

30.12.2015

To

Ms. Vinod Kotwal Advisor (F&EA)

Telecom Regulatory Authority of India

Jawahar Lal Nehru Marg,

New Delhi – 110002, India

**SUB: Consultation Paper No. 8/2015 on Differential Pricing for Data Services dated 9<sup>th</sup> Dec 2015**

**RE: STAR India's Response to the above.**

Madam,

We are thankful to the Authority for affording us an opportunity to respond to the aforesaid Consultation Paper ("CP").

We hereby tender our Response to the aforesaid CP.

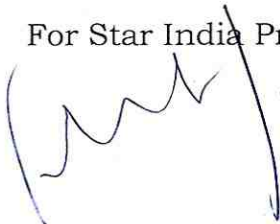
The same may be read together with our earlier Response dated 8<sup>th</sup> May 2015 to the "Consultation Paper on Regulatory Framework for Over-the-top (OTT) services" dated 27<sup>th</sup> March 2015.

We request your kindness that the same may be taken on record and considered. We would also request a personal audience before any final view is taken on the subject by the Authority.

Kindly revert for any clarification.

Yours Faithfully

For Star India Private Limited



(Pulak Bagchi)

Senior Vice President – Legal and Regulatory

Encl: As above

**Star India Pvt. Ltd.**

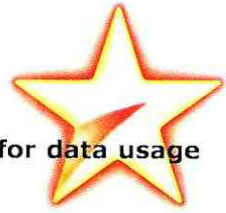
**Registered Office**

Star House, Urmi Estate,  
95 Ganpatrao Kadam Marg, Lower Parel (West),  
Mumbai 400 013, India.  
Telephone : + 91 22 6630 5555  
Fax : + 91 22 6630 5050  
Website : www.startv.com  
CIN : U72300MH1994PTC076485

**Address for Correspondence**

Star Centre Plot No. 77,  
Sector 32, Gurgaon. Haryana - 122 001.  
Telephone: +91 124 665 4400  
Fax: +91 124 238 2681  
Website: www.startv.com





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

No, TSPs should not be allowed to have differential pricing for data usage for accessing different websites, applications or platforms. The arguments against differential pricing are clear and substantive.

Firstly, ***allowing differential pricing violates the core principles of tariffing***: that they are non-discriminatory in nature and that they are not anti-competitive. Allowing the TSP to charge differently for different uses of data (or different "termination points" of data) essentially creates a tariff regime where the TSP creates different classes of subscribers based on the kind of content they want to access. In addition, by allowing the TSP to determine different prices for different websites, applications and platforms, the regime allows TSPs to fundamentally alter the nature of competition between these websites, applications and platforms in a manner not linked to the quality of the services they deliver to consumers, and the business models of their choosing.

Secondly, ***giving TSPs the power to do differential pricing fundamentally alters and distorts the role of TSPs*** from that of providing a telecom service (provision of data), for which it has been licensed and for which it uses public resources like spectrum, to that acting as an interested party intermediating between consumers and the websites, applications and platforms that these consumers choose to use. Not only is this counter to the license under which TSPs provide services but it also introduces the damaging potential of TSPs being incentivized to extract unfair value from its presence as an intermediary with the power to dramatically change the nature of the relationship between users and service providers. Focus on playing this intermediary role is also likely to distract the TSP from its primary role of providing better and cheaper access to telecom services (including data) for a larger and larger number of users in India.

Thirdly, differential pricing from TSPs will ***open the door to unholy alliances between TSPs and content providers to play the role of gatekeepers*** for both consumers as well as other content providers. Differential pricing will enable large incumbents to create a framework with TSPs that allow them, covertly or overtly, to create different versions of the Internet: an Internet that they package and control, available at a lower price and including only the content and service providers that have chosen to play by the rules established by the large incumbents, and a less privileged Internet: expensive, more difficult to discover,

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and occupied by the smaller players who don't have the financial ability and muscle to take on powerful incumbents. The most likely scenario is that bigger websites, applications or platforms will be able to strike deals with TSPs while the smaller players will be left in the cold. The premium that shall be paid by the larger players to the TSPs would provide the necessary incentives for TSPs to differentially price data whereby the bigger players will have better traction with users owing to the resultant subsidy that shall be factored in the data costs.

