



INTERNET
FREEDOM
FOUNDATION

To,
Shri Arvind Kumar,
Advisor (Broadband & Policy Analysis)
Telecom Regulatory Authority of India
broadbandtrai@gmail.com

June 29, 2016

Dear Sir,

Re: Comments by the Internet Freedom Foundation on the Consultation paper on Free Data [Consultation Paper No. 7/2016]

The Internet Freedom Foundation (IFF) is an organisation that supports and advocates for a free and open internet. We are a group of volunteers from the **SaveTheInternet.in** movement. We come from all over India, from different backgrounds and fields – technology, law, policy, design, journalism – and are grateful to submit our views in the consultation on Free Data.

More than a million Indians, hundreds of startups, academics and engineers have supported the TRAI for making the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016 (2 of 2016) (Hereinafter the, “discriminatory tariff regulation”). They have sent comments on the two consultations organised in the past – categorically calling against zero rated data plans, which includes free data. Even leading network neutrality experts such as Barbara Van Schewick applauded the TRAI stating that, “*What's great about the Indian decision is that it provides a full set of rules for different types of zero rating. These give certainty to the market. They have a huge advantage over other regimes that look at it case by case.*” (Interview with Kim Arora, Times of India published on February 22, 2016).

While we are grateful to the TRAI for seeking greater clarity on the discriminatory tariff regulation and are making the following submissions:

The models suggested by the Free Data consultation paper will have the same effect as a zero rating plan.



INTERNET
FREEDOM
FOUNDATION

- **We have consistently advocated for an equal rated model in which there is no restriction or incentives to restrict user choice. This needs to be implemented urgently without violating net neutrality to bring a large number of Indians online who get a full chance at engaging with the diversity of the open internet.**
- We are concerned that that the certainty brought through clear rule making may be undermined by the models proposed under the Free Data Consultation Paper.
- Available empirical data makes a case against providing access through free data models which restrict user choice;
- In response to Query No. 4 appropriate regulatory action is needed to prevent circumvention of the discriminatory tariff regulation by TSPs building large CECN (Closed Electronic Communications Networks) which are otherwise offered to users for zero rated services.

Our submissions are with the intent of clearing a regulatory path and removing any ambiguity on economic forms of discrimination. After this, attention can be devoted to addressing technical forms of discrimination and addressing all remaining harms which emerge from violating Network Neutrality.

Sincerely,

Internet Freedom Foundation



INTERNET
FREEDOM
FOUNDATION

Response by the Internet Freedom Foundation

Consultation Paper on Free Data

No. 7/2016

Question 1: *Is there a need to have TSP agnostic platform to provide free data or suitable reimbursement to users, without violating the principles of Differential Pricing for Data laid down in TRAI Regulation? Please suggest the most suitable model to achieve the objective.*

No, there is no need for a TSP agnostic platform to provide for free data. Because when users start deciding which sites to visit based on which sites are willing to subsidize them, we are enabling established or large companies to indirectly choke competition using money power. The Internet should exist as an equal platform where the most innovative succeed, not the richest.

The government is well aware of the potential for discounts to shape user behaviour at scale, which is reflected in its e-commerce policy towards marketplaces. By forbidding marketplaces from discounting directly, the government ostensibly wants to ensure that money power isn't used to decide who wins. The same principle is applicable to the wider Internet too.

The models suggested in the present consultation paper require further scrutiny and regulatory intervention. The most suitable model to increase access is by equal rating in which the liberty of end users to choose web services as per their own free will is not compromised.

We submit that a TSP agnostic platform linked to reimbursements, toll free platforms, and cash transfers for using *specific web services or platforms* violates the principles of Differential pricing regulations. Specifically any promotional scheme which tracks data usage on a select web service or platform and offers a similar amount of data back is effectively identical to zero rating or discriminatory pricing,



and therefore is a violation of net neutrality. For net neutrality to be maintained such incentives need be to offered, (a) for promotions relying on user activity other than access; or (b) in an unconditional manner without requiring the use of any specific web services and platforms.

IFF supports the practice of equal rating where users get a limited amount of data to browse the internet and select web services as per their own choice rather than as per a limited buffet menu as per the models suggested in the consultation paper.

The creation of a limited TSP agnostic platform by the TRAI will cause harms sought to be prevented by the Discriminatory Pricing Regulations and work against it. There is no underlying public purpose demonstrable through such plans as they do not help improve access.

