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COMMENTS ON THE CONSULTATION PAPER ON DIFFERENTIAL PRICING FOR DATA SERVICES

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

No, TSPs should not be allowed to have differential pricing for data usage for accessing different websites, applications or platforms.

The principle of non-discrimination has governed the Internet since its inception¹ and any deviation from it educes the Internet's ability to generate innovation².

¹ Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC's Order Be Affirmed at pp. 13-14, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), available at <http://cyberlaw.stanford.edu/files/publication/files/vanschewick-2009-amicus-brief.pdf>.

² Timothy Wu and Lawrence Lessig, Ex Parte Letter at p. 8, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52 (Aug. 22, 2003), available at <http://apps.fcc.gov/ecfs/document/view?id=6514683885>; Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC's Order Be Affirmed at pp. 13-14, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), available at <http://cyberlaw.stanford.edu/files/publication/files/vanschewick-2009-amicus-brief.pdf>.

Differential pricing schemes can take many forms. It includes the TSP discriminating between what content is accessed through the data connection, and charging different rates for each application or source of content or “zero-rating”, which is the practice of not counting the usage of certain websites or applications against a users’ monthly bandwidth³.

The main problem in these models is the role of private profit making entities in deciding which online services are offered at differential price rates. This allows the TSP or the platform provider to create a ‘walled garden’ of services that are available at reduced prices, thus creating unfairly beneficial market circumstances for the providers of these specific services and creating a “synthetic online experience for users that isn’t the Internet”⁴.

The discriminatory measures tilt the balance away from fair competition between different websites and content providers⁵ as any discriminatory behavior distorts competition amongst the applications or different classes of applications⁶. Ensuring a free market for these players would require that all content providers have an equal access to the consumers, else it makes it impossible for the content providers to have a level playing field. In absence of a non-discrimination rules, TSPs/ ISPs will decide the “winners and losers online”⁷.

³ Barbara van Schewick, *Network Neutrality and Zero-rating*, p.1 (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

⁴ Susan P. Crawford, *Zero for Conduct*, MEDIUM (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

⁵ Barbara Van Schewick, *Analysis of Proposed Network Neutrality Rules*, p.3 (Feb. 18, 2015), available at <https://cyberlaw.stanford.edu/downloads/vanSchewick2015AnalysisofProposedNetworkNeutralityRules.pdf>.

⁶ BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* 57-81, 277 (2010); Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 *STAN. L. REV.* 1, 65 (2015); Barbara van Schewick and Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 *STAN. L. REV. ONLINE* 85, 89 (2015).

⁷ Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC’s Order Be Affirmed at p. 18, *Comcast Corp. v.*

“Zero-price rule” has been one of the principles that have enabled innovation in the field Internet and technology services.⁸ It has helped to foster competition and innovation in applications for economic growth and to use Internet to create value in the “social, cultural, and political domains”⁹ and to distinguish it from other networks¹⁰.

According to *Professor Tim Wu* who coined the term “net neutrality”¹¹, on the Internet, content providers or new entrepreneurs did not have to reach agreements with every carrier to maximize the number of users and this helped the Internet reach its current “level of creativity and social usefulness”¹². If content providers had to pay fees before made more easily available, many business models would not have been successful and many content providers may not have entered the market.¹³ Any attempt to charge access fee will perpetuate the cable TV model in the open Internet context, which will be counter productive and harmful.¹⁴

FCC, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), available at <http://cyberlaw.stanford.edu/files/publication/files/vanschewick-2009-amicus-brief.pdf>; Barbara van Schewick and Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 STAN. L. REV. ONLINE 85, 89 (2015).

⁸ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009); Tim Wu, *Closing Time for the Open Internet*, THE NEW YORKER (Jan. 15, 2014), <http://www.newyorker.com/tech/elements/closing-time-for-the-open-internet>.

⁹ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 17-18 (2015).

¹⁰ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009).

¹¹ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145 (2003).

¹² Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 62 (2009).

¹³ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 69 (2009).

¹⁴ Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23(3) J. ECON. PERSP. 61, 69 (2009); Susan P. Crawford, *The Looming Cable Monopoly*, YALE L. & POL'Y REV. INTER ALIA (June 1, 2010), http://ylpr.yale.edu/inter_alia/looming-cable-monopoly; Susan P. Crawford, *Zero for Conduct*,

In the India context there has been a constant debate on the issue of zero-rating. However, we believe that zero-rating selected applications will allow the ISPs to make certain content more attractive and “pick winners and losers” on the Internet and such harm such must be prevented.¹⁵ If TSPs are allowed to charge content providers to be zero-rate, it will incentivize the TSPs to “lower monthly bandwidth caps or increase the per-byte price for unrestricted Internet use in order to make it more attractive for application providers to pay for zero-rating”¹⁶, thereby harming users and the excluded applications. It is also not likely to result in free Internet for the users and will end up being added revenue for the corporations¹⁷.

