

# **Counter response from IT for Change to some elements of the submissions for the TRAI consultation on 'Regulatory Framework for OTT Services'**

*IT for Change ([www.ITforChange.net](http://www.ITforChange.net)) is a Bangalore based NGO  
in Special Consultative Status with the United Nations<sup>1</sup>*

Reading the very great variety of submissions to the TRAI consultation paper, we will like to submit our responses to some key points raised in these submissions.

*Our current submission deals with the following key points in response to various elements in the numerous inputs made to the TRAI consultation paper on 'Regulatory Framework for OTT Services'.*

- (1) What is the key basis or justification of a net neutral Internet in terms of recognized social value, that the Indian state is supposed to uphold. We see that there is a lot of confusion about the basic justifications for the net neutrality principle.*
- (2) The issue of zero rating that has been raised in many submissions: much of our response deals with this issue.*
- (3) What to do to keep telecom business viable?*
- (4) Regulation of various Internet services.*
- (5) What kind of 'technical discrimination' and 'positive discrimination' can be allowed on the Internet without considering it a violation of net neutrality.*

Our points in the above areas are listed below – the numbering of response points does not correspond to the above summary of topics.

1. The primary issue here is of how the Internet and its neutrality is seen from a larger public policy principle, and why. This corresponds to the first point of the Committee's terms of reference. In getting the primary framework wrong or inadequate leads to many a net neutrality discussions and arguments taking place at cross-purposes to each other, and thus not fruitful. It is important to see net neutrality not just as matter of 'economic balance' between the telecom sector and the Internet sector, as it often largely gets seen as. Next, it is also not just a matter of a free, open and competitive market, which no doubt is an important consideration here, with regard to the burgeoning and the innovative Internet sector. Net neutrality encompasses important public policy and regulatory elements from the telecom sector – chiefly the common carriage principle – and also from the media sector, since the Internet is today a key media of our society. Both telecom and media are considered to be sectors of special importance from a public interest point of view which is why they are subject to special regulatory approaches,

---

<sup>1</sup>For any additional information or clarifications please write to [parminder@itforchange.net](mailto:parminder@itforchange.net)

beyond what ordinary economic sectors are subject to. ***Further, and this is our principal contribution here, since the Internet underpins deep transformations in virtually every sector of our society today, it represents a techno-social infrastructure of an exceptional importance. Over and above everything else, it is important to preserve a 'neutral' and egalitarian nature of this key techno-social infrastructure of the Internet if we want a more equal and just society, which is India's constitutional mandate to seek and preserve. Net neutrality is about maintaining such an egalitarian architecture of the Internet.*** Even very small deviations or distortions in the architectural design can show as hugely amplified distortions in the social supra-structures, in terms of various social systems that are being built on the Internet/ digital paradigm today – in areas as diverse as business, media and governance to education, health and livelihood support. It is important to preserve net neutrality as a public policy principle basically to preserve the egalitarian nature of the Internet, and to help ensure that our new digitally-mediated social systems are more equal and just than the existing ones. Correspondingly, allowing net neutrality to be compromised will mean a push towards greater inequality and social and economic injustices in the society. ***Net neutrality is basically about a certain 'equality of opportunity', in social, economic, cultural and political fields. Such a high and prior value, which is constitutionally required by the state to uphold, cannot just be weighed against normal commercial and business considerations.***

2. A lot of current discussion in India centres around what is called as '**zero rating**', whereby Internet content/application/service providers pay the ISPs to carry their content free to the consumers. Although such a practice involves no technical prioritisation or deterioration of any content or service, it introduces a huge distortion in the architecture of the public Internet; with a version of the 'Internet' put together by the ISPs and its partners being made available for free as against the priced 'public Internet' where all content, applications and services are available on an equal basis. This introduces a perverse incentive into the system whereby the individual consumers are expected to exercise a choice of immediate benefit and opt for the 'free channel', which is to the larger social detriment in terms of a comprised public and egalitarian quality of the Internet as a whole. This is the classical issue of how a series of free and narrow/ immediate self-interest based individual choices may not lead to the best overall collective social choice. It is not enough to argue on the basis of a *de jure* position that even while some content is zero rated, all other content too remains available for the same price as it would be if no content was zero rated. ***We need to understand through forward-looking analytical exercises the de facto situation that will arise with 'zero rating' practices, and its highly distortive impact on the architecture of public Internet, and thus on the Internet-mediated social systems that are emerging. Consider a situation whereby whenever one goes shopping, the shopping place has two sections, one with an entry fee and other free to enter. One would normally almost always go towards the free section, as long as one knows that enough variety and choice is available also in the free section.*** If 'zero rating' is allowed and takes root, ISPs and their partners will ensure that the 'zero rated' 'Internet section' has enough variety and choice to tempt most Internet users; only it will not be the real open and public Internet that we all today take for granted. ***It is not difficult to see how the 'special section' of the Internet which is free for 'users' and requires entry fee for 'providers' of content, applications and services has a perverse incentive and logic to easily become the dominant part of the Internet.*** For any public minded person, the incalculable loss in terms of what we really understand by the Internet as an open platform should be obvious. It is therefore imperative that 'zero rating' is treated as a violation of the public interest principle of net neutrality and is expressly

disallowed.

