

New Delhi, 4 July 2016

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

Subject: Submission of comments on TRAI's Pre-Consultation Paper on Net Neutrality

Dear Sir,

The Digital Empowerment Foundation (DEF) wishes to thank the Hon'ble Authority for the opportunity to submit our comments on the Consultation Paper on Net Neutrality.

Digital Empowerment Foundation is a New Delhi-based not-for-profit organisation. It was born out of the deep understanding that marginalised communities living in socio-economic backwardness and information poverty can be empowered to improve their lives almost on their own, simply by providing them access to information and knowledge using digital tools.

We recognise unhindered and universal access to the internet as a key driver of development and empowerment amongst the digital excluded masses in India. We are grateful that the TRAI has sought greater clarity on the discriminatory tariff regulations and has approached the concept of providing free data to all.

My colleagues, Mr. Rajat Kumar and Ms. Ritu Srivastava, who have drafted our response can provide additional material and DEF is happy to provide any further support to TRAI.

Yours sincerely,



Osama Manzar
Founder & Director
Digital Empowerment Foundation

Q 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?

The United Nations Special Rapporteur on the promotion of the right to freedom of opinion and Expression, Frank La Rue in his 2011 report has stated that “Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population”. Thus, we as a nation have to take effective steps to ensure uniform Internet access to the entire population.

According to Tim Wu, “the argument for net neutrality must be understood as the concrete expression of a system of belief about innovation, whose adherents view the innovation process as a survival-of-the-fittest competition among developers of new technologies”.

The pre-consultation paper outlines the definition of network neutrality as “*the principle that TSPs must treat all Internet traffic on an equal basis, without regard to the type, origin, or destination of the content or the means of its transmission*”. This definition is the most widely accepted definition of network neutrality the world over.

Equal and non-discriminatory treatment of internet traffic and, on the other, all end users’ (i.e. consumers and content providers) right to distribute and to access the information and content of their choice.

Reasonable traffic management by ISPs is acceptable in only a limited number of circumstances, and must not be based on commercial considerations.

ISPs are prohibited from degrading or blocking traffic (or certain categories of traffic), except under clearly defined circumstances. These practices are justifiable in only a small number of

instances: to comply with court orders, to protect the integrity or security of the network, or to prevent impending network congestion, that occurs temporarily and under exceptional circumstances

In addition to providing internet access, ISPs can offer services that need to be transmitted in an optimised fashion to meet certain specific requirements, provided that these practices do not have a negative impact on the availability or general quality of internet access services.

ISPs' commercial practices are now subject to scrutiny, notably their promotion of bundled online services. The national regulator has the right to monitor the features of these products.

Operators are subject to strengthened transparency obligations. These pertain in particular to providing more detailed information in customers' contracts: the possible impact of traffic management techniques used by the ISPs, the concrete impact of the (traffic, speed, etc.) caps or allowances attached to the plan, information on connection speeds, etc. – cf. fact sheet No. 4 for more information about quality of service.

We strongly oppose any model where service providers have a say or discretion to choose content that is made available at favourable rates, speed etc. They should not be allowed to price different kinds of services differently, thereby segmenting the Internet.

Access to Internet is increasingly being regarded as a human right in international discussions and some countries have reflected this perception in legislation. The Hon'ble Prime Minister, during the launch of the Digital India Plan also stated that the Internet is a human right. The Digital India Plan also approaches universal Internet access as a key activity vertical.

We highly recommend that TRAI incentivise CSR activities that increase public access to the Internet in rural and under-developed areas and work towards increasing digital literacy across the country.

Q 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?

