



September 19, 2016

To
Advisor (QoS),
Telecom Regulatory Authority of India,
Mahanagar Doorsanchar Bhawan,
Jawaharlal Nehru Marg,
New Delhi - 110002.

Subject: Access Now counter-comments to TRAI's consultation paper on Cloud Computing

Dear Sir,

I write to you in connection with the consultation paper on cloud computing which the Telecom Regulatory Authority of India (TRAI) published in June seeking public comments. This letter contains Access Now's consolidated inputs and counter-comments in response to the consultation paper.

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence in 10 countries around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. Access Now also engages with its global community of nearly half a million users from over 185 countries, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world.¹

We have previously provided inputs to TRAI on the subject of net neutrality, having filed comments to the pre-consultation paper on net neutrality in July 2016, and previously filed joint comments with nine other organisations in January 2016 on the consultation paper on differential pricing for data services.²

We welcome the initiative taken by TRAI to engage publicly with stakeholders on the subject of cloud computing. The internet helps facilitate unparalleled everyday access to computing resources by individuals across the world, providing abilities and services which were unforeseen even a few years ago. It is our hope that TRAI's current consultation on cloud computing and the Government of India's other related policy processes on this subject seek

¹ Access Now, *About us*, <https://www.accessnow.org/about-us/>.

² Access Now, Centre for Communication Governance and Ors., *Joint Letter and Counter-Comments on the TRAI's Consultation Paper on Differential Pricing for Data Services*, 14 Jan 2016, http://trai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access_Now_n_Ors.pdf

to help facilitate these positive benefits, while centering the focus of any policymaking effort around first protecting the rights of users and advancing the wider public interest.

This submission comprises of an overview section which provides our top-level comments on this consultation paper and further inputs from us under the broad themes of the consultation paper we see relevant to our expertise and which pertain to the other comments which have been publicly recorded as having been filed to TRAI.

Overview of our comments on the TRAI consultation paper on cloud computing

At the outset, we wish to state our belief that it is crucial that TRAI focus on advancing the rights of users, and ensure that free and open internet is protected. We therefore appreciate the several instances where the consultation paper brings up issues relating user rights - including privacy and security, access to data, and remedy for potential wrongs - in the context of cloud computing.

However, we believe that TRAI's focus with respect to several of these issues needs to be more clearly refined. Efforts from TRAI should be concentrated on areas where a meaningful change can be achieved and where TRAI has the requisite legal powers or policy channels to drive this. Furthermore, we are concerned by several statements and correlating proposals made in the paper which appears to suggest that TRAI believes that cloud computing services require licensing, even with respect to general consumer services not specifically offered as a telecom service by licensed telecom companies.

Specific, actionable next steps needed on safeguarding user privacy and security

TRAI would be best served by a specific consultation on this area with clearer background and identification of the specific issues it is concerned by. For instance, as noted previously by us in an earlier filing to TRAI,³ the United States Federal Communications Commission recently initiated a notice of proposed rulemaking on the subject of protecting broadband privacy,⁴ while the European Commission has begun a review of its e-Privacy directive - including its relevance and adaptation to cover specific privacy related concerns with respect to Internet messaging and other online communications.⁵ This indicates that a trend

³ See Access Now, *Comments to TRAI Pre-Consultation on Net Neutrality*, 5 July 2016.

⁴ See US Federal Communications Commission, *FCC Releases Proposed Rules to Protect Broadband Consumer Privacy*, 1 April 2016, <https://www.fcc.gov/document/fcc-releases-proposed-rules-protect-broadband-consumer-privacy>, and Access Now, *On broadband privacy: Working to protect your rights and your data*, 27 May 2016, <https://www.accessnow.org/broadband-privacy-working-protect-rights-data/>.

⁵ European Commission, *Public Consultation on the Evaluation and Review of the ePrivacy Directive*, 11 April 2016, <https://ec.europa.eu/digital-single-market/en/news/public-consultation-evaluation-and-review-eprivacy-directive>.

of telecom regulators holding specific regulatory discussions around areas more directly linked to their jurisdiction and where they can provide specialised regulatory guidance or policy recommendations connected with their area of functioning and expertise.

This should also be connected to the wider question of the state of privacy protection for user communications in India more broadly, including the discussions that have been on since 2011 to draft and pass a comprehensive Privacy Act in India, following on the earlier recommendations issued by the Justice A.P. Shah Expert Committee on Privacy. As TRAI noted in this consultation paper, “absence of proper data protection techniques and laws are major factors that deter an organisation or user to use cloud services”. Many of the submissions made to this consultation have noted the need to protect the right to privacy via legal frameworks which are internationally interoperable.⁶ These have included specific recommendations around ensuring comparability with the framework created first by the EU Data Protection Directive, and its successor – the General Data Protection Regulation - given the prevalence of this model and its importance to cross-border data flows that facilitate our global internet.

We believe TRAI must specifically look at this issue, and ensure that it provides recommendations on the approach and principles that the Government and Parliament should follow in advancing a privacy law which comprehensively provides for and enforces data protection. Any such consultation should include the agencies and Ministerial offices involved in the Privacy Bill process, so that there is meaningful policy-making progress in this area.