Differential pricing also causes harm to users. Users suffer in the choice of applications and services available to them through the Internet¹⁸. Their choice will be dictated by what applications are available for free or at

MEDIUM (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>; Vanita Kohli-Khandekar, *Net neutrality - Lessons from cable TV*, BUSINESS STANDARD (April 14, 2015), http://www.business-standard.com/article/opinion/vanita-kohli-khandekar-net-neutrality-lessons-from-cable-tv-115041401043_1.html; Raghav Bahl, *After My Cable Massacre, I Punch For Net Neutrality*, QUINT (April 16, 2015), <http://www.thequint.com/opinion/2015/04/15/after-my-cable-massacre-i-punch-for-net-neutrality>.

¹⁵ Barbara van Schewick and Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 STAN. L. REV. ONLINE 85, 89-90 (2015); Barbara van Schewick, *Network Neutrality and Zero-rating*, p.8 (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

¹⁶ Barbara van Schewick, *Network Neutrality and Zero-rating*, pp. 3-4 (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

¹⁷ Jonathan Zittrain, *Did Net Neutrality Just Kill the Possibility of a Free Internet, or Pave the Way for It?*, BIGTHINK, <http://bigthink.com/videos/jonathan-zittrain-on-net-neutrality>.

¹⁸ Barbara Van Schewick, *Analysis of Proposed Network Neutrality Rules*, p. 14 (Feb. 18, 2015), available at <https://cyberlaw.stanford.edu/downloads/vanSchewick2015AnalysisofProposedNetworkNeutralityRules.pdf>.

lower rates, as determined by the TSP¹⁹ and the consumers will not choose to use certain applications they value²⁰.

In this way the TSP becomes the arbiter of the choice of applications available to the end user. However, for the Internet to “realize its full economic, social, cultural, and political potential”, users and not TSPs should continue to decide how they want to use the Internet²¹.

Protection of users’ freedom of choice would necessitate measures to ensure that they have non-discriminatory access to all applications. This requires countering of the influence of other actors, such as that of the TSP.²²

As scholars have demonstrated, “the individual’s ability to speak and be heard, to be a producer and not just a customer, and to have a wide variety of diverse sources that are not selected or controlled by a central gatekeeper who has its own motivations, are central to the Internet’s political and cultural potential.”²³

¹⁹ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 66 (2015).

²⁰ Timothy Wu and Lawrence Lessig, Ex Parte Letter at pp. 2, 7, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52 (Aug. 22, 2003), available at <http://apps.fcc.gov/ecfs/document/view?id=6514683885>; BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 57-81, 277 (2010).

²¹ Brief Amicus Curiae of Professors Jack M. Balkin, Jim Chen, Lawrence Lessig, Barbara van Schewick, & Timothy Wu Urging that the FCC’s Order Be Affirmed at p. 18, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (No. 08-1291), available at <http://cyberlaw.stanford.edu/files/publication/files/vanschewick-2009-amicus-brief.pdf>; BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 57-81, 277 (2010); Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 5 (2015).

²² Barbara Van Schewick, *Analysis of Proposed Network Neutrality Rules*, pp. 11-12 (Feb. 18, 2015), available at <https://cyberlaw.stanford.edu/downloads/vanSchewick2015AnalysisofProposedNetworkNeutralityRules.pdf>.

²³ BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 57-81, 364 (2010) *citing* Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79(1) NYU L. REV. 1-58 (2004); Jack M. Balkin, *Media Access: A Question of Design*, 76(4) GEO. WASH. L. REV. 101-118 (2008);

The United States Open Internet Rules of 2015²⁴ provide direction on these issues as well. The Open Internet Rules expressly prohibits the favouring of any particular kind of data over other data, in lieu of any consideration.²⁵ It also prohibits treating data differently based on any business considerations of partnerships or affiliations.²⁶ It states as its objective the preservation of a free and open Internet where application developers can innovate in a competitive market without having to make arrangements with the service providers²⁷. It also mentions protection of users' choice to access content as per their wish without interference of blocking or preferential access to certain products²⁸.

