

Dated July 5, 2016

To
Shri A. Robert J. Ravi,
Advisor (QoS),
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi - 110002.

Subject: Access Now comments to TRAI pre-consultation paper on net neutrality

Shri Robert Ravi,

I write to you in connection with the pre-consultation paper which the Telecom Regulatory Authority of India (TRAI) published in May seeking public comments. This letter contains Access Now's initial comments in response to the pre-consultation paper.

Access Now is an international organisation which works to defend and extend the digital rights of users at risk globally. Through presence in 10 countries around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. Access Now also engages with its global community of nearly half a million users from over 185 countries, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world.¹

We have previously provided inputs to TRAI on issues relating to net neutrality via the joint comments we filed with nine other organisations in January of this year on the consultation paper on differential pricing for data services.² We have also actively engaged with many of the key global discussions on this issue. In the United States, we provided comments to the FCC's "Protecting and Promoting the Open Internet" Notice for Proposed Rulemaking which were cited in its historic Open Internet Order of February 2015.³ We also provided inputs to the European Union's Telecom Single Market regulations with respect to its provisions on

¹ Access Now, *About us*, <https://www.accessnow.org/about-us/>.

² Access Now, Centre for Communication Governance and Ors., *Joint Letter and Counter-Comments on the TRAI's Consultation Paper on Differential Pricing for Data Services*, 14 Jan 2016, http://trai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access_Now_n_Ors.pdf

³ See Access Now, *Access tells the FCC to use its authority to reclassify broadband and protect net neutrality*, 18 July 2014, <https://www.accessnow.org/access-tells-the-fcc-to-use-its-authority-to-reclassify-broadband-and-protect-net-neutrality/>, and US Federal Communications Commission, *Report and Order on Remand, Declaratory Ruling, and Order*, Adopted: February 26, 2015 Released: March 12, 2015, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf

net neutrality,⁴ and have been called upon to testify and provide comments to the Body of European Regulators of Electronic Communication (BEREC) which is currently developing the guidelines for implementing the EU law on the open internet for its 28 member telecoms regulators. Additionally, we have been asked to provide inputs to the Icelandic Parliament on its study of the net neutrality provisions of EU law,⁵ developed technical policy commentary on the dangerous consequences of zero rating practices,⁶ and submitted policy comments on the issue of zero rating in the context of Brazil's landmark Marco Civil Law.⁷

We have provided comments on this issue out of our concern that without sufficient regulatory measures, telecom carriers or Internet service providers could apply intentional and arbitrary restrictions on a user's access to the open and neutral internet, imposing what we call "network discrimination". Network discrimination takes the form of:

- slowing or "throttling" internet speed
- blocking applications, competing services, entire websites, and even users
- preferential treatment for a provider's services
- degradation of infrastructure
- increased privacy invasions

Such discriminatory and anti-competitive practices by ISPs can impinge on a host of fundamental rights, including user privacy and freedom of expression. With unstable and restricted access to goods, services, and tools on the "network of networks," many internet users - including those communities whose digital rights Access Now defends and extends - lose the opportunity to speak out and innovate online.

Seeing the benefits of the open internet and innovation, legislators and regulators across the world are enshrining "network neutrality" into law. Based on three principles of end to end connections, best effort traffic delivery, and innovation without permission for anyone or any entity, net neutrality is fundamental to ensuring open and equal access to this innovative marketplace of ideas, commerce, culture, and expression.

⁴ See Access Now, Q&A on Traffic Management in the Telecom Single Market Regulation, https://www.accessnow.org/cms/assets/uploads/archive/docs/Traffic_management_in_the_Telecoms_Single_Market_Regulation.pdf ; Access Now, *Civil society groups urge European Parliament to take final steps to real Net Neutrality* 6 Oct 2015, <https://www.accessnow.org/civil-society-groups-urge-european-parliament-to-take-final-steps-to-real-net-neutrality/>.