To supplement this, TRAI could undertake specific, telecom sector specific studies and propose limited policy measures on areas directly within its mandate - as the US FCC and EU policymakers have recently done. For instance, TRAI should ensure that it focuses on ensuring broadband providers and access providers protect privacy and user security, since cloud computing services are mostly available via the internet connectivity provided by licensed telecom networks.

Unclear around concerns regarding lawful intercept and jurisdiction

The current consultation paper has expressed concerns around jurisdiction and possible impediments to law enforcement with respect to access to user data and lawful interception. However, it does not provide clear specific details around what concerns law enforcement agencies in India are facing, and instead only speaks to the subject in general terms. It also does not indicate what elements of the existing Telegraph Act and Telegraph Rules regime are failing to be of use when it comes to cloud computing related services. Furthermore, of greater concern, TRAI’s discussion on this area in the cloud computing

⁶ Including submissions from Asia Cloud Computing Association, Business Software Alliance, Symantec, among others.

paper does not mention the constitutional and human rights norms which operate in this area with respect to protecting privacy and other rights of users. Restrictions and oversight on communications surveillance has already been held to be a requirements of the fundamental rights chapter of the Constitution of India in the Supreme Court of India's landmark *PUCCL v. Union of India* judgment,⁷ as well as increasingly recognised in international law as embodied by the International Principles on the Application of Human Rights to Communications Surveillance (the "Necessary and Proportionate" principles).⁸

We therefore submit that any future discussion on this area must be focused on specific, enumerated concerns, reference to existing Indian legal frameworks in this area, and the fundamental rights restrictions which apply on state surveillance measures.

Proposals regarding licensing for cloud computing services should not be advanced

We are particularly concerned by the apparent argument made by TRAI in the consultation paper that cloud computing services are covered under the definition of telegraph under the Telegraph Act, 1885. We do not believe that this correctly states the correct legal position in this area. In this regard, we reproduce and cite in approval the legal position provided to the Department of Telecom by the Centre for Communication Governance, National Law University, in the course of the study by the former's committee on net neutrality in 2015:

"...highlight at the outset that several kinds of online content providers would not fall within the scope of the Telegraph Act, and the statute cannot therefore be used to create a licensing regime to regulate them. All the regulatory power emerging from the Telegraph Act, 1885 pertains to the licensing and regulation of telegraphs in India. Section 3(1)(AA) of the Indian Telegraph Act defines 'Telegraph' as "telephone or any other instrument, appliance, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric optical or magnetic means." Therefore the statute cannot be used to regulate online content that does not emerge from such a telegraph. This is what distinguishes online content from the Value Added Services (VAS) provided by telecommunications companies – the latter are provided by Indian telegraphs and can therefore be regulated...."⁹

⁷ (1997) 1 SCC 301

⁸ International Principles on the Application of Human Rights to Communications Surveillance, May 2014, <https://necessaryandproportionate.org/principles> (hereinafter referred to as the "Necessary and Proportionate Principles"; signed by more than 200 organisations and 275,000 individuals globally)

⁹ Chinmayi Arun, Sarvjeet Singh, & Ors, Centre for Communication Governance, *Memorandum to the DoT Committee on Net Neutrality*, [http://ccgdelhi.org/doc/\(CCG%20at%20NLUD\)%20Memorandum%20for%20DoT%20Committee%20on%20Net%20Neutrality.pdf](http://ccgdelhi.org/doc/(CCG%20at%20NLUD)%20Memorandum%20for%20DoT%20Committee%20on%20Net%20Neutrality.pdf).

Given the clear language of the Telegraphy Act and the legal position which flows from that, we believe that the assertion by TRAI on the Telegraph Act extending to cover cloud computing services - beyond those directly offered by licensed providers - is incorrect and should not form the basis of any policy discussions or specific regulatory proposals. This also includes the additional statement implicitly made in the consultation paper that TRAI's quality of service regulatory powers under the TRAI Act extend to cloud computing services beyond those provided by licensed operators. Hence, while TRAI may convene discussions and lay down suggestions on best practices regarding quality of service for cloud computing services, it cannot lay down regulatory standards in this area and should avoid policy consultative proposals which suggest otherwise.

Our inputs above are also connected with another key concern we see with the current consultation paper, namely the proposal for a licensing model for cloud computing services. As we indicated above, we do not believe that this would be within the current legal powers of the TRAI or the Department of Telecom. Furthermore, we believe that such a step would have a negative impact on innovation, access to the ICT resources by everyday citizens, and harm the ability of users to be able to easily empower themselves to speak more freely and collaborate using cloud computing applications. This would run contrary to the policy focus otherwise shown by TRAI in the recent past, in addition to not being compatible with the Digital India mission advanced by the Union Government and numerous other public agencies across the nation.

In conclusion:

We appreciate TRAI's openness in soliciting inputs in its consultations in this area, and the interest shown in policy approaches to cloud computing by a range of Indian government agencies. We believe that any future policy effort here must focus on facilitating the empowering elements of cloud computing for realising the potential of all of the world's peoples, and that regulators should focus on specific measures which help protect the rights of users - particularly with respect to privacy and digital security - given the trust that such steps bring in the greater use of such technologies.

We hope that we can be of assistance to TRAI, and would be grateful if we could be informed of any open house discussions or other policy dialogues that TRAI may choose to organise on this topic.

Yours sincerely,

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