The Open Internet Rules states that a “person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.”²⁹ The term ‘paid prioritization’ here refers to preferential treatment of certain traffic (i.e, transfer of data) over other traffic³⁰. It further states that there shall be no discrimination in transmitting any lawful content over the service, apart from exceptions for ensuring security of the network and end user preferences.³¹

Remarks of Jack M. Balkin at FCC Workshop on Speech, Democratic Engagement, and the Open Internet at p. 1, (December 15, 2009), Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52 (Dec. 22, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020355385>.

²⁴ United States Federal Communications Commission (FCC) Open Internet Rules: The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, available at http://www.ecfr.gov/cgi-bin/text-idx?SID=0e632ddf7e60307aa0ea941c1d84ae79&mc=true&tpl=/ecfrbrowse/Title47/47cfr8_main_02.tpl; A detailed explanation of these rules by the FCC (March 12, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf.

²⁵ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.9.

²⁶ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.9.

²⁷ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.1.

²⁸ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.11.

²⁹ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.9.

³⁰ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.9.

³¹ The Code of Federal Regulations, Title 47, Chapter 1, Subchapter A, Part 8, § 8.11.

We propose that for a network neutrality regime to be effective and a meaningful, it requires bright-line rules prohibiting all forms of access fees³², not just fees paid in return for prioritization and application-specific discrimination. It needs to include a non-discrimination rule that applies to all forms of differential treatment and bans discrimination based on identity or type of the content or application accessed by the user³³. There should be an explicit ban on any type of zero-rating in exchange for edge-provider payment, and on zero-rating of selected applications within a class of similar applications, as well as zero-rating of all applications in a class without charging edge providers.

TRAI should come out with these rules at the earliest³⁴ and as has been stated by “these rules are necessary because network providers’ decisions about whether, when, and how to engage in discrimination will not necessarily result in socially desired outcomes. Network providers are not beneficial stewards of the Internet platform. They are private actors that pursue their private interests. Network providers’ private interests are often in conflict with users’ interests, and even if they are not, network providers do not know exactly what users want. Network providers’ private interests and the public’s interests with respect to the evolution of the Internet diverge as well.”³⁵

Any actions contrary to bringing out these bright line rules will undermine the “public’s right to know - the market place of ideas - which the Internet provides to persons.”³⁶

³² Barbara van Schewick and Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 STAN. L. REV. ONLINE 85, 86 (2015).

³³ Barbara van Schewick and Morgan N. Weiland, *New Republican Bill is Network Neutrality in Name Only*, 67 STAN. L. REV. ONLINE 85, 90 (2015).

³⁴ Apar Gupta, *Net Ambiguity*, INDIAN EXPRESS (Jan. 6, 2016), <http://indianexpress.com/article/opinion/columns/net-ambiguity/>.

³⁵ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 132 (2015).

³⁶ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 21.

Question 2: If differential pricing for data usage is permitted, what measures should be adopted to ensure that the principles of non-discrimination, transparency, affordable Internet access, competition and market entry and innovation are addressed?

Differential pricing for data usage should not be permitted and there should be no compromise³⁷ on this issue. The regulatory framework should contain a bright-line rule against differential pricing.

As *Professor Schewick* puts it:

“ [...] while lower profits may to some degree reduce network providers’ incentives to deploy more and better broadband networks, letting network providers block, discriminate, or charge access fees removes the very features that were at the core of the Internet’s success. Given that there are other ways to foster broadband deployment that are not similarly harmful, sacrificing the very aspects that drive the Internet’s value seems too high a price to pay. As Tim Wu put it³⁸, it is like selling the painting to get a better frame.”³⁹

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.

³⁷ *Professor Susan Crawford* of the *Harvard Law School* persuasively puts this point: “Compromise is great, but no democratic country should sacrifice the ideal of the global, interoperable Internet — and the speech and innovation it facilitates — in the name of pragmatism [...] when it comes to fundamentals—including the earth-shaking idea of the Internet, which has made possible for the first time an open, global, interoperable platform for communications—there can be no compromise. Because then we would be surrendering, not compromising.”: Susan P. Crawford, *Zero for Conduct*, MEDIUM (JAN. 7 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868#.lq308jucl>.

³⁸ Tim Wu, *Why You Should Care About Network Neutrality*, SLATE (May 1, 2006), <http://www.slate.com/id/2140850>.

³⁹ Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 19 (2015).

Also, describe the potential benefits and disadvantages associated with such methods/technologies/business models?