Improving internet access requires deployment of multiple technologies at local levels and districts primarily through equal rated plans in which the choice or incentives are not skewed towards any particular web service. This maintains user choice and lets them select and choose what web services they want to use. We believe improving access is essentially a state function which as submitted on several instances before has to be considered through roll out of the national fiber optic plan, community based wi-fi technologies and the Universal Services Obligation Fund (USOF).

Our reasons for this are stated in detail below.

1. **Lack of public purpose:** Empirical studies which have been conducted show that free data when restricted to specific websites and services does not lead to improving access. The stated objective of the present consultation is limited to improving access for people who cannot afford it. A TSP agnostic zero rating plan may not be the best way to further it.
 - a. Amba Kak has conducted field research which forms part of her MSC Dissertation at the Oxford Internet Institute on the need and preference for zero rated plans [1]. She states in her own words that “I



also interviewed twenty low-income users between the ages of 18 and 35, who had no access to Wi-Fi, and had only recently started using the internet via mobile phones. Many expressed a strong preference for unrestricted all-access internet plans, even when limited plans were more affordable.” [2]

- b. The Alliance for Affordable Internet (A4AI) by the issue brief dated June 1, 2016 titled “the Impacts of Emerging Mobile Data Services in Developing Countries” [3] on the basis of empirical research states that:
 - i. “Zero-rating did not bring most mobile Internet users online for the first time - Nearly nine in 10 users surveyed report having used the Internet before accessing it through a zero-rated plan. Numbers of people coming online for the first time via zero-rating were slightly higher in India (15%) and Peru (22%). About 10% of users said they had used zero-rating at least once.” People who have used zero-rating at least once is 10% of users globally and just 4% of Indian users; For 12% of those users globally, and for 15% in India, zero-rating was their first taste of the Internet. This means less than 0.6% of Indians are online due to zero rating.
 - ii. “The vast majority of users (82%) prefer access to the full Internet with time or data limitations, if restrictions are imposed. Approximately half (48%) of all users said that the restriction they most preferred was a limitation on time (i.e., the free plan would be only be valid for a short time, with no restriction on the websites/apps that could be accessed), while a third of respondents said they would prefer access to all websites/apps, with a restriction on the amount of data that could be used.”

With time more studies and data further clarity will arise helping guide the TRAI. The Discriminatory Tariff Regulation itself under Clause 6 provides for a two year period of review.

There exists no persuasive case for amending the Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016 or tinkering with the



same to promote or institutionalise models for free data. Such models on the contrary are a threat to network neutrality and regulatory approaches to curb them are suggested towards the end. Ideally the best interests of internet users are served by equal rating of data in which a limited amount is made available without restriction on to how it accrues and how it is used. This is primarily an obligation of the state and cannot be served by players who are guided by commercial gains and not by larger public welfare measures such as to increase access.

2. **Similar harms as zero rated services:** Three models are proposed under the consultation paper. These are namely, (a) rewards; (b) toll free; and (c) direct money transfer. All three seem to be motivated by the TRAI's attempt to improve access and the belief that the only harm to net neutrality results from a gatekeeping function of a TSP.

This is a limited appreciation of the concept of net neutrality and fails to consider that Net Neutrality prevents any system of incentives being built around the network or tied in with it to prefer access to a particular platform or service. Hence, all three models when they seek to subsidise the data cost for access to the web service result in indirect forms of zero rating and violate the spirit of the Discriminatory Tariff Regulation. There is no regulatory justification for the TRAI seeking to build an agnostic platform for their delivery when on the contrary steps should be taken to prevent them.

- a. Rewards based model : We believe that a rewards based model which subsidizes or transfers data back to a user for the use of a particular website is a breach of network neutrality. The mere fact that it may be carried out by a discovery app or a rewards platform that is TSP agnostic does not mitigate the following harms to network neutrality:
 - i. *Incentives against exploration* : To accrue a “reward” or “incentive” a user merely uses an application or web service within a discovery app or a rewards platform. It does not tie in with any other form of promotion which is outside the network (such as paying your electricity bill through a website) but it is offered for mere access to a select website within the discovery



app or a rewards platform. Further the “reward” or “incentive” for a user only accrues in the form of a data reimbursement for accessing a pre-selected website within the discovery app or a rewards platform and not towards accessing the open web. This also results in a gatekeeping role for the discovery application or rewards platform. While the level of harm is less than a TSP exercising such a role, the existence of a level of harm is not in doubt. This is because a similar effect results in which an incentive exists for the user to keep repeatedly using such a pre-selected website through the discovery app or a rewards platform. Such an incentive is stronger if the data reimbursement is instantaneous or done in a short period after the initial usage of data to access the zero rated website or application within the discovery or rewards platform.