Traffic management practices were highlighted in the Consultation Paper on Regulation for OTT Services in April 2015. In our response to that paper, we highlighted the traffic management techniques that should be excluded:

- Blocking Content e.g. spam, illegal website content
- Throttling/ degrading some types of traffic e.g. P2P
- Priority given to some service provider's content or application over others (perhaps for a fee. Potential revenue for ISPs) and
- Blocking rival content or application e.g. rival IPTV services

Any traffic management practice is open to exploitation by service providers towards unethical ends. Therefore, it is strongly recommended that all traffic management techniques/ methodologies that can be used by service providers should be based on suitable methodologies recommended by TRAI. Further, any traffic management techniques utilised should be subject to scrutiny by TRAI or a suitably empowered and independent committee as notified by the competent authority. This committee should include representatives from civil society organisations and other network neutrality advocates. Efforts should be taken to ensure there is no conflict of interest.

The definition of legal and illegal online content should be based on notification of the government and should not be left up to the discretion of the service provider.

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

It is our belief that TRAI should take a predominantly hands-off approach to network neutrality, except, in cases of violation of the principles.

We recommend that TRAI should outline the basic principles of network neutrality, set them out in a regulatory framework, similar to the prohibition on differential pricing rules and monitor any violations of the regulations. The Hon'ble Authority already holds the mandate of monitoring and adjudicating on certain matter.

The broad regulatory principles for network neutrality may be the following:

- The Internet must be kept neutral and open.
- Accessibility between all endpoints connected to the Internet without any form of restriction must continue to be upheld.
- All forms of discriminatory traffic management, such as blocking or throttling should be prohibited, unless as part of objectively necessary traffic management measures.
- Traffic management should only be allowed as a narrowly targeted deviation from the rule. It must be either necessary, proportionate and legally required, or required to address a transient network management problem which cannot be dealt with otherwise.
- Legal clarity must be established to determine what types of traffic management are legitimate under which circumstances.
- Access providers have to indicate in their contracts and advertisements a guaranteed minimum bandwidth, maximum latency and quality measures for the connection (so that customers can determine whether a particular connection can e.g. be used with Skype). access providers have to provide tools to verify those standards. These standards must be determined with a statistical method that should be decided by the public consultation process.
- Operators are subject to strengthened transparency obligations. These pertain in particular to providing more detailed information in customers' contracts: the possible impact of traffic management techniques used by the ISPs, the concrete impact of the

(traffic, speed, etc.) caps or allowances attached to the plan, information on connection speeds, etc.

- We need to establish a clear set of obligations for access providers regarding the neutrality and best effort of the Internet broadband services on the one hand, and for specialised services that are not transported via the Internet on the other.
- By default, only header information should be used for traffic management. The use of deep packet inspection (DPI) should be prohibited.
- End-users should be able to report violations of the points above to TRAI directly.
- Legislation on Net Neutrality should provide for financial sanctions with a sufficient dissuasive effect.

Q 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.

The above question does not fall under the legal jurisdiction of the TRAI as laid down by the Telecom Regulatory Authority of India Act, 1997. The questions above fall in the legal ambit of the Telegraph Act, 1885, Information Technology Act, 2000, Information Technology (Procedure and Safeguard for Interception, Monitoring and Decryption of Information) Rules, 2009 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

Law enforcement, security agencies and courts have appropriate mechanisms in place to ensure proper logging on personal data/ records by content providers. Further, Section 91 of the Code of Criminal Procedure, 1973, empower these agencies to compel content and service providers to provide any information as stated in Rule 3(7) of the Information Technology (Intermediary Guidelines) Rules, 2011.

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

With increasing public knowledge of the implications of breaches of privacy and security of consumer data, content providers are increasingly wary of the negative backlash that they face in case of any such breach.

Taking this into cognizance, the Government of India has proposed the creation of the Right to Privacy Bill, which covers extra-territoriality of data, data transfers and enforcement mechanisms.

Section 43(A) of the Information Technology Act, 2008 has to do with the collection of personal data. Further, any OTT application that collects private data has to follow the rules laid down in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

It is our opinion that this topic is outside the purview of the TRAI for reasons laid down in our response to Question 4.

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

No further comments.