The premise of this question needs to be addressed in terms of what approaches are considered for providing free Internet access, and to which consumers. TSPs incur costs for providing access to Internet and data services, and this cost needs to be covered by the charge levied on consumers. Consumers pay for the data they use in terms of the amount and/or duration of usage. This is the existing system and by and large considered a fair one.

It is fathomable that TSPs may develop new business models to cover the costs of providing the service that they do. However, it is not permissible to do this by differentiating how the service is provided based on the particular content accessed. This constitutes interference with the functioning of the market and a restriction of users' freedom of choice, which is a direct violation of the Telecommunication Tariff Order⁴⁰. Concerns of providing Internet access to a wider population must take into account the basic principle that a TSP cannot play the role of an arbiter regarding how different data services are offered and accessed. This is a function that should only be carried out by state authority with legislative backing.

In the Geneva Declaration of Principles from World Summit on the Information Society (WSIS) 2003⁴¹, India committed to providing access to the full Internet to all people. The relevant paragraphs state:

“14. We are resolute to empower the poor, particularly those living in remote, rural and marginalized urban areas, to access information and to use ICTs as a tool to support their efforts to lift themselves out of poverty.

⁴⁰ Clause 10, The Telecommunication Tariff Order, 1999, available at <http://tinyurl.com/tto1999>.

⁴¹ WSIS, Declaration of Principles- Building the Information Society: A Global Challenge in the New Millennium ¶¶ 14, 23, Doc. No. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf.

[...]

23. Policies that create a favourable climate for stability, predictability and fair competition at all levels should be developed and implemented in a manner that not only attracts more private investment for ICT infrastructure development but also enables universal service obligations to be met in areas where traditional market conditions fail to work. In disadvantaged areas, the establishment of ICT public access points in places such as post offices, schools, libraries and archives, can provide effective means for ensuring universal access to the infrastructure and services of the Information Society.”

This was reaffirmed by all United Nations member states, including India, in the recently concluded review of the implementation of the Outcomes of the World Summit on the Information Society⁴² (WSIS+10).

It is recommended that these commitments are fulfilled and that special emphasis is placed on providing full and equal Internet connectivity to weaker and marginalized sections of society. This implies that there must be no difference in the Internet accessible to the use group who are already regular users of the conventional Internet, and those who are the subject of policy measures to increase access to Internet for a larger share of the population. Such an objective dictates that telecom or online content companies cannot be permitted to play a role in deciding the nature of the Internet that anyone is able to access.

A commitment towards providing a basic utility like connectivity to the Internet cannot be diluted, or characterized as a halfway promise. The commitment made is to provide access to all people to the full extent of the

⁴² UNGA, Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society ¶ 2, U.N. Doc. A/C.2/59/3 (Dec. 13, 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.33&referer=https://t.co/QauJe5c1Wn&Lang=E.

Internet. TRAI has also stated that providing access to video content is the most crucial aspect of this mandate, as this medium can cut across literacy barriers. A restricted set of Internet services would disable access to video content for those who are most crucially in need of the same.

There is a misplaced focus placed by the consultation paper on giving telecom companies economic advantages for providing Internet access to remote areas and communities. This approach ignores the main objective of TRAI and the state, to provide Internet connectivity to people irrespective of who provides the service or how it is done. If telecom companies are unable to make a profit by providing further access and infrastructure, and choose not to do so, it is not within the mandate of state agencies to assist companies to reach their profit margins or expansion goals. The State agencies cannot remedy the lack of business alternatives by giving companies decision-making power over people's access to resources.

The models of differential pricing and a limited set of online applications are precisely aimed at helping existing telecom and internet market leaders to find a way to expand by compromising on the rights of citizens to access information. The discourse has created an artificial binary between providing limited Internet access to all, and providing full Internet access to a limited set of users. This presupposes the possibility of a compromise in the commitment made to provide full access to all citizens. However, the mandate needs to be respected by aiming for full access to the Internet for all, and the models explored should have with this objective in mind.

There are studies carried out to show the division in consumer choice regarding data plans with a restricted set of applications.⁴³ According to a

⁴³ "Evidence suggests that zero-rating has a powerful effect. For example, in a study commissioned by CTIA, "[n]early three-quarters of respondents (74%) report that they would be more likely to watch videos offered by a new provider if the content did not count against their monthly limit." When Slate experimented with zero-rating and "told some would-be listeners that the podcast wouldn't count against the data plans on their smartphones [...] users were 61% more likely to press play.": Barbara van Schewick, *Network Neutrality and Zero-rating*, p.2 (Feb. 19, 2015), available at

study of Indian consumers, certain highly used applications like messaging services are sought after in these kinds of plans (which are not zero rated), but with others the response is fairly lukewarm.⁴⁴ This helps demonstrate the importance of having access to the full extent of the Internet as a crucial aspect of any data connection. It is also important to think about this beyond mere consumer choices -- as the constitutional right of consumers (as Indian citizens) to be informed by a plural media creates an obligation on the State⁴⁵ to form a policy which creates a versatile and diverse media, or at the very least does not operate against it. This obligation would have to be taken into account in a hypothetical scenario where there actually was a significant demand for zero-rated data plans with limited content.

