

Federal Communications Commission
445 12th Street, SW
Washington D.C. 20554

July 8, 2016

Dear Chairman Wheeler:

We write to share more information on Mozilla's approach of "equal-rating" as a potential frame for analysis of data subsidization practices, consistent with the pro-innovation, pro-competition, pro-user goals of net neutrality.

Mozilla recently filed the attached comments with the Telecom Regulatory Authority of India in response to a consultation on free data practices.¹ The consultation asked whether there are models to provide free data to users that would not violate the Prohibition of Discriminatory Tariffs for Data Service Regulations, implemented earlier this year which effectively banned zero-rating in India.²

In our submission, we elaborated on the concept of "equal-rating" which we introduced last year. We believe the principles of equal-rating explained in these comments will be equally helpful for the Commission to use as guidelines to evaluate existing and future data models in the United States consistent with the Open Internet Order.

Under the equal-rating approach, consumers are able to pick the content they choose to access based on the merit of the content to them, rather than the financial power and business partnerships of the providers. Equal-rating practices meet the following criteria:

1. *They are content-agnostic.* Subsidization should not be subject to any predetermined limits on the content, application, or service sought by the user, nor type of content, application, or service.
2. *They are not subject to gatekeepers.* When a human element is involved in the approval of content, there is the possibility of subjective decision-making that introduces a risk of content-specific bias into the system.
3. *They do not allow pay-for-play.* Allowing content providers to buy their own subsidization injects the same types of harms as paid prioritization in the context of traditional network neutrality analyses. Smaller providers are far less able to pay than large, resulting in harm to competition, innovation, and user choice.
4. *They are transparent.* The service provider should disclose details of the practice, including coverage limits as well as any tradeoffs the user will experience.
5. *They allow for user/content choice.* Users and content providers should be able to choose whether or not to participate in the subsidization practice.

¹ Telecom Regulatory Authority of India, *Consultation Paper on Free Data*, May 19, 2016, http://traf.gov.in/WriteReadData/ConsultationPaper/Document/CP_07_free_data_consultation.pdf.

² Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs for Data Services Regulations 2016*, Feb. 8, 2016, http://www.traf.gov.in/WriteReadData/WhatsNew/Documents/Regulation_Data_Service.pdf.

We believe these equal-rating principles are consistent with the goals of net neutrality and provide adequate guidance to encourage the development of forward-looking and sustainable approaches for subsidization of user-facing access charges. These principles encourage development of platforms that further the goal of connecting the unconnected in developing countries, and are also an appropriate lens by which to evaluate practices in the U.S. market.

In the current U.S. market, it is unclear whether any of the current data subsidization practices are compliant with these equal-rating principles. We encourage the Commission to consider the above framework when looking at existing approaches. We also encourage the Commission to look closely at technical implementation of current practices, as flaws in execution can undermine or even eliminate potential benefits and make the lack of alignment with equal-rating a more pressing problem.³ Mozilla remains concerned about zero-rating as currently practiced in the market and the potential threat it poses to the principles of net neutrality that the Commission strives to uphold.

With the D.C. Circuit's recent decision providing a solid legal basis going forward, Mozilla encourages the Commission to be vigilant about any potential attempts to undermine the Order. We believe that the equal-rating approach will help inform the Commission when evaluating data models in the context of the Open Internet Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Riley". The signature is fluid and cursive, with the first name "Chris" and the last name "Riley" clearly distinguishable.

Chris Riley, Head of Public Policy, Mozilla
Jochai Ben-Avie, Senior Global Policy Manager, Mozilla
Rachael Stelly, Policy Team, Mozilla

³ A recent study by researchers at Northeastern University identified some alleged technical problems in T-Mobile's Binge On practice, resulting in inferior quality of service for both subsidized and unsubsidized video traffic, as well as numerous ways to "free ride," allowing unintended subsidization. David Choffnes et al., *BingeOn Under the Microscope: Understanding T-Mobile's Zero-Rating Implementation* (2016), http://david.choffnes.com/pubs/bingeon_sigcomm16.pdf.



June 29, 2016

TO:
RS Sharma
Chairman, Telecom Regulatory Authority of India

Shri Arvind Kumar,
Advisor (Broadband & Policy Analysis), Telecom Regulatory Authority of India

Dear Sirs,

*Re: Comments by the Mozilla Corporation on the Telecom Regulatory Authority of India's
Consultation Paper on Free Data*

Introduction

Thank you for the opportunity to submit comments on the Telecom Regulatory Authority of India's Consultation Paper on Free Data. Mozilla welcomes the opportunity to further comment on the risks to net neutrality posed by differential pricing models and the need to promote alternatives that encourage Internet adoption in a non-discriminatory manner.

