

Comments on the Draft Digital Communications Policy

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Preliminary

On 1st May 2018, the Department of Telecommunications of the Ministry of Communications released the Draft Digital Communications Policy for comments and feedback.¹ We laud the Government's attempts to realise the socio-economic potential of India by increasing access to Internet, and drafting a comprehensive policy while adequately keeping in mind the various security and privacy concerns that arise due to online communication. On behalf of the Centre for Internet & Society (CIS), we thank the Department of Telecommunications for the opportunity to submit its comments on the draft policy.

We would like to point out two concerns with the consultation process: (i) a character-limit imposed on the comments to each section, due to which this submission has to sacrifice on providing comprehensive references to research; and (ii) issues with signing in on the MyGov where this consultation was hosted. We strongly recommend that the consultation process be liberal in accepting content, and allow for multiple types of submissions.

Comments

Connect India: Creating a Robust Digital Communication Infrastructure

On 2022 Goals

a. Provide Universal broadband coverage at 50 Mbps to every citizen

According to UNICEF's 2017 report, *Children in a Digital World*, only 29% of the internet users in India are female.² It is essential that the policy recognise the wide digital gender gap and other differences in internet access that result from traditional sociocultural barriers. Therefore, we recommend that the goal read as: "Provide Universal broadband coverage at 50 Mbps to every citizen, with special focus on increasing internet access for women, people with disabilities, and historically-marginalised communities."

g. Ensure connectivity to all uncovered areas

The term "connectivity" should be changed to "active internet connectivity". As per the current norms, a gram panchayat may be considered "connected" if the fibre infrastructure exists, but this does not necessarily mean an active internet connection being serviced in the

¹ 'NDCP 2018: Public can give comments till 1st June', Ministry of Communications, Press Information Bureau, 25th May 2018, <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=179542>>

² 'The State of the World's Children 2017: Children in a Digital World', United Nations Children's Fund, December 2017, <https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf>

area. For example, as on May 20, “of 1.22 lakh gram panchayats with fibre connectivity, 1.09 lakh had active internet.”³

On Strategies

1.1 (a) i. BharatNet – Providing 1 Gbps to Gram Panchayats upgradeable to 10 Gbps

The Central Government, under the “State-led” implementation of the BharatNet initiative, has allowed certain state governments to implement the program in their respective states. This has allowed State Governments to take misplaced liberty with the core objective of the program, which originally was to increase access to internet services. For example, after the Telecom Commission’s approval of Andhra Pradesh’s “State-led” implementation of the program, the state government set up a body corporate Andhra Pradesh State FiberNet Limited. This body then went on to exceed its mandate by venturing into the television broadcasting and distribution business by offering Internet Protocol Television (IPTV) services.⁴ This is deeply problematic as it indicates that central government funds meant for increasing internet access are being used for IPTV services, despite the TRAI’s repeated recommendations (since 2012) that state-owned entities should not be allowed to enter broadcasting and distribution activities⁵; allowing state entities in the business is against fair play and competition, runs contrary to the principle of independent and free media, and has chilling effects on the freedom of expression.

Additionally, this has created a problem for aggregated data availability on the expenditure on the program. While the central government should ideally have all data pertaining to state-wise expenditure of funds for the program, data regarding the states implementing the initiative on their own is generally excluded from the data provided by the Ministry.^{6, 7} The goals of the program need to be specifically defined so that funds are directed effectively. The program needs stricter monitoring mechanisms to ensure that the intended objectives are met.

1.1 (a) iv. JanWiFi – Establishing 2 Million Wi-Fi Hotspots in rural areas

Under present regulations, resale of communication data logged by WiFi hotspots is not permitted. However, recent news reports^{8, 9} suggest that the DoT may change these norms to

³ ‘Four years of Modi government — Telecom and IT: Digital push reaches Bharat; telecom stress remains’, Pranav Mukul, Indian Express, May 24 2018, <<http://indianexpress.com/article/business/four-years-of-modi-government-telecom-and-it-ravi-shankar-prasad-5188871/>>

⁴ ‘Unstarred Question No. 4544: National Optical Fibre Network in Andhra Pradesh’, Ministry of Communications, Rajya Sabha Secretariat, April 6 2018, <<https://164.100.158.235/question/annex/245/Au4554.pdf>>

⁵ ‘TRAI issues Recommendations on “Issues related to entry of certain entities in to the business of broadcasting and/or distribution of TV channels”’, Telecom Regulatory Authority of India, December 28, 2012, <<http://www.trai.gov.in/notifications/press-release/trai-issues-recommendations-%E2%80%9Cissues-related-entry-certain-entities%27>>

⁶ ‘Unstarred Question No. 4344: Monitoring Implementation of Bharat Net’, Ministry of Communications, Lok Sabha Secretariat, March 21 2018, <<http://164.100.47.190/loksabhaquestions/annex/14/AU4334.pdf>>