Professor Schewick eloquently sums up the issues of marginalized communities and Internet access⁴⁶:

“Some commenters argue that at least one type of zero-rating in this class – giving users access to [...]” a limited part of the Internet “even if they haven’t bought a mobile Internet plan – is beneficial for underserved communities. Having “free” access to [...]” a part of the Internet, “they argue, is better than not having no access to the Internet at all.

This argument does not apply to the zero-rating of ISPs own

<http://apps.fcc.gov/ecfs/document/view?id=60001031582>; Amba Kak, *The Internet Un-bundled- Locating the user’s voice in the debate on zero-rating*, ch. 5, ch. 6, at 49 (August, 2015) (MSc Dissertation, Oxford Internet Institute), available at <http://www.savetheinternet.in/files/amba-kak-thesis.pdf>; Amba Kak, *Is Free Basics the access that users want*, BUSINESS STANDARD (Dec. 30, 2015), http://www.business-standard.com/article/opinion/free-basics-vs-net-neutrality-is-free-basics-the-access-that-users-want-115123000131_1.html.

⁴⁴ Amba Kak, *The Internet Un-bundled- Locating the user’s voice in the debate on zero-rating*, ch. 5 (August, 2015) (MSc Dissertation, Oxford Internet Institute), available at <http://www.savetheinternet.in/files/amba-kak-thesis.pdf>.

⁴⁵ See *infra* pp. 17-21.

⁴⁶ Barbara van Schewick, *Network Neutrality and Zero-rating*, pp. 6-7 (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>.

applications, so it shouldn't prevent the [...] regulator "from adopting a ban on these practices. But even for plans that give users "free" access to" a limited part of the Internet "the argument that these plans benefit minorities is wrong for two reasons:

[...]

And second, the argument suggests a false choice. The choice is not between granting low-income communities free access to [...] a limited part of the Internet "or no Internet access at all. Instead of allowing free access to [...] a limited part of the Internet, "ISPs could offer low-cost, limited options that give users free, but limited access to the entire Internet.

Zero-rating [...] a limited part of the Internet "doesn't meet the needs of underserved communities. Now more than ever, Internet access is necessary to secure full participation in [...] economy and democracy. However, access to [...] a limited part of the Internet "is not the same as access to the Internet. Low-income families need access to the Internet to do homework, communicate with teachers, search for jobs, sign up for health insurance, and register to vote. Minority communities, who have historically been left out of broader social and political discourse, need the Internet to organize, create, educate and innovate online." A few applications "[...] alone do not allow them to do this [...]

[...] allowing ISPs to zero-rate certain applications as a tool to help spread the digital divide sets a dangerous precedent [...]

[...] Low-income families, both on their computers and on their phones, will be restricted to sites that providers choose for them. It will shuttle already marginalized communities into "walled gardens" – cutting them off from free information and full participation."

The alternatives for expanding Internet access through state owned enterprises such as BSNL, BBNL etc. can be explored in areas where private companies fail to meet market requirements, or choose not to expand. Further, the resources available through the Universal Service Obligation Fund (USOF) which is currently in excess of ₹ 40 thousand crores⁴⁷, can be used for the requisite investment in the absence of private investment in providing access to remote areas. The said fund has been set up with the specific objective of providing equitable access to the Internet by connecting those groups and areas that have not been serviced by conventional expansion of the telecom industry. It is thus a perfect alternative to provide the economic backing for projects with these objectives.

India has already committed to pursue the objective of developing Information and Communications Technology (ICT) infrastructure to improve connectivity through USOF and other public funds, as stated in the 2015 WSIS+10 outcome document⁴⁸.

“36. We commit to efficient public resource allocation to deployment and development of information and communications technology, recognizing the need for budgeting for information and communications technology across all sectors, especially education. [...] We recognize the potential to improve connectivity, especially in remote and rural areas, through universal service funds and publicly funded network infrastructure, among other tools, particularly in areas where market conditions make investment difficult.”

