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Counter Comments to TRAI Consultation Paper No. 8 / 2015 on Differential Pricing for Data Services, dated 09 December 2015

Counter Comments by IPRG - ICT Policy & Research Group

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Issue - Need for a Separate Paper on Differential Data Pricing

Some stakeholders have questioned the need for this Consultation Paper, pointing out that TRAI had issued a consultation paper titled "Consultation Paper on Regulatory Framework for Over-the-Top (OTT) services" dated 27 March 2015 (popularly termed the Net Neutrality Paper), whose recommendations are currently being formulated by TRAI.

Counter Comment by IPRG - ICT Policy & Research Group

It is pointed out by ICT Policy and Research Group that there are three distinct and separate issues, which are often confused in the mind of the stakeholders as well as the general public:

1. Net Neutrality;

2. Differential Data Pricing and Zero Rating Schemes; and

3. Licensing of Over the Top (OTT) Players.

These three distinct separate issues are often confused, although there are some commonalities in these issues.

1. Net Neutrality refers to the principle that Internet Service Providers should treat similar types of content, data, applications, platforms, etc equally, without discrimination. That there should be no intentional throttling of content / websites / videos, etc.

2. The issue of Differential Data Pricing and Zero Rating Schemes are regarding whether or not ISPs / TSPs can offer their subscribers access to certain select content providers at lower or zero tariffs, whereas access to other content/websites are charged at usual rates.

3. The issue of Licensing of OTT Players is regarding whether unlicensed applications which provide voice, data, video services (such as but not limited to Vonage, Viber, Skype, WhatsApp, Messenger services etc) should be allowed to offer services under differential / advantageous conditions, as compared to licensed telecom service providers, who are licenced as per the requirements of the Indian Telegraph Act, 1885.

Further, issues 1 and 3 are governed by Sections 11 (1) (a) and 11 (1) (b) of the TRAI Act, where the TRAI submits its recommendations for the Government to take a final decision.

However, the issues in this Consultation Paper on Differential Data Pricing are governed by Section 11 (2) of the TRAI Act:

“11 (2): Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

PROVIDED that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.”

The issues considered in this Consultation Paper are purely tariff issues, and not issues governing terms of licensing. It is noteworthy that this Consultation Paper does not mention the terms Net Neutrality or OTT anywhere.

Thus the decisions taken by TRAI on Differential Data Pricing and Zero Rating Schemes in this Consultation Paper are final, as TRAI has sole and final jurisdiction on all aspects of tariffs as per section 11 (2) of the TRAI Act.

Issue - Differential Pricing is Anti-Competition

Several stakeholders have contended that Differential Pricing is Anti Competition.

Counter Comment by IPRG - ICT Policy & Research Group

Differential pricing is common in several sectors of the economy, not just in telecom. Differential pricing is prevalent in India, depending on demand, volumes, location, time, quality, customer loyalty, etc. For example, several shops utilize “Loss Leaders”, or goods priced below cost, in order to attract customers, who could then be persuaded to look at other goods and services. Courts in several countries have held that differential pricing or “Loss Leaders” are not necessarily illegal or anti-competitive.

Zero Rating Schemes are akin to toll-free 1-800 numbers, which are common not only in other countries, but in India as well. Many Indian corporations permit customers or the public at large to telephone them at no charge, reimbursing the telecom operators for the cost of the call. Nobody has complained that this practice discriminates against corporations who do not provide toll-free services to their customers.

In India, there is intense competition among Content Providers. There are numerous sources of various types of content - Social Networking Platforms, E-Commerce Platforms, Search Engines, E-Mail Providers, News websites, etc. There are few barriers to entry for content providers in the Indian market.

Even amongst Access providers there is intense competition, with most telecom circles having six to ten cellular mobile telecom service providers. These are already providing differential pricing, in that they provide numerous packages, and the customer can choose whichever plan suits him best. With nationwide mobile number portability, a dissatisfied subscriber can easily, cheaply, and quickly port to a competing access service provider.

Some stakeholders have alleged that Differential Pricing violates the constitutional provisions of equality and non-arbitrariness. However, differential pricing is in vogue in several sectors of the economy, including prevailing telecom services, where TRAI is following the principle of tariff forbearance. ICT Policy and Research Group is of the opinion that this policy of tariff forbearance should be continued, and that tariffs should be left to the market forces and customer needs.

As pointed out in the submission to TRAI by ICT Policy and Research Group, the relationships between Content Providers, Telecom Service Providers / Internet Service Providers, and end subscribers is not a Zero-Sum Game, but is, instead, a complex Multi-Player, Multi-Market Game.

Moreover, in India, the relationship between tariff and data access / data use is not symmetric. Lowering of tariffs / zero tariffs will greatly increase the demand for data services,

especially among new / low-income subscribers, or those at the “Bottom of the Pyramid”.

The experience of ICT Policy and Research Group is that even low-income consumers at present are paying a substantial proportion of their income for accessing content about health, medicine, agriculture, irrigation, government services, legal information, fisheries, jobs; and services viz. fund transfer for low income groups, mobile banking, etc because the benefits they derive exceed the amount that they pay for the data required to access these services. It is these low-income people who need low, affordable tariffs the most.