⁷ ‘Starred Question No. 73: BharatNet Project’, Ministry of Communications, Rajya Sabha Secretariat, February 7 2018, <<http://164.100.47.190/loksabhaquestions/annex/14/AS73.pdf>>

⁸ ‘Govt may allow data resale in boost to public WiFi plan’, Navadha Pandey, Mint, May 20 2018, <<https://www.livemint.com/Industry/T4c6llgpofYfHODmuOUjIP/Govt-may-allow-data-resale-in-boost-to-public-WiFi-plan.html>>

permit (virtual network) operators to further sell this information. We understand that while changing such norms may incentivise the operators to set up WiFi hotspots, however, the proliferation of internet access cannot come at the cost of privacy of users. The data available to the operators of these hotspots includes all browsing data, which is sensitive private information, and thus, should be restricted from sale. We strongly recommend that in compatibility with the security & privacy goals for consumers envisioned in the latter sections of this draft policy, the DoT ensure that strong privacy measures are in place for public WiFi hotspots made available through programs like JanWiFi.

1.1 (f) Enabling Infrastructure Convergence of IT, telecom and broadcasting sectors

The policy proposes a convergence of the infrastructure administration currently performed by three central Government departments: IT, Broadcasting and Telecom. As admitted in the draft, this will require amendments, amongst many Acts, to the Telegraph Act. However, the draft policy has not clearly delineated the new proposed responsibilities for each department, and avoids elaborating on the nuance that will be required to address the multiple legal and administrative concerns stemming from the proposed convergence. The document also fails to detail how infrastructure (say internet access through 4G) will be regulated differently services (say IPTV operating on 4G). Further clarity is also required (i) how department-specific concerns (which are unsuited for a larger body) will be handled; and (ii) regarding the auspices under which the new converged body will operate.

1.2 (a) Making adequate spectrum available to be equipped for the new broadband era

TRAI's consultation paper, *Allocation and Pricing of Microwave Access (MWA) and Microwave Backbone (MWB) RF carriers* (March 2014), recommends the exploration of the usage of the E-band (71 - 76 / 81-86 GHz) and V-band (57-64 MHz), and for the allocation of the same to telecom service providers.¹⁰ We recommend that the Ministry accept TRAI's recommendations, and reflect it in this policy.

While the draft policy aims to decrease regulation of the spectrum, including liberalising spectrum "sharing, leasing and trading" regime, in addition, the policy should clear the government's stance on unlicensed spectrum usage. CIS has written earlier (June 2012) about the demonstrable need for unlicensed spectrum to create a path for inexpensive connectivity in rural and remote areas.¹¹

1.2 (a) v. Optimal Pricing of Spectrum to ensure sustainable and affordable access to Digital Communications

The draft policy should review existing approach to spectrum pricing in India. The Indian telecom sector is under heavy debt, and if rejuvenating this sector is a purported goal of this policy via "optimal pricing of spectrum", auctions with a view to revenue maximisation

⁹ 'Data resale should be allowed to boost public Wi-Fi hotspots: Trai', Navadha Pandey, Mint, April 7 2018, <<https://www.livemint.com/Industry/1j16MGWuOM7RiBNhPOb4z1/Data-resale-should-be-allowed-to-boost-public-WiFi-hotspots.html>>

¹⁰ 'Consultation Paper on Allocation and Pricing of Microwave Access (MWA) and Microwave Backbone (MWB) RF carriers', Telecom Regulatory Authority of India, March 28 2014, <<http://164.100.47.190/loksabhaquestions/annex/14/AU4334.pdf>>

¹¹ 'Unlicensed Spectrum Policy Brief for Government of India', Gupta et al, The Centre for Internet and Society, June 24 2012, <<https://cis-india.org/telecom/unlicensed-spectrum-policy-brief-for-govt-of-india>>

should no longer remain the preferred method of assigning spectrum. The National Telecom Policy, 1999 which adopted a revenue-sharing approach to license fees, showed good results for the sector and translated into huge benefits for consumers. The government should adopt a similar approach to rescue the industry.

Propel India: Enabling Next Generation Technologies and Services through Investments, Innovation, Indigenous Manufacturing and IPR Generation

On Strategies

2.2 (a) ii. Simplifying licensing and regulatory frameworks whilst ensuring appropriate security frameworks for IoT/ M2M / future services and network elements incorporating international best practices

The process of “simplifying” licensing and regulatory regime is currently vague, and the intentions remain unclear. Simplifying licences without clear intentions can lead to losing the necessary nuance in the license agreements required to maintain competitive markets. In recent months, the industry has already witnessed a dilution of provisions which were placed to ensure healthy competition in the sector. For example, on May 31st, new norms were announced by DoT under which now allow an operator to hold 35% of the total spectrum¹² as opposed to the earlier regulation which only allowed for holding a maximum 25% of the total spectrum.