We have already seen the harmful effects of such arrangements between carriage and content playing out in the cable and satellite space. MSOs instead of consumers have been prioritising the content to be carried in their cable platforms. The basis of such prioritisation on the part of the MSOs is the Carriage and Placement fees being paid by content owners. This anticompetitive behavior by MSOs have led to small content providers being hit the most as carriage and placement fees act as entry barriers for new content providers. Given that the MSOs own the last mile, they are in a position to abuse their dominance by squeezing as much carriage and placement fees possible from content providers. Instead of consumer choice shaping retail packaging by MSOs, it is carriage and placement fees that prompt MSOs to deliberately prioritise, package and push unwanted channels to the detriment of the consumer. The consumer ends up paying for content that he has no desire to subscribe for, in the first place.

In addition, it is almost guaranteed that TSPs will differentially price data to promote their own in-house applications, websites and platforms to the detriment of better, cheaper applications, websites and platforms from competing providers.

Nothing will stifle innovation more decisively than enabling such a scenario to emerge.

As the consultation paper suggests, just like in the early days of the voice regime, the same principles should apply to "on-net" as well. Given the data usage and ecosystem is still very early, it is imperative that the non-discrimination applies equally to on-net and off-net.

It also violates the basic tenet of Internet access: that the flow of information is free (subject to the laws of the country) and no private player can determine what information can be accessed and what is less easily available. In fact, it is pretty obvious, as is evident in the mass disinformation campaign around the idea of a "free Internet" in the last few



weeks, that such a framework is but a naked offer to large, for-profit, self-interested incumbents to present themselves as arbitrators of what is "essential" and "basic" and what is not. We have seen the power of a single social media company to present an entirely new definition of the Internet with a level of marketing spend and lobbying that is unprecedented in the country. The effort seems to be to hoodwink the regulator into allowing a practice that is clearly discriminatory in nature. ***History teaches us that no government or regulator should ever allow the definition of public good to be set, managed and controlled by interested private parties.***

Fourthly, ***we already have a system in which net neutrality is under attack in many ways; where consumer choice is stifled and incumbents set the rules of the game; allowing TSPs to do differential pricing will sound the death knell on the idea of a free and neutral Internet.*** It is remarkable that in a country where most people access the Internet from a mobile, we have a dominant mobile operation system that pre embeds a large number of its own applications on devices sold in the country that are then not easily removed, thus constraining the ability of consumers to download new applications of their own choice. This becomes especially important in a middle income country like India where most devices that are affordable have limited storage capacity and most users have only a few applications they can keep on the phone. The country, thus, has allowed the dominant OS provider to continue a system that dramatically limits consumer choice on the device.

The same exploitation of dominance extends to search as well. A dominant search provider is the gateway to the Internet in India with search neutrality not even up for discussion.

Lastly, it must be pointed out that, even with moderate expansion in access to data, we have seen an explosion in websites, applications and platforms that have had a dramatically positive impact on the country's GDP growth and in generating employment. Creating a new regime that has the potential of introducing artificial distortions at a critical stage in the evolution of the data economy may have a ***devastating impact on the number and diversity of applications and services, and therefore on GDP growth and employment.***

Our strong stand on net neutrality and differential pricing from TSPs is not meant to stifle companies from doing what is right for their consumers and what is right to grow their private enterprises. ***We strongly believe that websites, applications, and platforms***





***should have the full freedom to provide incentives to their users, whether financial or non-financial in nature, based on their own economic models and investment principles.*** But these transactions should be firmly between the consumer and the website/application/platform. Such incentives are a regular order of business in the offline world as well and limiting the ability to provide such incentives will have a devastating impact on innovation and the emergence of new business models. However, we do not see any role for a TSP in any such transaction.

