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Ms. Vinod Kotwal,  
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Mahanagar Door Sanchar Bhawan,  
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New Delhi – 110002

Sub: Comments on “Consultation Paper on Differential Pricing for Data Services”, 2015 (No. 8/2015)

Dear Ms Kotwal,

This is with reference to the “Consultation Paper on Differential Pricing for Data Services”, issued on 9th Dec. 2015. I have gone through the paper and record some of my personal and comments on the same. Some additional issues are also highlighted in the comments attached. I would be pleased to address any clarification, if required.

Thanking You.

Sincerely Yours

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## Comments on “Consultation Paper on Differential Pricing for Data Services”

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- 1. Discrimination Defeats Competition:** Non-discriminatory access to key infrastructure assets governing entry to the sector remains the virtue of competition in a number of sectors. With these objectives in mind, power transmission and distribution networks, and oil and gas pipelines have been mandated to provide non-discriminatory open access to electricity network, and oil and gas pipeline network respectively. There is no discrimination based on the content / content provider (For e.g. seller/buyer of electricity / gas etc.). Remove this essential feature and we would have fiddled with the competitive fabric in these sector.

Airwaves are critical social assets that have been allocated to private/public telecom service providers by the DOT, and hence access to the same (for example in provision of data services) should not be discriminated. Discriminatory access based on content/content providers would also be detrimental to the spirit of competition that TRAI as a regulator is expected to safeguard.

This spirit has been rightly translated by TRAI in ensuring 'non-discriminatory' interconnection between telecom operators i.e. a telecom operator cannot discriminate between 'content of their own customers' vs the customers of their competitors.

Following examples portray situations that can seriously undermine competition if the sector 'regulator' violates the principle of 'non-discrimination'.

- Airports giving undue preference to a particular airline operator for allocating parking bays, landing and takeoff rights.
- Multi-lane roads giving fast-lane access to only particular car brands, or to selected taxi / bus operators to
- DTH/ cable operates giving better 'bandwidth' to selected TV channels and, hence, leaving poor transmission quality to other channels.

Basics of regulatory principles should not be sidestepped. Let us ensure that there are no barriers to entry through discriminatory access of the web.

- 2. 'Tax' on Innovation:** Provision of 'free access' to limited number of websites/apps would, in effect, impose a 'tax' on innovators giving serious blow to Innovation drive for Digital India and 'Make in India' initiatives of the country. Further, innovation would be

stifled as 'boundaries' of innovation would be fixed by the 'service providers'/ content providers who would benefit from the discrimination.

3. **Consumer Unfriendly:** The proponents of 'free internet' do not guarantee that the web services to which they currently provide 'free access' without advertisements would continue to do so in perpetuity. Providing 'free access' is like teaser loans on home loans that attracts the home buyers with the lure of low EMIs, while the truth of higher EMIs stares at them in the future. TRAI as a regulator should safeguard the interest of the consumers, who may face a similar situation in the telecom sector as well.
4. **Discriminatory 'free internet' access is not an alternative to Universal Service Obligation for data:** The operators/content providers who would like to ensure internet access to large masses should perhaps offer limited data-pack free of charge and allow them to choose sites they wish to visit rather than being fixed by the 'free internet plan'. This would enhance welfare of data users. TRAI/DOT can mandate the licensees deliver, through regulatory / policy instruments, on their obligation to provide Universal Services Obligation (USO) for voice as well as data services. Hence, the 'Free Internet' plan should not used to project itself as being the proxy to USO in the context of data.
5. **Violation of the Provisions of the Competition Act 2002:** Section 3 of the Competition Act, 2002 specifically prohibits anti-competitive agreements as well as abuse of dominant position

"No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India." (emphasis added)

Proviso 3 to the section states that

"Any agreement ..... provision of services, which

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;"

Proviso 4 to the section further states that (emphasis added)

"(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

- (a) tie-in arrangement;

- (b) **exclusive supply agreement;**
- (c) **exclusive distribution agreement;**
- (d) refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India."

Discriminatory pricing for data services would be against the letter and spirit of the Competition Act 2002. It is clear that 'agreements' that lead to discriminatory pricing of data services would hamper the spirit of competition in the sector.

6. **Irreversibility:** Over time, stakes of telecom companies as well as those supporting 'differential' data pricing would grow higher that the process would become increasingly irreversible due to interest of the concerned parties. Such high stakes are already visible as interested parties have spend large sums on media blitz.
7. **Competition and TRAI:** Proviso (a)(iv) to sub-section (1) to Section 11 of the TRAI Act 1997, states that one of the functions of TRAI is to make recommendations on matters related to

"measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services." (emphasis added)

In this context, it is expected that TRAI would safeguard the ethos of competition in the sector. It is also important to note that the above proviso of the TRAI Act 1997 links growth in the sector with competition.

8. **Regulatory Principles of TRAI:** The "Consultation Paper on Differential Pricing for Data Services" highlights that TRAI checks consistency of tariffs with various regulatory principles/guidelines, which include the following:

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

The proposal on discriminatory data pricing would clearly violate the regulatory principle of being **non-discriminatory, anti-competitive** as well as **predatory** in nature.

9. The proposed Differential Pricing for Data Services goes beyond the "Non-discrimination" as defined in Clause 2(k) of the Telecommunication Tariff Order (TTO), 1999 as it also aims to discriminate based on the 'use of the data' to access a particular

website, web service or app. This kind of discrimination is barred in other sectors as it undermined competition.

Further, the TTO highlights that while applying discrimination in tariff between subscribers of the same class, such classification of subscriber shall not be arbitrary. The proposed discrimination of data services uses arbitrariness in 'classification of subscribers'.

**10.** Response to the specific questions asked in the Consultation Paper are given below.

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

**Answer:** No. Reasons for the same have been discussed above.

**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?

**Answer:** Since answer to Question #1 is No, this question does not arise. Differential pricing for data usage would fail on all four counts i.e. nondiscrimination, transparency, competition and market entry, and innovation. The idea of affordable internet access is misleading and is only short-term in nature as there is no assurance of the 'free access' being available later on and without additional advertisements. Even if limited 'free internet' access is made available perpetually, the same would be 'cross-subsidised' by the voice/data services that are paid for by the consumers. This would be detrimental to the interest of the consumers, who would be attracted by the 'freebies' for which they would pay in any case.

**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?

**Answer:** The 'differential pricing' for data services does not provide solution in terms of making 'services accessible' (both in-terms of basic telecom & data services) to those who can't access it due to missing telecom footprint and unaffordability of services, and unavailability/affordability of a suitable device which can make use of the data services more meaningful.

Let all telecom/data service providers provide a limited quantum of data services made available free of cost/ at very low cost to consumers. This is in line with the 'Lifeline' tariff for electricity available across most of the states in India wherein daily household consumption of about 1 kWh of electricity is provided at a very affordable tariff. This is cross-subsidised by other consumers or subsidised by the state government. In telecom, need for government subsidy may not arise as marginal cost of providing 'minimum basic data services' is close to zero.

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

**Answer:** TRAI should clearly define 'net neutrality' in its pure form so that a similar debate could be guided more productively. Further, TRAI should also spell out its vision and issue regulations to promote competition and protect consumer welfare in the telecom sector.