Mozilla produces the Firefox web browser and the Firefox OS ecosystem for connected devices, together adopted by half a billion individual Internet users around the world. Mozilla is also a foundation that educates and empowers Internet users to be the Web's makers, not just its consumers. Finally, Mozilla is a global community of technologists, thinkers, and builders, including thousands of contributors and developers in India, who work together to keep the Internet alive and accessible.

Net neutrality - the principle that all communications on the Internet should be treated equally, and not blocked, throttled, or favored based on content - is essential to the continued growth of the open Internet. Mozilla applauds the Telecom Regulatory Authority of India for making net neutrality a policy imperative for India. As with blocking, throttling, or paid prioritisation, subsidisation that makes some content available for free, and other content only available at a cost that is prohibitively expensive to some, poses risks to competition, innovation, and people's ability to use the Internet freely. As Mozilla noted in our comments in the 2015 Differential Pricing Consultation,¹ differential pricing can enable gatekeepers who exercise market power to disrupt the Internet's inherently level playing field.

Innovation and competition online suffer and end user rights are greatly limited if the vitality of the open Internet comes into jeopardy due to the broad use of differential pricing practices. Even for those users who adopt such services who would not otherwise have connectivity, their ability to choose their online experience is limited; users are more empowered when they are able to use connectivity services that did not limit their choices.

¹ Comments of Mozilla, Consultation on Differential Pricing for Data Services, Telecom Regulatory Authority of India (Dec. 29, 2015), <https://blog.mozilla.org/netpolicy/files/2015/12/Mozilla-Comment-on-TRAI-consultation-paper-on-differential-pricing-122915.pdf>.

The Prohibition of Discriminatory Tariffs for Data Service Regulations (“Data Service Regulation”), implemented on February 8, 2016, will prevent the abuses envisaged, and provides a strong regulatory foundation to ensure the protection of users and the Internet as well as the orderly growth of the telecom sector. TRAI appropriately chose to impose an *ex ante* bar on service providers offering, charging, or entering into any agreement that have the effect of discriminatory tariffs for data service on the basis on content. With this regulation, in conjunction with the ongoing consultation on net neutrality rules, India is making substantial progress in ensuring the Internet remains a neutral platform for growth, innovation, and participation online.

Nevertheless, connecting the unconnected remains one of the great challenges of our time. TRAI’s landmark ruling banning differential pricing practices to ensure the adequate protections of users was an important step, but as contemplated in both this consultation paper and the previous consultation paper on differential pricing, further work is needed to ensure progress continues in developing new, alternative models for bringing everyone online.

The Equal-Rating Approach

In the Data Service Regulation, TRAI explicitly recognised that the ban on differential pricing did not apply to forms of tariff differentiation that are independent of content, citing the instance of providing limited free data that enable a user to access the entire Internet. This is an example of what Mozilla has introduced as “equal-rating” as an alternative to differential pricing models. Mozilla welcomes the opportunity to further elaborate on equal-rating and offer a roadmap for evaluating models under this approach in the context of TRAI’s Free Data Consultation.

Under the equal-rating approach, all data is transmitted at the same price and consumers pick the content they choose to access based on the quality of the content rather than the financial power and business partnerships of the provider. Specifically, it describes a model of subsidisation of user-facing access charges that does not introduce the risks to innovation, competition, and user rights inherent in differential pricing models. Equal-rating practices meet the following criteria:

1. *They are content-agnostic.* Subsidisation should not be subject to any predetermined limits on the content, application, or service sought by the user, nor type of content, application, or service. This does not mean that a service provider cannot limit the user to predetermined amounts of subsidisation – merely that the provider cannot control that decision on the basis of content, application, or service sought by the user, nor type of content, application, or service.
2. *They are not subject to gatekeepers.* In many systems, a human element is involved in the approval of content before it can be included in a subsidisation scheme. This element effectively establishes a gatekeeper. Even if the criteria applied are facially neutral, the process creates the possibility of subjective decision-making that introduces a risk of content-specific bias into the system.
3. *They do not allow pay-for-play.* Allowing content providers to buy their own subsidisation injects the same types of harms as paid prioritisation in the context of traditional network neutrality analyses. Smaller providers are far less able to pay than large, resulting in harm to competition, innovation, and user choice.

The equal-rating approach also encourages transparency throughout the process, and requires meaningful user choice to be built into subsidisation practices.

