# Counter Comments to the Consultation Paper on Free Data

Following our initial comments on the Consultation Paper on Free Data, below are our set of counter comments that serve as responses to the comments made by TSPs and TSP associations. Though a number of substantive proposals have been made in response to the Consultation Paper, owing to the large volume of comments, we have identified some common themes found across the submissions made by major TSPs and TSP associations and presented our responses accordingly.

## Return to the differential pricing debate

While proposing potential models for provision of free data, several TSPs and TSP associations have highlighted differentially priced models including zero rated models as being best suited for the purpose. TSPs including Bharti Airtel, while arguing in favor of zero rated models, have even suggested that any anti-competitive concerns can be addressed by mandating TSPs to clearly disclose rate cards for sponsoring data on their respective platforms as well as by enforcing a framework to protect edge providers from denial-of-service by any TSP. A number of TSPs have even portrayed through their responses that zero-rated models are necessary for digital inclusion, and should be promoted rather than prohibited.

The TRAI has notified the Prohibition Of Discriminatory Tariffs For Data Services Regulations, 2016 after considering the opinions of all stakeholders. The TSPs are trying to re-agitate the issue which has already been decided. This consultation on free-data should be limited to that and cannot be used as a means to reopen the discussion on discriminatory tariffs. The Discriminatory Tariffs Regulations not only prohibit such kind of practices but also safeguard the neutral nature of the Internet. We would like to reiterate that research has shown that access to Internet provides individuals and firms a vital resource that facilitates innovation, learning and efficiency, all of which lead to greater productivity and thus, greater economic growth.

This is the reason that even our Government has recognized the importance of Internet and started the Digital India Initiative that seeks to digitally empower our Indian society. But any kind of positive impacts associated with the Internet would not reach our citizens if we are unable to maintain the neutral character of the internet. Zero-rated models, other such service arrangements and differentially priced models though aim at proliferating access are in reality detrimental to the

Internet itself.

Various TSPs and TSP Associations in their responses, have also disapproved the need to have a TSP agnostic platform. They have given various reasons in support of their argument such as TSP agnostic platform gives more rights to private party than a licensed party[1] and would mean indirect licensing and lead to content providers becoming passive telecom service providers.[2] Other reasons given include that there is no guarantee that a TSP agnostic platform will not act as Gatekeeper, as the owner of the website who has commercial interest will be the only interested party to promote his website.[3]

This perception seems to stem from the fear that a TSP agnostic platform will mean that the TSPs' own commercial interests will suffer at the hand of OTT players that are “unregulated” and have thus, suggested various models by which OTT Players are either more “regulated” or revenue sharing happens with the TSPs, so that the they may also get their piece of the pie. Some such models include Bharti Airtel's “Technical Aggregator Model” where TSPs will participate on “FRAND” terms or VAS model wherein the OTT players, like VAS providers will integrate their system with TSPs and work on a revenue share model or Vodafone's “two-way charging models” under which operators and content providers implement bilateral agreements that'll govern what benefits are provided to the customers.

However without going into the merits and demerits of specific models, we would like to submit that the various models that are being mooted for in different responses by TSPs and TSP Associations are a rehash of the "Sender Pays" Principle mooted by the European Telecommunication Network Operators Association (ETNO) which was rejected by even by the European Governments at the World Conference on International Telecommunications held at Dubai in December 2012. Such a proposal was even rejected by the Industry representatives from India. However, these models discussed in the consultation paper will in effect result in the sender paying for the data consumed by the user while accessing the website of the sender. Such an approach will change the open nature of the Internet and the permissionless innovation ecosystem that resulted in the growth of the new digital economy. 'Sender pays principle' will only help the incumbents and the TSPs and will adversely affect the interests of the startups as well as the users.