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

As explained in the response to Question 1, if differential pricing is permitted, then all the principles of non-discrimination, transparency, affordable access, healthy competition and innovation are likely to be severely violated. In fact, it will represent a big reversal in achieving the vision of Digital India.

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

We are deeply supportive of the underlying objective evident in the consultation paper: expanding Internet access to the largest number of consumers in the country as possible in the shortest period of time.

Instead of using differential pricing to employ this goal (and it is quite clear that differential pricing will only lead to reduced access) with the attendant risks of market distortions, we suggest that a more direct path be employed to achieve it. Many alternate routes are possible to expand free Internet access to consumers, including:

- **Free access for rural consumers.** Creating a public subsidy program to enable TSPs to provide free Internet access to rural consumers, along the lines of other national social security programs currently used by the country.

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- **Time based models.** Allowing TSPs to provide free Internet access to all consumers, at certain time periods when the network utilization is low.
- **Introductory models.** Allowing TSPs to provide free Internet access to new consumers (those who are new the Internet or are using data on the TSP's network for the first time).
- **Public or community networks.** Building access points around the country geographically selected to provide access to those consumers who cannot afford to buy private services.
- **Income targeting.** Enabling TSPs to provide free Internet access to consumers below a certain income level.
- **Direct compensation.** Allowing TSPs to provide free Internet access to new consumers (those who are new the Internet or are using data on the TSP's network for the first time).

It is obvious that there are many routes available to dramatically expand access to the Internet and enable a digital India. But what is under discussion, the route of TSP-led differential pricing, is clearly the one option that will not enable expanded access and instead will introduce new market distortions that will favor incumbents, stifle innovation and dramatically lower choice for consumers.

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

Though not directly connected with the question on differential pricing for data services, we are compelled to raise a fundamental concern that has been at the heart of the creative industry in all ongoing discussions and deliberations on "Net Neutrality". It must be noted that the owners of copyrightable works are granted the exclusive right to exploit or authorise the exploitation of their works in accordance with market practices. This time tested feature of copyright law prevalent internationally, is also recognized under the Indian Competition Act where an exception has been carved out for agreements under copyright law. Such exclusive rights are granted in order to incentivise authors to create and disseminate copyright works. Further, under the Act, copyright owners can enter into exclusive licensing agreements and grant rights to a single party. It is also important to note that while the Copyright Act recognizes this principle it also already imposes obligations on copyright owners to ensure that the general public can access copyrighted



works via "exceptions provisions" (Section 52) and involuntary licensing provisions contained in the Copyright Act. It must further be noted that even under the Competition Act exclusive licensing arrangements are not treated as being presumptively anti-competitive in nature. This would there mean that exclusive licensing would be subject to a case to case examination for an appreciable adverse effect on competition (AAEC). Consequently, this would mean that instead of being subject to broad brush and overarching regulation or rules which impose restrictions or are in conflict and in effect unwind or defeat the statutory rights granted to the owners of copyrighted works under copyright law, the legislature has determined that such conduct would be subject to a case to case examination. Clearly there is no justifiable and cogent reason to change this policy at this time. Whilst the principles of net neutrality are of utmost importance to ensure a transparent world wide web, it is pertinent that market forces should determine the relationship of TSPs, content providers and other parties active in the digital environment to foster innovation, creativity and the development of a hyper competitive yet nascent content industry. In a nascent industry still coming to grips with business models, pricing strategies, consumption patterns, it is imperative for the TRAI and the DOT to understand that the economics of industries dependent on Intellectual Property rights for value creation are very different from economics of TSPs/ ISP's and other distribution pipes and thus superimposing a Network centric regulatory construct on content creators would be akin to putting a square peg in a round hole. In effect the net neutrality principle has never been applicable to or determined how content is licensed but rather to the behaviour of distribution pipes and network service providers. We will therefore urge both the TRAI and the DOT to shape and delineate the debate and discourse on Net Neutrality accordingly.