⁵ Access Now, *Iceland: on the path to Net Neutrality*, 22 March 2016, <https://www.accessnow.org/iceland-path-net-neutrality/>.

⁶ Access Now, *Zero rating: a global threat to the open internet*, 4 June 2016, <https://www.accessnow.org/zero-rating-global-threat-open-internet/>

⁷ Access Now, *Access submits comments on zero rating to government of Brazil*, 2 April 2015, <https://www.accessnow.org/access-submits-comments-on-zero-rating-to-government-of-brazil/>.

We thank TRAI for continuing in its efforts to safeguard the open Internet and protect net neutrality. We hope that this pre-consultation paper helps solicit useful recommendations to aid the TRAI in advancing in the commitment to safeguarding net neutrality that has been expressed by the Government of India and in Parliament.

Specifically, we hope that TRAI expeditiously publishes specific policy position proposals and proposed regulatory language for public comment, so that the same can be finalised, adopted, and soon enforced. The process to get so far has been long. After initially discussing the importance of net neutrality in its Internet service related recommendations in 2007, TRAI initiated specific discussions on net neutrality in its widely commented-upon March 2015 consultation paper, followed by specific draft proposals from a Committee of Experts to the Department of Telecom published in May 2015 (consulted upon on MyGov.in in August 2016), and finally leading up to this current preconsultation document.

Given the specific policy proposals and regulatory language that it has received in millions of comments, it is crucial that TRAI act to bring this process to fruition and soon set in place a legally enforceable network neutrality regulatory regime in India which provides meaningful recourse to users and clear bright-line rules in order to protect and further the Internet ecosystem.

Overleaf, we provide specific recommendations in response to the questions posed for comment in this current pre-consultation paper. We are grateful at this opportunity to provide comment and hope we are of aid to TRAI in its crucial next steps on this important issue.

Thanking you,

Yours sincerely,

Raman Jit Singh Chima
Director of Public Policy,
Access Now.

Inputs to the specific questions listed in the pre-consultation paper:

1) *What should be regarded as the core principles of net neutrality in the Indian context? What are the key issues that are required to be considered so that the principles of net neutrality are ensured?*

As outlined in the definition agreed to by over 70+ organisations from across the world at thisisnetneutrality.org, “Net neutrality requires that the Internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination”.⁸

The Department of Telecom’s Committee of Experts greatly helped put this in perspective in India when they outlined their view of the core principles of net neutrality in their draft recommendations in May 2015. As put there, “the core principles of Net Neutrality are no blocking, no throttling and no prioritization of any data or site.”⁹

Moreover, we wish to again draw the TRAI’s attention to our earlier recommendations in this comments vis-a-vis that regulators must act in order to prevent network discrimination from taking place. We noted that network discrimination can take the following forms, all of which should constitute prohibited or regulated activity on the part of telecom providers:

- slowing or “throttling” internet speed
- blocking applications, competing services, entire websites, and even users
- preferential treatment for a provider’s services
- degradation of infrastructure
- increased privacy invasions

We believe that TRAI should continue with its efforts to advance this understanding of net neutrality, and build on the policy position against the growth of gatekeepers or other discriminatory behaviour that harms the open Internet that it outlined in its February 2016 regulations on differential data privacy. As outlined in the memorandum published alongside those rules, it is crucial to note that the advancement of net neutrality in India is also linked to the constitutional obligations upon the state (including the Government of India and TRAI as a regulator) that have been outlined by the Supreme Court of India regarding ensuring access to information and diverse media, the protection of free expression, and the management of public resources for the public interest.

As outlined subsequently in our comments, we believe that these principles of net neutrality must be enforced by means of clear, understandable bright line regulatory provisions that allow for legal recourse against any violative behaviour.