- ii. *Similar harms as Zero Rating* : This is similar to the zero rating platforms with two changes, where *firstly* it is available across TSPs (as opposed to being limited to one operator) and *secondly* the user is reimbursed for data use with more data (as opposed to not being charged in the beginning itself). Despite such changes the negative impact on net neutrality is similar to a gatekeeping function; creation of a carriage fee model; increase of entry barriers to web services discovery by new users; and a threat to the open internet. It is acknowledged that the data reimbursement harm is less than a pure zero rated platform where a user’s access itself is made free however a level of harm still exists.
- iii. *Creating MSO’s for the internet* : The risks which emerge due to abovementioned model is plain to see. In place of a TSP, a discovery app or a rewards platform becomes a gatekeeper. Such a discovery app or a rewards platform is now openly operating in commercial interest and it charges a carriage fee against which the web service is listed. A user can then access the webservice through the discovery app or a rewards platform



and is reimbursed with data. This is the creation of a carriage fee model for internet services and publishers. It is hoped that the TRAI, rather than seeking to institutionalise this by creating a TSP agnostic platform, recognises the risks this poses. In time around 10 discovery apps or a rewards platforms which list 100 top websites visited in India will in effect create a zero rating system in which it will be impossible for new platforms and services to enter. This disability will particularly impact smaller startups and entrepreneurs who do not have deep pockets and cannot afford to pay the carriage free to the discovery app or a rewards platform.

- iv. *Regulatory circumvention by TSPs* : It is an established principle in law that what cannot be done directly should also not be done indirectly. However there exists a real risk that the *Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016* may be circumvented by TSPs who may create their own discovery app or a rewards platform through third party companies in which they hold commercial stakes. For platforms to be truly independent, the TRAI must not allow any form of vertical integration between a telecom operator and the platform. This includes not only shared ownership between the telecom operator and the platform, but also cross holdings via group companies. For example, the Bharti Group, the parent of telecom operator Bharti Airtel, has a co-owned Internet company with Softbank, called Bharti Softbank (BSB), which runs messenger services such as Hike, and built music streaming services such as Wynk. As an illustration, it may result in an Airtel Zero being created, without being called “Airtel Zero” but still being controlled by Airtel indirectly.

- b. Toll free model : The toll free model is fundamentally in conflict with the Discriminatory Pricing Regulation. Given that under the model



only a “select” number of websites and online services will be free to access, it will fragment the wider web and result in a violation of network neutrality. It is submitted that the repeated emphasis on the benefits of creating a TSP neutral platform or using open API’s is misplaced; it will not mitigate harms to network neutrality if the cost for access to a particular website is discriminatory. This was the very intent of the *Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016* which now needs to be further strengthened rather than diluted. Also as SavetheInternet has previously submitted in the last round of consultations by TRAI, the repeated use of the toll free analogy is misplaced. It was stated that, “*Secondly, it’s important to note that toll free access is not a marketing innovation for a startup, and cannot be equated with toll free numbers: toll free numbers are support mechanisms [such as police, ambulances, customer service], and not a means of delivery of the service: ability to access determines whether the service (commercial or noncommercial) gets used. The ability to enforce price discrimination gives disproportionate power and control to carriers.*”

- c. Direct Money Transfer: The third and final model proposed is the direct money transfer model. This would create the same preference for a set of select web services and websites. As the Consultation paper states, it will require that “*the Platform owner not only measure the real time data consumption but also the tariff that is being applied to each individual user and reimburse/recharge actual amount incurred by the user in the form of a recharge for data usage or for voice usage to the user.*” This makes it clear that a system of instantaneous recharges or even cash backs against data usage can be built in which users are locked in to websites which provide such a facility. This is another form of price discrimination where even if the user’s initial access is not discounted, their usage behaviour is manipulated by offering economic incentives directly towards data usage. However if the cashback is, (a) not measured and proportionate against the amount of data usage; and (b) not against a user’s mobile wallet which can be used to recharge data; then the level of harm will be lesser.



3. IFF supports equal rating : We wholeheartedly welcome a minimum data allowance to be provided free by TSPs to subscribers. This will be a powerful force to increase Internet usage in the country. This may be implemented in one of two ways:
 - a. Making it mandatory for mobile operators to provide a minimum free data pack as part of their license conditions; or
 - b. Making it optional, but offering an incentive to operators who provide a free data pack and funding this out of the USO Fund which the government collects for the purpose of digital inclusion.