ICT Policy and Research Group further recommends that encouragement be provided to develop relevant content in local Indian languages.

Regarding the issues of discrimination and transparency, in para 9 of the TRAI Consultation Paper, it was stated:

“While scrutinizing the tariff proposals, TRAI checks their consistency with various regulatory principles/guidelines, which include the following:

- Non-Discriminatory
- Transparency
- Not Anti-competitive
- Non-Predatory
- Non-Ambiguous
- Not Misleading”

If TRAI finds prima facie non-compliance with these principles/guidelines, they can take appropriate corrective action.



**Issue - Consistency of Differential Tariff Schemes / Zero Rating Schemes
with the Principles of Non-Discrimination & Transparency**

In para 8 of the Consultation Paper, TRAI described various constructs of data tariff offerings:

Model A) When the service provider selects the content, which is offered free or bundled together at reduced rates.

Model B) One content provider creates a platform where other content providers can apply, and be selected. The platform creator then partners with service provider(s) to provide free internet access to participating content providers, for the subscribers of those service providers.

Model C) Charge differently for certain types of internet apps over others [On-Network terminated calls]

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- Not Anti-competitive
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- Not Misleading”

Some of the stakeholders have submitted to TRAI to the effect that for Model A, telecom operators / ISPs would have the power to provide preferential access to certain content providers of their choice, and disincentivize access to other websites / applications / platforms by charging higher tariffs to access the latter. This would place small content providers and

start-ups at a severe disadvantage compared to dominant incumbents.

Some of the stakeholders have also submitted to TRAI to the effect that Model B was discriminatory in that those who wanted to access non-participating content would be charged more than those who wanted to access participating content.

These stakeholders also submitted that cross-vertical collusion, intra-vertical collusion etc. constituted predatory pricing, and lowered consumer choice. Further, that new users would not know of the entire range of the internet, and would be under the mistaken narrow view that the few websites they were accessing constituted the entire internet. Thus, public opinion could be manipulated by providing preferential access to content providers who promoted certain preferred opinions, and by either preventing access to, or charging higher tariffs for accessing content providers who held inimical opinions.

Various stakeholders have called for transparency and disclosure by TSPs / ISPs of payments made for such deals for selecting discounted content/apps.

Comments were received from a stakeholder to the effect that for Model C: “The customers, who use On-Network terminated calls which are essentially just data or bandwidth, pay access charges and data charges to the service providers which are determined by market dynamics and competition. The proposal to price such calls differentially from other data apps will hurt consumers and developers of such applications who have successfully created low-cost, data-efficient tools.”

Counter Comment by IPRG - ICT Policy & Research Group

With reference to the above comments from various stakeholders regarding Model A (When the service provider selects the content, which is offered free or bundled together at reduced rates), the ICT Policy and Research Group reiterates its views that Differential Tariffs / Zero Ratings are akin to Toll-Free 1-800 numbers, which have been in vogue for many years, both

in India as well as abroad.

The ICT Policy and Research Group further recommends that such preferential access to any websites / platforms / applications should be best left to the service provider, subject to the principles / guidelines as stipulated by TRAI from time to time, such as:

- Non-Discriminatory
- Transparency
- Not Anti-competitive
- Non-Predatory
- Non-Ambiguous
- Not Misleading

In this manner, small content providers and start-ups would not be disadvantaged as compared to the larger content providers. Further, IPRG recommends that no restriction should be placed by the operator for the user accessing other sites, provided he/she is willing to pay the requisite data tariff for doing so.

With reference to the statements made by stakeholders regarding Model B (where One content provider creates a platform where other content providers can apply, and be selected. The platform creator then partners with service provider(s) to provide free internet access to participating content providers, for the subscribers of those service providers.), the ICT Policy and Research Group is of the opinion that a service provider should not be permitted to block access to any lawful content.

The user's choice of websites is guided by the need /utility of the content rather than the data usage charges. Because the usage charges are not prohibitively high at present, hence access to other websites / content providers is possible by paying regular data tariffs. This will ensure no blockage / discrimination on the part of the service provider who is offering differential tariffs. Hence, influencing the mind of the customer with limited access to certain preferential content therefore seems implausible.

With reference to the statements made by certain stakeholders regarding Model C, {Charge differently for certain types of internet apps over others such as On-Network terminated calls}, ICT Policy and Research Group is of the opinion that the views of some of the stakeholders quoted above seem to be contradictory. It is evident that data efficient apps / content will be more cost effective to the ultimate user.

In conclusion, the ICT Policy and Research Group re-iterates that differential tariffs have been in vogue and have been beneficial for the phenomenal growth of mobile telephony in India. Hence IPRG supports the principles of differential tariffs based on market forces and customer needs, within the overall guidelines of TRAI.

About IPRG - ICT Policy & Research Group

ICT Policy and Research Group consists of professional technologists with several decades of top managerial and engineering experience in telecommunications and information technologies.

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