1 Bharti Airtel
2 Aircel
3 BSNL

## Regulation of OTT services

It is also submitted that OTT players are not the same as VAS providers and other players cited in the various submissions and they do not need to be regulated further or in the same way as TSPs. The comparison made in various submissions between OTT players and VAS providers comes from an over simplified and superficial view that OTT players and VAS providers function in similar ways. But the fact is that VAS providers were giving out a bunch of services tightly coupled with the core services provided by the TSPs. However, their functionality and access was dependent on a particular TSP, which is not the case with the OTT players as they can be accessed from any TSP or ISP for that matter, which increases their availability. Moreover, in terms of technology there is not much in common between the VAS providers and OTT players, with the former becoming more or less obsolete.

Similarly OTT players are different from TSPs because communication services offered by OTTs and TSPs differ in terms of functionality, in that the former's reliance on existing networks for content delivery enables them to bundle additional services such as multimedia file transfer, location based services and so on with their primary service offerings. In light of the functional and architectural differences that exist between communication services provided by OTTs and TSPs, efforts at introducing additional regulatory frameworks aimed at leveling the regulatory playing field with respect to fundamentally different business entities would prove to be counter-productive and serve only to stifle innovation and healthy competition in a free market environment.

Moreover, OTT communication service providers are already regulated by a number of general and specific legislations that prescribe numerous general, technical, financial and security related conditions that OTTs must necessarily comply with. Some of the existing legislations that apply to OTTs are:

- Information Technology Act, 2000
- Consumer Protection Act, 1986
- Payment and Settlement Systems Act, 2007
- Indian Copyright Act, 1957
- Income Tax Act, 1961
- Customs Act, 1962
- Central Excise Act, 1944

- Foreign Exchange Managements Act, 1999
- Prevention of Money Laundering Act, 2002

As OTTs are already regulated under the above legislations, we submit that additional regulatory frameworks would be excessive and would hinder the growth of the OTT service industry. We feel the purpose of ensuring comprehensive regulation of OTTs would be better served by a review of how the existing regulations apply to OTTs and making necessary amendments based on the findings, rather than establishing a dedicated regulatory framework from scratch.

Regulations and laws prevailing over telecommunication services such as entry fees, spectrum allocation and charges, tariff regulations etc. cannot be imposed on OTT services for the reason that regulation of websites and applications provided on the Internet would have a direct impact on start-up companies and new entrants who will be forced to comply with regulatory costs notwithstanding the cost of setting up the website in the first place which is very low or even negligible.

The Internet provides an opportunity to everyone, be it college students who are constantly coming up with great, innovative business ideas and even people in rural areas who are able to sell their products on the internet. Over-regulation would mean a loss of all such opportunities and a sudden hindrance to innovation.

## Conclusion

To conclude, we reiterate that it does not matter whether the platform used to provide free data services is TSP-agnostic or not. In fact, the premise for the idea of a TSP agnostic platform seems to be that such a platform cannot result in greater control for the TSP and will prevent the TSP acting as a gatekeeper. However, the free data models suggested will result in the bigger players controlling access. In such a scenario, instead of the TSP acting as a gate-keeper, various platforms offering free data will act as gate-keepers.

The Internet is a great leveler and gives options for any service or startup to compete with an established player. But if the bigger players are allowed to control the access of users and user behavior by any means, whether through a rewards platform or through a zero rating service this will result in changing the nature of the Internet. Such approaches will destroy the permission-less innovation feature of the Internet that has resulted in startups like Google and Facebook succeeding.

As per Professor Tim Wu, known among others for his coinage of the term “network neutrality”, models of development must not vest control in any initial prospect-holder, private or public, who is expected to direct the optimal path of innovation, minimizing the excess of innovative competition.[4] The argument for net neutrality therefore, is anchored in the protection of certain core characteristics of the Internet that have played central roles in making it a quintessential tool for information exchange in the 21st century, and any understanding of net neutrality that attempts to shift focus from this fact must be seen as subversive.

Thus, any model, irrespective of it being TSP agnostic or not, as long as it is in harmony with the basic tenets of net neutrality and complies with the Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, by not differentiating on the basis of content and providing complete open access to the the full Internet and not parts of it will work in this context.

4 Professor Tim Wu, Network Neutrality, Broadband Discrimination, Journal on Telecom and High Tech Law, available at: http://www.jthtl.org/content/articles/V2I1/JTHTLv2i1_Wu.PDF