3. It is important to appreciate the real difference between a net neutral Internet and a non net neutral one. It is not the difference between say a fancy warm blanket and a shoddy one, whereby to someone suffering the cold the latter is better than having nothing. In terms of the Internet, the equivalent to this blanket analogy will be of a high speed Internet connection versus a very poor connection. The difference between a net neutral and a non net neutral Internet is a very different one. It is about an Internet bound by certain public policy requirements that defend larger public interest versus an Internet not so bound and may thus hurt larger public interest. To make an argument in favor of providing non net neutral Internet to people in poverty because it is cheaper or free is to say that such people do not require the public policy protections that are provided to other people. Surely, in most cases, such people require such protections more than others require it. The public policy imperatives that underpin the net neutrality principle concern a more egalitarian Internet, a more culturally diverse Internet, and so on. It is very patronising to tell people in poverty that they simply cannot afford such higher values. It is like saying democracy, for instance, is not for them. Lets use another analogy, of media which is subject to many regulatory controls - like prohibition of 'paid news', clear separation of editorial and commercial content, a minimum percent of editorial content and thus limiting the extent of commercial content, checks on vertical and cross media ownership, and so on. ***Now lets say some media houses come up with a plan that they are ready to provide a special media channel much cheaper or free to people in poverty as long as all these regulatory provisions are not applied to this particular channel. Would that be fair to people in poverty?*** If not, providing a non net neutral Internet to them for free is also not fair. It is simply setting them up, taking advantage of their poor bargaining power, for a digital ecosystem that would further exploit themselves, and deny them the protections - which are available to others - that could save them from such exploitative digital systems.
4. It is certainly important that telecom business remains viable in an increasingly IP-centric environment. This however should not be done by allowing distortions in the basic egalitarian architecture of the Internet but by ensuring that all users of the networks, including the big content providers, pay their due compensation to network builders and providers. Without going into details we may just mention here that ***it is important to undertake public interest regulation of the inter-connection market*** to make sure that big players, whether content providers or telcos, are not able to unfairly treat players with lesser market power.
5. The TRIA consultation also speaks of unevenness of regulation across the telecom sector and the Internet sector (with which we mean what is mentioned in the Committee's terms of reference as the content and applications sector). To the extent this regulatory imbalance is about economic issues like levy of various kinds of fees, it may be necessary to undertake a comprehensive review of the whole communication sector in the new context. However, any levies etc can only be made overall on data services as such and it is not possible to begin selecting some or the other OTT services for special levies, for the simple reason that it is not possible at a logical level to separate OTT services that directly compete with services traditionally provided by the telecom sector; any simple web based application can today provide all such services.
6. It is also important to undertake a comprehensive review regarding what does universal service

obligations mean and require in the new context of an Internet-centric communication paradigm.

7. As for other regulatory issues like privacy, security, consumer protection, media aspects of the Internet, and so on, it is important to see them not from a prism of regulatory burden on the telecom sector versus the Internet sector. What is required is a comprehensive new approach to look at these important social and policy issues in the context of the new Internet-centric communication paradigm, and an emerging Internet-mediated society. ***The committee should recommend to the government to initiate a new and a different approach and process in this regard. We should move towards developing a new, rights-based Internet policy and regulatory framework. Brazil's recent Marco Civil framework is an example of such an approach.***
8. Net neutrality is not technical principle; it is a regulatory principle. Technically equal treatment of all bytes is not sacrosanct and discrimination is fine as long as it serves stated and clear public interest rather than the commercial interests of the ISPs. Some such public interest may be in terms of requirements for appropriate traffic management for a better Internet experience for all or for prioritizing some emergency services. What gets considered as public interest for such discriminatory purposes however cannot be allowed to be determined by ISPs, because they would try to mask their commercial interest as pursuance of public interest. Policy, law and regulation should clearly lay out the larger principles under which technical discrimination may be allowed, and adherence to them has to be closely monitored and ensured.
9. Treating net neutrality foremost as a social egalitarian principle also helps us avoid extreme 'technical' positions – like seeking strict neutralities of some kinds even when they manifestly go against the public interest. ***It is possible that upholding public interest may at times call for positive discrimination in favor of some applications, content and services.*** This may not amount to a violation of net neutrality, in the same way as reservations for women in jobs is not considered as gender discrimination. ***However such legitimate public interest has to be determined by a duly empowered and accountable public body and not by the ISPs.*** As Internet connected mobile phones become near ubiquitous even in developing countries, it is entirely possible that governments enable and promote a 'zero data charge' channel for some essential citizen services, which could include obtaining their participation in key public discussions and policy decisions. Similarly, with the Internet likely to become a key if not the main platform for community media, it could be useful to explore committed channels for community radio/ TV, possibly with zero data charges. At an appropriate stage and time, possibilities of such kind can be enforced by the regulator on the telcos through license conditions. Such measures indeed contribute to a greater non-discrimination or neutrality of the Internet, in that they merely mitigate inequalities and discriminations in the overall social structures. Positive discrimination on the Internet in public interest, as determined by duly legitimate means, fits with the definition of ***net neutrality that bars any discrimination among different applications, content and services 'by infrastructure providers' on any kind of 'commercial grounds'.***