

Counter Comments of the Center for Democracy & Technology
in response to the
Telecom Regulatory Authority of India
Consultation Paper on Traffic Management Practices (TMPs) and Multi-Stakeholder Body
for Net Neutrality
February 26, 2020

The Center for Democracy and Technology (CDT) thanks the Department of Telecommunications (DOT) and the Telecom Regulatory Authority of India (TRAI) for the opportunity to provide comments on the Traffic Management Practices consultation. CDT is pleased to have participated in several of TRAI's consultations on this issue, and we continue to appreciate DOT's and TRAI's perseverance and thoughtful approach to protecting consumers and online service providers from potentially discriminatory practices of internet service providers (ISPs).

As a general matter, the question of how to monitor and enforce net neutrality principles, especially in the context of network traffic management practices, is one of the most difficult to answer. As the consultation paper notes, there are many factors impacting consumers' Quality of Experience when using their internet access service. This can make it difficult to isolate the individual impacts of a ISP's traffic management practices and difficult to identify when, where, and how any particular data streams might be treated differently from others on their routes across the internet. Despite this difficult task, we encourage DOT and TRAI to take all appropriate measures to monitor and enforce against violations of India's strong net neutrality protections because, ultimately, these protections are only as strong as their enforcement. By the same token, DOT and TRAI should not limit or undermine their regulatory protections of net neutrality principles based on any technological conflicts posed by new network technologies, such as those expected to be deployed in fifth generation (5G) mobile networks.

Net neutrality is worth preserving. New technologies offering more efficient ways to implement discriminatory practices make DOT's regulation and enforcement of net neutrality even more vital to the future of the open internet.

Our comments respond to several of the proposals and issues raised by other commenters in this proceeding.

1) Monitoring, detecting, and determining the reasonability of traffic management practices should not rely solely on industry self-certification or self-regulation.

We urge TRAI to reject proposals from commenters who suggest that TSP/ISPs self-certifying or self-auditing their compliance with relevant regulations will be sufficient to achieve the goals of the regulations.¹ Likewise, TRAI should reject proposals suggesting that a multi-stakeholder

¹ See, e.g., Comments of Bharti Airtel Ltd. at 6.

body should be comprised entirely of industry representatives.² As regulated entities, ISPs have perverse incentives with respect to finding and preventing their own practices prohibited by regulation. Indeed, if ISPs were inclined to abstain from the practices prohibited by net neutrality regulations, then such regulation might not be necessary.

Additionally, if the network management practices implemented by ISPs were easy to detect, differentiate, and understand (beyond the network operator level), then consumers and OTT providers might be more able to use market forces to discourage net neutrality violations. However, network management is complex and opaque, and ISPs have financial incentives to leverage these practices to their own advantage, or to the advantage of their affiliates. Therefore it is essential that entities other than ISPs should monitor for potential violations. This concept should extend to the multi-stakeholder body as well—an MSB dominated by industry representatives is unlikely to vigorously defend the principles of net neutrality or the DOT’s strong regulatory approach enshrining them.³

2) A hybrid approach to monitoring TMPs is acceptable, but the TRAI or the DOT should also conduct secret audits as capacity allows.

CDT agrees with commenters who propose an “all of the above” approach to monitoring network TMPs.⁴ Although detecting and identifying net neutrality violations is difficult for all parties other than the network operator, successful enforcement of regulations becomes more likely when more parties are involved. As discussed above, industry self-reporting is unlikely to reveal any violations. This is not to say that reporting on TMPs and their use would not be a useful aspect of the overall enforcement effort. Having granular information on when, where, and how ISPs manage the traffic on their networks would help TRAI and DOT understand the scope, extent, and duration of various TMPs used by ISPs. This could provide a background against which the DOT could compare its own findings or the findings of third parties.

Whether performed by a government body or an independent third party, technical measurement studies of traffic management practices are crucial to enforcement. Although the clearly prohibited practices, such as blocking, could be detected by end users, the subtleties of discriminatory traffic management practices make it difficult for users to identify where and how such practices may be deployed. Accurate analysis of TMPs (reasonable or otherwise) requires sophisticated study of a network operator’s internal network traffic management as well as the management practices at internet exchange points (IXPs). CDT agrees with commenters suggesting that DOT incorporate the findings of third parties, such as M-Lab and OONI,⁵ and further suggests that audits of TMPs are more likely to accurately reflect reality when performed without notice to ISPs, who may be inclined to change their management practices during an audit.

² Comments of Bharti Airtel Ltd. at 6-7.

³ See Comments of Internet Freedom Foundation, para. 6.3.

⁴ See, *generally*, Comments of Mozilla; Comments of Internet Freedom Foundation.

⁵ Comments of Mozilla, at 10.

To the same end, we support the approach taken by BEREC with regards to its commissioning of a Net Neutrality measurement tool.⁶ Given the complex technical nature of network management and the difficulty associated with end-user based measurements, government regulators need this kind of tool if they are to effectively enforce their regulations. In any case, we encourage TRAI and DOT to pursue some form of independent technical audits of traffic management practices as a means of verifying any self-reporting from ISPs and investigating complaints from users.

3) 5G should not be an excuse for departure from NN principles. Rather, 5G networks and TMPs should be conformed to align with Net Neutrality principles.

As a final point, we note that some commenters encourage DOT not only to take a hands-off approach to regulation, but also suggest that any such regulation should bow to the technical capabilities of 5G.⁷ It is true that newer networking technologies such as virtualization and edge computing could facilitate certain commercial arrangements and support emerging network-based applications. However, the existence of those technologies should not render net neutrality principles obsolete, nor should India weaken its strong regulatory approach to net neutrality to allow ISPs to leverage these technologies in ways that unfairly discriminate against services or providers.

Instead, we encourage DOT and TRAI to carefully assess new and emerging network management technologies for their compliance with net neutrality principles. For example, to the extent that network function virtualization allows for the provision of increasingly customized network services, regulators should monitor how network operators allocate their network capacity among different services and demand thorough explanation and documentation for any services claiming the need for “objectively different technical Quality of Service.” These “specialized services” should neither degrade the quality of experience for general internet access services nor be offered in ways that circumvent India’s net neutrality regulations.

Respectfully Submitted,

Stan Adams
Deputy General Counsel & Open Internet Counsel
Center for Democracy & Technology
1401 K Street, Suite 200
Washington DC 20005

⁶ Comments of Mozilla at 10.

⁷ Comments of Bharti Airtel Ltd. at 2.