This same submission has been repeatedly given in the two previous network neutrality consultations. It is hoped that the TRAI responds to this positively. This will be consistent with the objective of the Discriminatory Tariff Regulation.

As stated by your offices in the explanatory memorandum accompanying the regulation, “[i]n India, given that a majority of the population are yet to be connected to the internet, allowing service providers to define the nature of access would be equivalent of letting TSPs shape the user's' internet experience. This can prove to be risky in the medium to long term as the knowledge and outlook of those users would be shaped only by the information made available through those select offerings.” [Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs for Data Services Regulation*, 2016, Pg. 10 (Feb. 8, 2016)].

It is also relevant to note that telecom companies have already started responding to the regulatory path taken by the TRAI. IDEA Cellular has on June 22, 2016 announced an equal rated plan in which users can gift free 100 MB data for a month by entering the Idea mobile number of non-internet users at to <http://i4all.ideacellular.com> from their smartphones.

4. Models of discovery applications or rewards programs, cashback that do not harm net neutrality - There also exist forms of discovery applications and rewards programs that may not impact network neutrality.
 - a. Any discovery application which displays advertisements against which it allows unrestricted internet access.



- b. Any rewards program where data packs or top ups are offered against promotions that rely on the user doing any task other than primarily visiting a pre-selected website.
- c. Any rewards or discovery program where the data reimbursement occurs after a term/period which decreases the incentive for repeated use. This may be a period of more than 2 weeks at least. Hence, no incentives are offered for repeated use in the short term.
- d. Telecom operators may provide their API to platforms which reimburse data for activities not directly accruing from access, such as participating in a contest, watching advertising (video or otherwise), inviting new users to a particular service; this does not amount to discriminatory pricing, and would come under equal rating. This is the same as purchasing a data recharge as a reward, and does not amount to an evasion of TRAI's discriminatory pricing regulation.
- e. Cashbacks when the cashback is, (a) not priced equivalent or proportional to data usage; (b) is not stored in the mobile wallet operated by a telecom operator.
- f. However it must be pointed out that such models are open to abuse and circumvention. They will need to be carefully scrutinised and constant regulatory overview will be necessary. A case by case appraisal will cut against the adoption of bright line rules which have been accepted as a regulatory principle by TRAI in making the Discriminatory Tariff Regulation. We have elaborated on this in our response to Query No. 2.

Question 2: *Whether such platforms need to be regulated by the TRAI or market be allowed to develop these platforms?*

“First, a case-by-case regime will fail to provide much-needed certainty to industry participants. In the absence of a clear rule setting out the permissible and impermissible business practices, service providers may refrain from deploying network technology. This would be due to the fear that their conduct may subsequently be construed as being



discriminatory as per the case-by-case analysis. Second, it will create high costs of regulation on account of the time and resources that will be required for investigating each case. It will also lead to further uncertainty as service providers undergoing the investigation would logically try to differentiate their case from earlier precedents. Third, there is also the concern that this approach provides a relative advantage to well-financed actors and will tilt the playing field against those who do not have the resources to pursue regulatory or legal actions. This may include end users, low-cost innovators, start-ups, non-profit organisations, etc. The Authority believes concerns are significant.” [Telecom Regulatory Authority of India, Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016, Pg. 13 (Feb. 8, 2016)]

We submit that a regulatory intervention is needed to further augment the existing regulations on Discriminatory Pricing of Data. Discriminatory pricing of access isn't possible without close integration with a TSP.

A platform directly pricing an application or website differentially can only do this either with active participation and at the very least an agreement with TSPs. The only difference here is that the payment for discriminatory pricing, or the decision to price discrimination, is being taken by the platform, which then takes on a role similar to that of an access provider, and performs the role of a gatekeeper.

Gatekeepers are bad for all sorts of innovation, but they're especially bad for the Internet because network effects allows them to attain scale and power at an exponential rate. And once established, it's difficult to dislodge them or try and change user behaviour (a preference for “free data”).