2.3 (d) (iii) Providing financial incentives for the development of Standard Essential Patents(SEPs) in the field of digital communications technologies

This is a welcome step by the government to incentivise the development of SEPs in the country. However, this appreciable step will only yield results in the long term - and realistically speaking, not before a decade. It is equally necessary to improve the environment of licensing of SEPs in the short-term. The government should take initiative for creation of government-controlled patent pools for SEPs, which will solve issues of licensing for SEP holders, and also improve transparency of information relating to SEPs. Specifically, we recommend that the government initiate the formation of a patent pool of critical mobile technologies and apply a five percent compulsory license.¹³

¹² 'DoT amends licence rule to allow higher spectrum holding', Press Trust of India, Economic Times, May 31 2018, <<https://telecom.economictimes.indiatimes.com/news/dot-amends-licence-rule-to-allow-higher-spectrum-holding/64406115>>

¹³ See 'Open Letter to Prime Minister Modi', Rohini Lakshané, The Centre for Internet and Society, February 10 2015, <<https://cis-india.org/a2k/blogs/open-letter-to-prime-minister-modi>>

Secure India: Ensuring Digital Sovereignty, Safety and Security of Digital Communications

On Strategies

3.1 Harmonising communications law and policy with the evolving legal framework and jurisprudence relating to privacy and data protection in India

We welcome the Ministry's intention to amend licence agreements to include data protection and privacy provisions. In the same vein, the Ministry should also consider removing provisions from licenses that prevent the operator from using certain encryption methods in its network. For example, Clause 2.2 (vii) of the License Agreement between DoT & ISP prohibits bulk encryption.¹⁴ Additionally, in the License Agreement, encryption with only up to 40-bit in RSA (or equivalent) is normally permitted.¹⁵ Similarly, Clause 37.1 of the Unified Service License Agreement prohibits bulk encryption.¹⁶ These provisions must be revised to ensure that ISPs and other service providers can employ more cryptographically secure methods.

When regulating on encryption, we recommend that the government only set positive minimum mandates for the storage and transmission of data, and not set upper limits on the number of bits or on the quality of cryptographic method. In pursuance of the same goals, we also recommend adding point 'iii' to 3.1 (b): "promoting the use of encryption in private communication by providing positive minimum mandates for strong encryption in (or along with) the data protection framework."

3.2 (a) Recognising the need to uphold the core principles of net neutrality

Like other goals of the draft policy, the target for ensuring and enforcing net neutrality principles has been set as 2022. However, this goal is achievable by as early as December 2018. We suggest that the Government take the first step towards this goal by accepting the net neutrality principles proposed by the TRAI and its recommendations to the government which have been pending with the Ministry since November 2017. The government may additionally take into consideration CIS' position on net neutrality.^{17, 18}

The vaguely worded "appropriate exclusions and exceptions" carved out to net-neutrality principles in the policy need urgent elaboration. Given the vague boundaries between

¹⁴ 'Licence Agreement for Provision of Internet Services', Ministry of Communications, <<http://www.dot.gov.in/ispllicense/template-agreement-between-internet-service-provider-isp-and-vendor-equipment-product-and>>

¹⁵ *Ibid.*

¹⁶ 'Unified License Agreement', Ministry of Communications, <http://www.dot.gov.in/sites/default/files/Unified%20Licence_0.pdf>

¹⁷ 'CIS's Position on Net Neutrality', Sunil Abraham, The Centre for Internet and Society, December 4 2015, <<https://cis-india.org/internet-governance/blog/cis-position-on-net-neutrality>>

¹⁸ 'CIS Position Paper on Net Neutrality in India (Background Submission to TRAI)', Pranesh Prakash, The Centre for Internet and Society, June 29 2015 <https://cis-india.org/internet-governance/resources/net-neutrality/2015-06-29_PositionPaperonNetNeutralityinIndia/view>

different control layers in digital communication, content regulation is very easy to slip into, and needs to be consciously avoided by the government.

3.3 (f) ii. Facilitating lawful interception agencies with state of the art lawful intercept and analysis systems for implementation of law and order and national security

There is no clarity in policy on how the government plans to meet the goal of “[f]acilitating lawful interception agencies with state of the art lawful intercept and analysis systems for implementation of law and order and national security.” It has been recently suggested that some legal provisions that enable targeted communication surveillance might be violative of the privacy guidelines laid out in the recent Supreme Court judgment that affirmed the Right to Privacy.¹⁹ Additionally, mass surveillance, *prime facie*, does not meet the “proportionality test.” Therefore, the policy documents needs details as to how the Ministry will aid intelligence agencies, and whether these interception details will be known to ISPs, TSPs and the public via reflection in the various License Agreements.

¹⁹ ‘India's communication surveillance through the Puttaswamy lens’, Bhandari et al, Ajay Shah’s Blog, May 18 2018, <<https://ajayshahblog.blogspot.com/2018/05/indias-communication-surveillance.html>>