The first, involves exclusionary conduct against targeted content providers in order to maintain market power for specific content. The second and third

12 See for instance the Petition Against Airtel’s Fair Usage Policy, available at <http://broadbandforum.co/afup/> and Katya Naidu and Shubhashish, “Fair Usage Policies Tick off Broadband Consumers”, Business Standard, February 21, 2011, available at http://www.business-standard.com/article/technology/fair-usage-policies-tick-off-broadband-consumers-111022100076_1.html

13 <https://cyberlaw.stanford.edu/downloads/ProfessorLetterToFTC-20150129.pdf>

involve exploitation of market power over content providers available to a terminating access monopolist to charge excessive process to content providers for access or preferential access to its subscribers. Competition law enforcement after problems arise cannot address the second and third problems stated above, and would only address the first problem in part.

TRAI banning differential charging on grounds of the content viewed would prevent market power arising from targeted exclusionary conduct. Competition law enforcement alone cannot fully address this problem because of the difficulty of proving such a violation when the competitive harm arises from chilling potential competition and innovation by content providers that are not yet a success or have not yet been imagined. Competition law cannot practically prevent the other two competition problems associated with paid prioritization: excessive access charges imposed by terminating monopolists and their incentive to degrade non-priority traffic or set low monthly bandwidth caps. That's because competition law liability requires identifying anticompetitive conduct that creates or maintains market power. A firm's mere exploitation of market power through monopoly pricing or its decision not to invest in upgrading non-priority services or to impose low bandwidth caps would rarely satisfy this condition for competition law enforcement.

Further, we believe that TRAI is indeed the appropriate authority to take action on the core issue of network neutrality (and the same cannot be left to institutions such as the Competition Commission and Consumer forums). While we recognize that the various regulatory authorities may indeed have concurrent jurisdiction over various matters, we note that TRAI is the competent sectoral regulator and network neutrality is squarely an issue related to regulation of unethical practices by access providers. As mentioned previously, TRAI must take the lead in putting place appropriate regulation not only to ensure existing violations of the principle of network neutrality do not continue unchecked, but also ensure that further and more insidious violations are not seen in the market.

In this respect it is worth pointing out that neither the Competition Commission nor the Consumer Forums have the power to issue directions to an entire sector as the TRAI does. These are generally speaking adjudicatory forums where rights *inter se* parties are usually determined, and not a sectoral regulator set up with the specific purpose of ensuring proper growth and regulation of the telecom sector in India.

- 12) **Creating an exception for enterprise solutions:** Many industry players have argued for enterprise solutions / specialized services to be excluded from the purview of the present consultations, which they argue should only apply (for various reasons) to the public Internet.

While we do not per se object to the exclusion of private networks / specialized services from the scope of net neutrality regulation (or indeed differential charging from normal retail services to the public), care must be taken to ensure this exception is not used to defeat the purpose of any net neutrality or other regulation implemented vis-à-vis the public Internet.

Defining the scope of what constitute specialized services will therefore be critical (and should not be left to the market). Allowing ISPs/TSPs the ability to declare any specific system/platform a private network – for instance Facebook declaring Free Basics as a private network / specialized service – would permit public interest regulations to be evaded easily.

Therefore, it must be ensured that any private networks are actually private networks – and that no portions of the public Internet can be accessed using this method or that this does not end up being a method to avoid regulations applicable to the public internet while providing similar services.

Should such an exception be created, constant vigilance will therefore be required by TRAI to ensure the provision is not taken advantage of and is appropriately adhered to.

- 13) **Improving transparency and implementing a system of public scrutiny.** In the event TRAI does permit differential pricing on the grounds of content being viewed by the user, it is then necessary to set up a pre-implementation system of scrutiny regarding each individual instance or proposal to offer a differential pricing plan. The public must be provided an opportunity of being heard (as must the relevant TSP/ISP) and a determination made as to the possible anti-competitive and other effects of the individual tariff plan.