An important premise to be kept in mind is that it is not necessary to allow TSPs to modify the nature of data services to provide greater Internet

⁴⁷ Universal Service Obligation Fund Status (December 29, 2015), available at <http://www.usof.gov.in/usof-cms/usof-fund-status-table.jsp>.

⁴⁸ UNGA, Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society ¶ 36, U.N. Doc. A/C.2/59/3 (Dec. 13, 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.33&referer=https://t.co/QauJe5c1Wn&Lang=E.

access to the wider population. The questions in the Consultation Paper seem to assume that without this measure it is not possible to provide Internet connection to a greater share of citizens. This is patently untrue, and there are other approaches to increase the penetration of last-mile Internet connectivity. Further investment in conventional infrastructure for telecommunication and data services is the first and most obvious method to go about achieving this. If telecom companies find that it is not profitable to expand connectivity any further, such expansion can either be incentivized as part of the terms of licensing agreement between the Central Government and the TSPs.

There are however other models to fulfill this objective as well. Community radio has proved to demonstrate a successful model for increasing access to media for newer and more diverse sections of the population.⁴⁹ The presence of a substantive regulatory framework ensures that the players who opt to feed into this market have objectives that are in line with the mandate of the state as mentioned in the Consultation Paper to provide internet access to all citizens. This model also presents a system where the services provided to the citizens are those, which are most meaningful and relevant to their priorities and livelihood.

It is the duty of the State and various agencies including TRAI to protect the right to freedom of speech and expression of citizens⁵⁰, and not business models. The public interest demands that we secure the benefits of an open and participatory Internet for this century and frame strong network neutrality framework.

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

⁴⁹ See Chinmayi Arun and Siddharth Manohar, *Empowering the Marginalized: Tales of the Digital Good Life* in THE GOOD LIFE IN ASIA'S DIGITAL 21ST CENTURY pp. 2-7 (Digital Asia Hub, 2016).

⁵⁰ See *infra* pp. 17-21.

The crux of the arguments being put forth in the debate on net neutrality and differential pricing consists of the harm to competition caused by differentially priced platforms, along with the related concern of monopolization of a section of the country's user base. This is pitched against need to increase the accessibility of the Internet. Missing completely from this discussion is the right of users to access a diverse information set from multiple sources of media content, and the principles to which usage and allocation of spectrum is subject as per Article 19(1)(a) of the Constitution of India.

TRAI must take into account constitutional principles as well as the Supreme Court's jurisprudence on Article 19 before finalizing its view on the issue of differential pricing.

Telecommunications companies may be private, market-driven entities but they operate in a sector in which they perform a public function by offering information services to citizens. They are, and have always been, regulated with the object of citizens deriving as much benefit as possible from their services. The growth of the Internet has meant that these companies now perform a critical gatekeeping function in providing citizens with access to online information, which is increasingly being recognized as an important human right. TRAI must ensure that these companies do not abuse their gatekeeping function and their control over an important national resource such that citizens are deprived of access to a plurality of information.

The part below is a summary of relevant Indian constitutional principles and how they might apply to the regulatory clearance of differential pricing of different kinds of online content.

CONSTITUTIONAL PRINCIPLES

There are three key principles that the committee must consider in the context of the Internet. The first is the public's right to receive information under Article 19(1)(a) of the Constitution of India, the second is that the

government is required to regulate limited public resources such that they are used in the best interest of society, and the third is that even private parties will be required to respect constitutional rights when they perform a public function.

The right to freedom of speech and expression in the Indian Constitution⁵¹ contains within it the right to *receive* information. This has been articulated repeatedly in a series of Supreme Court judgments ranging from Justice Mathew's dissent in *Bennett Coleman*⁵², the *Indian Express Newspapers v. Union of India*⁵³ case, *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*⁵⁴, and *Sahara India Real Estate Corporation Ltd. & Ors. v. SEBI & Anr*⁵⁵. 'The public's right to know' has most recently been acknowledged in the context of the Internet by the Supreme Court in *Shreya Singhal v. Union of India*⁵⁶.

Added to this is the fact that airwaves are a limited public resource. The Supreme Court of India held in *Cricket Association of Bengal*⁵⁷ that since airwaves are a scarce resource, they have to be used in the best interest of the society, and that the government may regulate the grant of licenses accordingly. The public authority must control and regulate airwaves or frequencies **in the interests of the public** and to prevent the invasion of their rights. *Justice Jeevan Reddy's* concurring judgment adds that public good lies in ensuring plurality of opinions, views, and ideas.