⁸ Global Net Neutrality Coalition, <https://www.thisisnetneutrality.org/>

⁹ Department of Telecommunications Expert Committee, *Net Neutrality DoT Committee Report*, May 2015, http://www.dot.gov.in/sites/default/files/u10/Net_Neutrality_Committee_report%20%281%29.pdf, page 21.

2) What are the reasonable traffic management practices that may need to be followed by TSPs while providing Internet access services and in what manner could these be misused? Are there any other current or potential practices in India that may give rise to concerns about net neutrality?

Net neutrality does not prevent access providers from managing their networks. It does, however, prohibit traffic management that imposes arbitrary restrictions and discriminatory practices, including blocking, throttling, or altering of specific content, application, or services.

Strict control over these practices is necessary to prevent telecoms operators from becoming internet gatekeepers, being able to pick and choose winners and losers among content and application services. Failure to prevent these developments would result in the creation of a new monopoly for the telecoms operators: access to their customers. This would have a damaging impact on competition, choice, and innovation, in addition to affecting the right to free expression and access to information.

Traffic management techniques should only be treated as reasonable if used on a temporary basis, during exceptional moments of congestion. Additionally, the impact of network management must be necessary, proportionate, and targeted to solve a particular problem. Finally, companies should have to transparently and in an easy to understand manner disclose to their users their traffic management policies and practices in accordance with the future regulatory regime that will be put in place. Examples of potential reasonable uses of traffic management include the prevention of spam, blocking malware, or any other purpose to limit the effects of temporary congestion or preserve the integrity and security of the network.

It is key that any regulatory framework established in India provides for strict rules on traffic monitoring practices put in place by operators, particularly with respect to data protection and privacy in order to ensure that the use of privacy-intrusive tools - which could be used to monitor traffic - is prohibited. Alongside this, regulations must ensure transparency that meaningfully aids users, particularly to ensure that information regarding traffic management practices, speed and delays is made available to the public in clear, verifiable, and simple to understand methods.

3) What should be India's policy and/or regulatory approach in dealing with issues relating to net neutrality? Please comment with justifications.

As the Department of Telecom Expert Committee on Net Neutrality noted:

“... Content and application providers cannot be permitted to act as gatekeepers and use network operations to extract value in violation of core principles of Net Neutrality, even if it is for an ostensible public purpose.

19. A clause, requiring licensee to adhere to the core principles of Net Neutrality, as specified by guidelines issued by the licensor from time to time, should be incorporated in the license conditions of TSP/ISPs. The guidelines can describe the principles and conditions of Net Neutrality in detail and provide applicable criteria to test any violation of the principles of Net Neutrality”¹⁰

As noted above, and in other parts of the Department of Telecom Experts Committee draft report, a range of options are available to ensure regulatory protection for net neutrality. What the draft recommendations from the Committee of Experts emphasised - and we agree with - is that regulatory action needs to be taken expeditiously in order to protect net neutrality both in practice and in law in India. Existing law and regulatory instruments in India allow for further rules or licensing related developments to be advanced immediately, in addition to any proposals to codify and further strengthen a regulatory system by means of a new law or set of legal provisions on net neutrality.

TRAI should commit to specific regulatory protection and oversight provisions for net neutrality in its next consultation on net neutrality. It should outline immediate regulatory measures, and indicate if any other powers require further legal development or any specific concerns around its rule-making powers .

The TRAI can also propose to follow the hybrid short term approach originally proposed in the Department of Telecom Committee of Experts report on net neutrality, with some elements regulated by way of amendments to the telecom license terms (and their enforcement by the Department of Telecom), and other elements falling under TRAI’s powers under Section 11 and other provisions of the TRAI Act. In this approach however, there is the danger that it may appear complex and unclear to consumers as to who would be responsible and accountable for different facets of net neutrality related complaints.¹¹ It would then be advisable that at the very least a unified complaint point of contact or ombudsman process be created; this could include the TRAI taking up the responsibility of collecting complaints to either directly handle itself if falling within its purview or to forward to the Department of Telecom if they pertain to latter’s legal powers or regulatory sphere.