Differential tariffs when offered by telco agnostic platforms (or telcos), disadvantage “end users, low-cost innovators, start-ups, non-profit organisations” who may not be able to participate in such schemes. The TRAI has acknowledged this as a significant concern in the *Prohibition of Discriminatory Tariffs for Data Services Regulation, 2016*. This leads to the creation of entry barriers, and using that, differential access to content via differential pricing is gatekeeping. Therefore, when it comes to differential pricing, it is essential that neither telecom operators,



nor a telco agnostic platform, nor a content provider is in a position to make access to a specific website, application or content available for free: it gives disproportionate power over access to the entity enabling differential pricing.

As per our understanding, given that such platforms cannot become deployed without agreement or an arrangement with the TSP, it is necessary for the TRAI to apply Regulation 3(2) of the Discriminatory Tariff Regulation and ask TSPs to prevent such platforms from operating on their networks. TSPs have the ability of preventing such platforms from integrating within their networks not only by refusing to enter into agreements with them but also on getting notice, disabling access to them. It is restated that the primary duty to promote and further internet access is on the government. This can be done a in several ways as stated in response to Question No. 1.

Question 3: *Whether free data or suitable reimbursement to users should be limited to mobile data users only or could it be extended through technical means to subscribers of fixed line broadband or leased line?*

The same regulatory regime should be made applicable to mobile data users and subscribers of fixed line broadband or leased lines as long as they connect to the Internet. The policy choices examined by the TRAI in making the discriminatory tariff regulation do not distinguish between mobile and broadband data services.

Given the rapidly changing technology and definition behind communication networks, there is no saying how what we currently define as “mobile” and “broadband” will change or merge. The same devices already seamlessly hop between mobile, Wi-Fi and even Bluetooth bands. The same operators already provide mobile telephony, wireless broadband, wired broadband etc. There will be no easy or clear way to define how data flows through a telecom network and through a user’s device. Using these definitions to craft differential policies will only result in regulatory arbitrage as telcos seek to find loopholes using advancements in converged telecom networks and technologies.



INTERNET
FREEDOM
FOUNDATION

Unless a compelling policy reason exists otherwise, it is requested that the same regulatory regime for network neutrality should be followed for all forms of internet connectivity.



Question 4: Any other issue related to the matter of consultation.

As stated before we are concerned by several press reports which seem to indicate that telecom operators are creating technical frameworks for the deployment of large, public intranets to zero rate content and services with the sole view of circumventing the Discriminatory Tariff Regulation. As per our understanding this issue has been needlessly created with a view to circumvent the regulation. We call on the TRAI to address the issue of pricing based discrimination comprehensively so that focus can then be devoted to the technical forms of discrimination which harm network neutrality.

1. Applicable law : The applicable law contained in the discriminatory tariff regulation is as follows: As per the definitions contained within Regulation 2, which specifically in Regulation 2(e), defines, “content” to include various classes of data that is, “accessed or transmitted over the internet”. Similarly Regulation 2(f) defines, “data services”, as those that are, “accessed or transmitted over the internet”. That “discriminatory tariffs for data services” under Regulation 2(g) mention both, “content” and “data” services. The regulation finally defines, “internet” to be a, “global information system”, which uses a set of IP ranges or the TCP/IP protocol.
2. Prohibition does not apply to CECN : Regulation 3 contains a general prohibition stating that,

“(1) No service provider shall offer discriminatory tariffs for data service on the basis of content. (2) No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged to the consumer on the basis of content. Provided that this regulation shall not apply to tariffs for data services over closed electronic communication networks, unless such tariffs are offered or charged by the service provider for the purpose of evading the prohibition in this regulation. (3) The decision of the



Authority as to whether a service provider is in contravention of this regulation shall be final and binding.”

3. Definition of CECN : There is further definition on what constitutes a, “closed electronic communication network” in Regulation 2(c) that states that it means a, “communication network where data is neither received nor transmitted from or to any other network”. Further, the explanatory memorandum contains some clarification on it. The memorandum states that:

“31. Differential tariffs being offered for data transmitted over closed electronic communications networks, such as intranets are not prohibited by these regulations. Though the prohibition on discriminatory pricing of data services does not apply to such networks, which are not accessing the internet, if such a closed network is used for the purpose of evading these regulations, the prohibition will nonetheless apply.”