Telecommunications infrastructure has already been recognized by the Indian judiciary as a public resource. In *Delhi Science Forum & Ors. v. Union*

⁵¹ Article 19(1)(a), Constitution of India, 1950.

⁵² *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*, (1972) 2 SCC 788.

⁵³ (1985) 1 SCC 641.

⁵⁴ (1995) 2 SCC 161.

⁵⁵ (2012) 10 SCC 603.

⁵⁶ (2015) 5 SCC 1.

⁵⁷ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

*of India & Anr*⁵⁸, the Supreme Court acknowledged that telecommunications is an internationally recognized public utility of strategic importance. Further, in the case of *Centre for Public Interest Litigation and others v. Union of India & Ors.*⁵⁹ (the 2G case) the Supreme Court recognized spectrum as a scarce natural resource, and applied the public trust doctrine to explain that the state must protect such resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. In *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*⁶⁰, the Supreme Court has reemphasized that the State is bound to protect spectrum resources for the enjoyment of general public rather than permit their use for purely commercial purposes. It has pointed out that the public trust doctrine “puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest”, and that it “mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management.”

The mechanism for distributing the resource must therefore follow the doctrine of equality, which requires among other things, that the people be granted equitable access to natural resources. This means that the Department of Telecommunication is under an obligation to ensure that the telecommunication infrastructure is used by its operators in a manner by which people are granted equal access to both, a wide range of information as well as platforms on which they may express themselves. This is an obligation that is taken seriously in India, as is reflected by the National Telecom Policy, 1999 through its requirement that BSNL provide affordable services to remote areas, and by the Universal Service Obligation Fund directed at financing the introduction of telecommunications services in

⁵⁸ (1996) 2 SCC 405, ¶ 2.

⁵⁹ (2012) 3 SCC 104.

⁶⁰ (2014) 6 SCC 110, ¶ 4.

rural and remote areas.⁶¹ In the context of spectrum, this obligation is also reflected in the licensing agreements issued under Section 4 of the Indian Telegraph Act, 1885. It highlights the fact that the Central Government enjoys an “exclusive privilege” so far as “spectrum” is concerned, which is a scarce, finite, and renewable natural resource which has got intrinsic utility to mankind.⁶² In this context, the Supreme Court has emphasized in *Association of Unified Tele Services Providers & Ors.*⁶³ that spectrum “is a natural resource which belongs to the people, and the State, its instrumentalities or the licensee, as the case may be, who deal with the same, hold it on behalf of the people and are accountable to the people.”

Finally, the question of whether Internet Service Providers perform a public function must be considered in the context of *Jayta Pal Singh v. Union of India*⁶⁴. In this case, the Supreme Court’s standard to check if a body is performing a public function is to “prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so”. The court then found that telecommunication operators do not meet this standard (in the context of the rights available to their employees) on the basis that they provide commercial services for commercial considerations – which was viewed as different in essence from the function performed by private institutions imparting education to children (acknowledged as a sovereign function by the judiciary). This principle recognizing that private bodies may perform public functions was also highlighted in *Binny Ltd. & Anr. v. V. Sadasivan & Ors.*⁶⁵, in which the Supreme Court, in the context of the writ jurisdiction under Article 226 of

⁶¹ In addition to the primary documents, see Sagnik Datta, *Skewed Plan*, FRONTLINE (June 14, 2013), <http://www.frontline.in/economy/skewed-plan/article4746549.ece>.

⁶² *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*, (2014) 6 SCC 110, ¶ 23.

⁶³ *Association of Unified Tele Services Providers & Ors. v. Union of India & Ors.*, (2014) 6 SCC 110, ¶ 23.

⁶⁴ (2013) 6 SCC 452.

⁶⁵ (2005) 6 SCC 657.

the Indian Constitution, explained that when a “private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced”.

Authoritative sources on human rights, including the Indian Supreme Court⁶⁶ and the UN Special Rapporteur on human rights⁶⁷ have highlighted the critical role played by Internet for the exercise of freedom of expression rights of citizens. It is our submission that any consideration of the role of Internet service providers in the context of freedom of expression online is likely to satisfy the public function test since access to information is in fact not just a collective benefit but a fundamental right of the public.

Further, differential access and pricing of online content by Internet Service Providers could have the effect both of thwarting the market and causing serious losses to Indian content-based start-ups, as well as affecting people’s access to information. We would also caution that regulation of information markets must always take into account diversity of content and the access rights of citizens, and must be regulated from the point of view of providing the maximum possible information, and a plurality of information to citizens.