¹⁰ *Supra* note 9, at page

¹¹ Namely, doubt as to when they should approach the Department of Telecom or when to complain to the TRAI.

4) *What precautions must be taken with respect to the activities of TSPs and content providers to ensure that national security interests are preserved? Please comment with justification.*

TRAI's current pre-consultation paper has not clearly indicated what national security interests are of concern in this discussion. For instance, there is insufficient background on or specific questions on the current law or practices on issues such as surveillance, content blocking, leave alone whether TRAI is also concerned about ensuring the furtherance of secure encrypted communication or the creation of meaningful data protection and privacy provisions regarding user communications.

It would be more appropriate for TRAI to initiate specific focused discussions via separate consultations if it has concerns in this area - provided that the same pertain to its statutory mandate on helping advance the interests of consumers and the proliferation of telecommunications to all Indians. For example, the United States Federal Communications Commission recently initiated a notice of proposed rulemaking on the subject of protecting broadband privacy,¹² while the European Commission has begun a review of its e-Privacy directive - including its relevance and adaptation to cover specific privacy related concerns with respect to Internet messaging and other online communications.¹³

5) *What precautions must be taken with respect to the activities of TSPs and content providers to maintain customer privacy? Please comment with justification.*

Please see our inputs to the preceding question; TRAI would be best served by a specific consultation on this area with clearer background and identification of the specific issues it is concerned by. This should also be connected to the wider question of the state of privacy protection for user communications in India more broadly, including the discussions on since 2011 to draft and pass a comprehensive Privacy Act in India. Any such consultation should include the agencies and Ministerial offices involved in the Privacy Bill process.

6) *What further issues should be considered for a comprehensive policy framework for defining the relationship between TSPs and OTT content providers?*

This question unfortunately does not present a clear indication as to the issues that TRAI wishes further input on. TRAI has received extensive inputs from members of the public and

¹² See US Federal Communications Commission, *FCC Releases Proposed Rules to Protect Broadband Consumer Privacy*, 1 April 2016, <https://www.fcc.gov/document/fcc-releases-proposed-rules-protect-broadband-consumer-privacy>, and Access Now, *On broadband privacy: Working to protect your rights and your data*, 27 May 2016, <https://www.accessnow.org/broadband-privacy-working-protect-rights-data/>.

¹³ European Commission, *Public Consultation on the Evaluation and Review of the ePrivacy Directive*, 11 April 2016, <https://ec.europa.eu/digital-single-market/en/news/public-consultation-evaluation-and-review-eprivacy-directive>.

experts in its previous March 2015 consultation on OTT regulatory frameworks - the majority of which appeared to express serious concerns at the approach considered in that earlier paper. Similar concerns were also apparent in the inputs collated on the Prime Minister's MyGov.in consultation page for the draft recommendations of the Department of Telecom's Group of Experts with respect to the portion of the report suggesting further regulation for online communications services. Beyond this, some specific issues are under consultation in the VoIP consultation paper which the TRAI published subsequent to this net neutrality pre-consultation paper.

At this point of time, the only other input we could add would be few words of caution on the framing indicated in this current pre-consultation paper. For instance, the pre-consultation paper appears to argue that a regulatory framework for online messaging services is lacking merely because they are not subject to the same regime enforced on the licensed services for voice or messaging offered by telecom providers - though the paper acknowledged that "such services are governed in some respects by the provisions of the Information Technology Act, 2000". While drawing reference to possible concerns around telephone number management, emergency number access etc, the pre-consultation paper fails to provide any detailed concerns to substantiate the same. The pre-consultation paper also does not indicate why services which are legally barred from domestic PSTN interconnection in India should be subject to the requirements that licensed telecom services have to comply with - a policy shortcoming also shared unfortunately by the draft recommendations regarding online communications services in the earlier Department of Telecom Committee of Experts report.