4. Models of CECN to circumvent the regulations : Given the above some telecom operators have suggested that large intranets may be created to offer proprietary content to their users that would then circumvent the regulations made by the TRAI. Such networks to exempt application of the regulations may be:
 - a. Completely closed and not connect to the public Internet or any other intranet. They may create this through assigning private IP ranges to their users on their own networks.
 - b. The content available on such a closed network will not be available otherwise on the public Internet (the world wide web) and be proprietary.
5. A proviso is an exception to the rule : Despite such models such CECN’s created to circumvent the regulation will fall foul of the proviso to Regulation 3(2) which states that, “*unless such tariffs are offered or charged by the service*



provider for the purpose of evading the prohibition in this regulation.” As per the principles of statutory interpretation the proviso has to be strictly construed when it creates an exception. In Laxminarayan R. Bhattad and Others Vs. State of Maharashtra and Others [(2003) 5 SCC 413] the Supreme Court held that the proviso acted as an exception to the main provision and such an exception must be strictly construed. Hence, the attempt to create a CECN to circumvent the regulation will in any instance not succeed given the phrasing and drafting of the discriminatory tariff regulation.

6. Attempts to invent doubt : Two instances have come to our knowledge where a large TSP and an Industry Organisation have sought to create doubt in the CECN regulation.
 - a. TSP seeks to create a CECN for its subscribers : A large TSP has in a letter to the TRAI sought clarification on the legality of tying up with a big global content provider which wants to offer its video content exclusively over a Closed Electronic Communications Network (CECN). Such exclusive content would be offered in India to the TSP’s customers only [5].
 - b. COAI seeks to throw up hypotheticals : As per media reports the COAI has sought clarification on three points [6]:
 - i. Firstly, whether Telecom Operators are allowed to subsidise/discount content, for exclusivity and advertising revenue shares.
 - ii. Secondly, whether the content provider offering subsidized subscription of its content to select / all subscribers of all / some telecom operators would constitute a CECN, since data charges would apply.
 - iii. Thirdly, a request for allowing differential data tariffs whether such content is provided through the closed network or the open Internet.



- c. Creating confusion : We would like to submit to TRAI that rather than clarify issues, this is a deliberate and desperate attempt by a TSP and the COAI to create confusion around what are very clear regulations from the TRAI.
- i. We would submit that the request from TSP and COAI (point b(i) and b(iii) above) should be denied for the following reasons:
1. In order to comply with this regulation, the content provider would have to make the content available exclusively to the telecom operator worldwide, ensure that it has not routed the content on any other closed network and simultaneously remove it from the Internet, globally, and not just India. Otherwise merely providing the same content via an intranet or multiple intranets, would amount to circumventing the regulation.
 2. We submit that if the TRAI were to allow this, it will result in telecom operators inking exclusive tie-ups with different content providers for differential pricing, and therefore, end up allowing services like Airtel Zero and Facebook's Free Basics, which the regulation itself sought to disallow. This will also amount to shaping the users Internet experience, by providing an alternative to services already on the Internet, but at a lower cost, via their own deals.
 3. As we had mentioned in our filing in January 2016 [7], such differential pricing would create pressure on other content providers to ink similar tie-ups with telecom operators. This would give telecom operators disproportionate gatekeeping powers and go against the spirit in which the TRAI had drafted its regulation, which has been clearly articulated by the TRAI Chairman in



stating that “pipes should be agnostic of the data packets they carry” as well as in point 17 in the Explanatory Memorandum of the Discriminatory Tariff Regulation.

- ii. In response to the second question raised by COAI in point 2 of their letter, we would like to submit that a TSPs network does not become closed just because subscribers are offered exclusive or subscribed content on it from a content provider. However, such a practice is just another form of discrimination between consumers of the same class. Since it is not possible for a content provider to discriminate between traffic originating from different networks without colluding with the TSP/ISP, such a practice will still violate Clause 10 of Telecommunication Tariff Order, 1999 (TTO). This will further lead to practices such as Telecom Service Provider floating content companies which will sign exclusive contracts with the parent TSP to re-introduce discriminatory pricing using content providers that fall outside TRAI’s jurisdiction
- iii. Finally, to address the request made by COAI as described in point b(ii), TRAI has not only disallowed differential pricing on the internet but also very specifically sought to disallow the use CECN as a means to subvert discriminatory pricing. Further, we have shown in their letters that COAI and TSP are attempting to misinterpret the CECN exemption in a self-serving attempt to surreptitiously reintroduce discriminatory pricing and, still unsatisfied, want to extend that exemption to the open internet.

In its wisdom, TRAI foresaw that attempts might be made by unscrupulous TSPs to circumvent the regulatory order using the CECN exemptions and added clauses exclusively to counteract such attempts. We urge TRAI to stand by its order and not succumb to the feeble attempt at creating a slippery slope fallacy.