MEDIA PLURALISM

The Supreme Court of India has read Article 19 of the Constitution to mean that citizens have a right to a plurality of information. In the words of the Apex Court:

“The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public

⁶⁶ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

⁶⁷ UNGA, Sixty-sixth session Report by Special Rapporteur Frank La Rue on the Promotion and Protection of the Right to Freedom of Opinion and Expression, (Sept. 7, 2012) UN Doc A/67/357.

issues. A successful democracy posits an ‘aware’ citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them. This cannot be provided by a medium controlled by a monopoly — whether the monopoly is of the State or any other individual, group or organisation...⁶⁸

This reading of the right to freedom of expression suggests that zero-rating may be problematic since it will create monopoly control (whether by the state or private parties) over the information available to a large number of citizens. Especially in view of the government’s ‘Digital India’ program, such control may be unnecessary since the government is already working on ways to ensure that there is universal access to the Internet.

In addition to being recognized in India, the necessity of plurality of information, especially in the context of the media is a well-established norm in Europe. It has been explicitly recognized in the European Charter of Fundamental Rights⁶⁹, which states that ‘the freedom and pluralism of the media shall be respected’. Plurality has also been recognized as being a priority in the context of Article 19 of the International Covenant on Civil and Political Rights⁷⁰, and General Comment 34⁷¹ to the covenant urges states to prevent monopoly control of the media and promote plurality of the media.

It must therefore be kept in mind that while market-priorities and access to information are important, it is an equally important principle embedded in Article 19 of the Indian constitution that no entity, not even the government, can control the nature of information that citizens are able to access. In view

⁶⁸ *Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, ¶¶ 201(3)(a) and (b).

⁶⁹ Charter of Fundamental Rights of the European Union, [2010] OJ C 83/02, art. 11(b).

⁷⁰ International Covenant on Civil and Political Rights, art. 19 (Dec. 16, 1966), 999 U.N.T.S. 171.

⁷¹ International Covenant on Civil and Political Rights General Comment 34, Article 19: Freedom of Opinion and Expression, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 7 (Aug. 31, 2001).

of this, it is difficult to see how zero-rating can be implemented in the absence of a completely independent and legitimate regulator that is accountable to the people in a manner such that it will not attempt to exercise an adverse influence on the plurality of information that they are owed.

Finally, regulation focusing on net neutrality and on the issue of differential pricing can take a variety of forms and it will be critical to choose a model that will be effective within our regulatory environment. We are attaching an article⁷² written by *Professor Barbara van Schewick*⁷³ of *Stanford University* that offers an insight into the same issues that TRAI is currently looking into, and the different kinds of models that can be adopted in this regard. We are also attaching a recent note by *Professor Schewick* on the specific issue of “Network Neutrality and Zero-rating”⁷⁴ and hope that it is useful to the regulator⁷⁵.

⁷² Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 65 (2015), available at http://www.stanfordlawreview.org/sites/default/files/67_Stan_L_Rev_1_van_Schewick.pdf.

⁷³ Barbara van Schewick is a leading net neutrality expert, a Professor at Stanford Law School, the Director of the Stanford Center for Internet and Society, Professor (by Courtesy) of Electrical Engineering at Stanford University and the author of *Internet Architecture and Innovation* (MIT Press 2010). Her writings on network neutrality have influenced regulatory debates in the United States, Canada, Europe and Latin America and have been cited by academics, stakeholders, regulatory agencies and other public entities worldwide. The FCC’s Open Internet Orders in 2010 and 2015 relied heavily on Professor Schewick’s work: http://www.slate.com/blogs/future_tense/2015/09/22/barbara_van_schewick_susan_crawford_and_other_women_who_won_net_neutrality.html.

⁷⁴ Barbara van Schewick, *Network Neutrality and Zero-rating*, Submission to the US Federal Communications Commission (Feb. 19, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001031582>. The document contains a typographical error with respect to the date of the document and the correct date is available at <http://apps.fcc.gov/ecfs/comment/view?id=60001018565>.

⁷⁵ In her third recommendation *Professor Schewick* states that zero-rating of all applications in a class that does not involve edge-provider payments should be reviewed under the general conduct rule. Given *Professor Schewick*’s position on this, it appears her recommendation is best suited for countries which have existing regulatory safeguards. Due to the absence of such a framework in India we are of the opinion that this will not be applicable to the Indian scenario.