The Free Data Consultation proposes that any data-offering models should (1) facilitate connecting the unconnected and underconnected, (2) should not allow any TSP or large company to play a gatekeeper

role, (3) use the principles of open, transparent, and equal access to consumer services by all consumers and business, and (4) should not hold back innovation and the opportunity to increase Internet penetration and usage. We believe that the equal-rating approach appropriately aligns with the goals of TRAI and the criteria above may serve as useful additional guidelines when evaluating free data practices.

TRAI must continue to exercise regulatory oversight and intervene as necessary as new, alternative models for connecting the unconnected are developed. Further, the protection of users and the continued orderly growth of the telecoms sector is better served by having a single regulatory framework for online communications, as conflicting regulatory regimes can lead to a lack of legal clarity, perverse business incentives, and ultimately harm end-users. To that end, we believe wireless and fixed broadband should both be subject to the rules implemented by TRAI in a consistent manner.

Comments on the TRAI Proposed Models

It is difficult to see how some of the models described in this consultation comport with the equal-rating principles or with TRAI's previous regulatory guidance in the Data Services regulation. More specifically, we are concerned that the toll free API and rewards-based incentives model threaten the open Internet and would ultimately undermine TRAI goals of protecting Indian users.

TRAI rightfully recognized the possibility of the Data Services regulation being undermined by other means of discriminatory practices indirectly, and expressly stated in the regulation that, "TSPs are also prohibited from entering into arrangements that *have the same effect* as charging discriminatory tariffs on the basis of content" (emphasis added). TRAI continues, "an arrangement by which, instead of a service provider differentially charging tariffs to the consumer, other arrangements are made by the TSPs which in effect make accessing some content cheaper, *for example through a refund to the consumer or other methods*, are likewise barred" (emphasis added). Clearly the TRAI understood that the regulation should be directed at the discriminatory results of a model, rather than the means, to fulfill its purpose to ensure an open Internet.

Further, while they are generally preferable, TSP agnostic platforms do not *per se* assuage the threats to Internet openness arising from differential pricing and do not resolve the totality of harms addressed by the previous consultation on differential pricing. Discrimination practices by platform owners raise comparable concerns to net neutrality, even without the coordination with TSPs. A TSP that charges different rates for data services depending on the content would directly undermine openness and user choice. Similarly, when a content platform is subsidizing the costs of the data of users to access their service, the end user's experience is the same as if a TSP was involved: a user can access some content on the Internet for free or at a lower cost while having to pay for other content. From TRAI's wise perspective of focusing on results rather than means, a content provider offering some kind of subsidy or incentive rather than the TSP should fare no better on review.

The toll free API model allows a content provider to subsidize the data costs when users choose their application. Applying the equal rating principles outlined above, the toll free model is not content-agnostic and is a form of pay-per-play. It would lead to favored content in the Internet ecosystem, the outcome that TRAI's prohibition on differential pricing sought to eliminate. Allowing companies to subsidize the costs of a user's data favors incumbent platforms and distorts the inherently level playing field for online innovation.

The rewards model contemplated in this consultation paper also raises anti-competition and anti-innovation concerns and requires careful regulatory vigilance. Certainly any business model that provides a subsidy in the form of a reward for the approximate cost of using a given site, service or application can and should be considered a form of price discrimination and a "pay-for-play model." By encouraging users to direct their traffic towards dedicated applications or online activities in exchange for data

allowances or other incentives, such models would favor incumbents and rich companies that have the financial means to provide such subsidies. However, it is possible to imagine rewards models that do not violate net neutrality. For example, consider the Grameenphone,² an equal-rating compliant model, which Mozilla pioneered in partnership with Grameen Phone, Telenor, and Symphony, which provides a user with 20MB of unrestricted data per day in exchange for watching a short advertisement in the phone's marketplace.

The Data Service Regulation observes that restrictions on accessing content on the Internet that run afoul of the ban can take several forms. While explaining the harms of price discrimination, TRAI recognized that discriminatory practices that “makes certain content more attractive to consumers results in altering a consumer's online behavior.” The toll free API and some variations on a rewards model achieve this same result: a distortion of the Internet ecosystem and a limitation on consumers choice. Again, the focus of the application of the Regulation should be at the discriminatory results of a practice, rather than the means by which they are achieved.

The third model, the direct money transfer allowing for the subsidization of data costs, *could under certain constraints* be an alternative that would satisfy the equal-rating requirements. More specifically, a direct money transfer would be acceptable if it subsidized access to the full diversity of the open Internet without discrimination on the basis of content, application, or service sought by the user, nor type of content, application, or service. This could be accomplished through government disbursement of Universal Service Funds, for example. That said, the ability for the government to view the Internet usage patterns of citizens does raise potential privacy concerns. However, if the direct money transfer were to be disbursed by content providers or other non-neutral actors based on usage of specific sites, services, applications, etc (regardless of when this usage occurred) this would then effectively result in price discrimination, which is banned under the Differential Pricing Regulation.

Spurring Innovation in Equal-Rating Models

Mozilla believes that all people should have access to the Internet. While we encourage efforts to expand access to the Internet around the world, the preferred approach is to offer the full capabilities of the Internet ecosystem rather than allowing gatekeepers to dictate the environment and limits on how users can read, write, and participate online. Mozilla rejects the argument that the ability to bring a limited form of the Internet to those who lack access offsets the anticompetitive harms that arise from differential pricing. Choosing limited inclusion today, despite offering short-term benefits, poses significant risk to the emergence of an open, competitive platforms that will ultimately stifle inclusion and economic development online. As India seeks to expand Internet access as part of the Digital India initiative, it is important that those currently unconnected are able to unlock the full capabilities of the Internet rather than being limited to a previously cultivated environment.

Recent studies have undermined the argument that zero-rated models currently in the market serve as an onramp to the full Internet. A report released in June 2016 by the Alliance for Affordable Internet concluded that zero-rating did not bring most mobile Internet users online for the first time.³ Rather, nearly nine in ten users surveyed used the Internet prior to accessing it through a zero-rated plan. Notably, the report observed that the vast majority (82%) of users prefer access to the full Internet with time or

²<https://blog.mozilla.org/blog/2014/09/15/expanding-reach-in-asia-telenor-group-brings-firefox-os-smartphones-to-bangladesh/>

³ The Alliance for Affordable Internet, *The Impact of Emerging Mobile Data Service in Developing Countries - Mobile Data Services: Exploring User Experiences & Perceived Benefits* (2016), available at http://1e8q3q16vyc81g8l3h3md6q5f5e.wpengine.netdna-cdn.com/wp-content/uploads/2016/05/MeasuringImpactsofMobileDataServices_ResearchBrief2.pdf.

data limitations over content limitations, an unsurprising result given the high levels of price sensitivity in the Indian market.

In order to identify and spark new innovations in business models connecting the unconnected to the full diversity of the open Internet, Mozilla recently announced the forthcoming Equal-Rating Open Innovation Prize.⁴ The initiative seeks to inject practical, action-oriented, new thinking into the current debate on how to connect the unconnected people of the world. Mozilla hopes to show that there are viable ways to connect people without losing out on the full capabilities of the open Internet.

Investing in Improved Capabilities

While much of the global conversation around connecting the unconnected has focused on the challenges of improving affordability and infrastructure, we also encourage serious consideration of the value of investing in improving capabilities, specifically digital literacy and digital skills training. As noted in previous comments, our research suggests that investing in digital literacy can increase access and use of the Internet.⁵ We urge TRAI and the Government of India to consider digital literacy interventions alongside exploring new, alternative models in the broader effort to bring all of India online.

We have also continued to investigate and invest in cultivating digital literacy around the world. For example, Mozilla is building a global hub to help more women learn how to read, write, and participate online. Over the past five years, Mozilla volunteers have started over 100 clubs and run over 5,000 local events in 90 countries to teach digital literacy. Building on this model, Mozilla is now working with U.N. Women to set up clubs for women and girls in Kenya and South Africa. Relatedly, we are continuing to develop digital literacy curricula, including for first time Internet users, as part of our Digital Skills Observatory project.⁶

Conclusion

We commend the TRAI and the Government of India for your continued dedication to protecting the open Internet and your substantial commitment to evaluating the application of net neutrality in the current market. We encourage TRAI to maintain consistency with the Data Service Regulation by being vigilant in watching for discriminatory results arising from new models. The pursuit of an open Internet can and must coincide with meaningful efforts to expand Internet access and digital literacy.

Respectfully submitted by:

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⁴ *Mozilla's Commitment to Inclusive Internet Access*, The Mozilla Blog, (Apr. 14, 2016), <https://blog.mozilla.org/blog/2016/04/14/mozillas-commitment-to-inclusive-internet-access/>.

⁵ GSMA and Mozilla, *Mobile for Development Impact: Approaches to Local Content Creation* (2015), available at https://stuff.webmaker.org/whitepapers/smartphones_content_skills.pdf.

⁶ Mozilla, Digital Skills Observatory, <http://mozillafoundation.github.io/digital-skills-observatory/>.