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Ms. Vinod Kotwal
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Via Email

Dear Ms. Kotwal:

I appreciate the opportunity to submit the following reply comments in the Consultation on Differential Pricing for Data Services.¹ My primary concern is that some of the other submissions mischaracterize the way that net neutrality regulations are being applied in other countries, particularly with respect to zero rating.

NO COUNTRY CATEGORICALLY PROHIBITS ZERO RATING

Some comments and press reports erroneously assert that some countries have banned zero rating (see, e.g., Comments of Zee Networks, p. 27; Guha and Aulakh 2015). A close examination of the policies reveals that at this point, no country categorically prohibits zero rating as a practice.

The vast majority of countries have yet to take a stance with respect to zero rating. This includes countries that pride themselves on being leaders in network neutrality enforcement. Take Latin America for example. The fact that zero rated plans are currently available in every Latin American country attests to the fact that no country in the region has banned the practice (Galperin 2015). Brazil has yet to take a stance against zero rating despite the fact that the issue played a central role in issue in the consultations conducted during 2015. Argentina, Bolivia, Colombia, Mexico, and Peru have also not taken any action with respect to zero rating. The only country in the region to have undertaken an enforcement action against some forms of zero rating is Chile, but as I noted in my initial comments, the fact Chile has also approved other forms of zero rating underscores that Chile is following a nuanced, case-by-case approach instead of erecting a categorical ban.

In North America, Canada has blocked TSPs' attempt to zero rate proprietary video services. But in so doing, as the Canadian Broadcasting Corporation reports, the Canadian regulator has "stopped short of outright bans on zero-rated services," and although it has

¹ The author acknowledges and thanks Facebook for its financial support for these comments.

“essentially banned carriers from zero rating their own services, . . . it remains open to the practice being applied to third-party applications” (Nowak 2015). Consistent with the view that Canadian law only prohibits zero rating of proprietary services, in August 2015, one of the companies that the regulators ordered to stop zero rating its own video services (Vidéotron) began offering zero-rated service to music streaming provided by third parties (Bode 2015b). The Open Internet Order adopted by the U.S. Federal Communications Commission (FCC) in 2015 specifically declined to take a position on zero rating, and the FCC Chairman recently lauded T-Mobile’s decision to zero rate video streaming services as “pro-competition and pro-innovation” (Bode 2015a). This is why even news reports recognized that zero rating has “(so far) received the green light by both US and Canadian regulators” (Bode 2015).

In Europe, as detailed in my initial comments, Slovenia has also struck down some forms of zero rating, particularly those favoring proprietary offerings, while letting stand plans offering zero rating to premier content, such as the World Cup and the UEFA Champions League, offered by the two leading providers. The only country in the world that at any time seems to have prohibited all forms of zero rating is the Netherlands. But subsequent EU legislation displaced that policy by deleting a specific provision that would have banned differential pricing, which prompted the Netherlands to vote against the regulation and file a statement complaining that the regulation obliged it “to withdraw [its previously enacted ban on differential pricing] from its national net neutrality rules” (Council of the European Union 2015).

Thus, no country is actively banning zero rating, and the vast majority of countries have not addressed the issue at all. Of the four countries to have brought enforcement actions against zero rating, three (Chile, Canada, and Slovenia) have done so in a nuanced, case-by-case manner that approves some forms of zero rating, but not others. Only one (the Netherlands) appears to have categorically banned zero rating, only to see that outcome overridden by subsequent EU legislation. These enforcement practices indicate that favoring both net neutrality and zero rating does not represent an inconsistency, as some have suggested (see, e.g., Comments of ISPAI). Instead, it is a reflection of the importance of appreciating that differential pricing (or service differentiation, as I have called it) is a complex phenomenon that often benefits consumers.

CASE BY CASE ANALYSIS REPRESENTS THE DOMINANT AND APPROPRIATE MODE OF ANALYSIS

Enforcement practice also reveals that regulators routinely regard case-by-case analysis as well within their institutional capabilities, despite the claims of some commentators (see, e.g., Comments of the Centre for Media Studies). Case-by-case analysis is the typical approach followed by competition policy authorities all over the world with respect to vertical restraints. In addition, many privacy authorities, including the U.S. Federal Trade Commission, routinely regulate via case-by-case adjudication.

The propriety of case-by-case analysis is reinforced by substantive principles of competition policy. As I noted in my initial filing, categorical prohibition (known in antitrust law as *per se* illegality) is a blunt instrument that is appropriate only when there is a strong inference that a practice is so nearly universally harmful that nothing would be lost if it were banned altogether. Such inferences are proper only when regulators have long experience with a practice and when no plausible circumstances exist where the practice could benefit consumers.

Neither of those criteria are satisfied with respect to service differentiation. The wireless broadband revolution remains in its early stages, and TSPs are experimenting with a wide range

of new service packages and pricing regimes. The empirical literature on vertical restraints demonstrates that cooperative arrangements of this type do not harm and even benefit consumers in the vast majority of cases (Cooper et al. 2005; Lafontaine and Slade 2008).

In addition, simply banning differential pricing would not eliminate the ability to favor some sources of content, as some have suggested (see, e.g., Comments of Vishal Mishra). Instead, such a ban would simply force those willing to pay for improved service to look for solutions outside the network. The most common response would be to resort to local storage either offered on a proprietary basis, such as Netflix's Open Connect, or through a third-party content delivery network (CDN), such as Akamai or Limelight, for a charge (Yoo 2010). In other words, simply regulating the terms of network carriage would not prevent parties from accomplishing the same result through other means. Instead, the rules would simply force them to do so through means that are more costly.

The Internet remains an emerging industry in India, and the business practices remain in a state of flux. This suggests that it is far too early in the day to allow regulation to lock into place any particular conception of the way that firms should interact with each other. In this regard, the cautionary words of Nobel Laureate Ronald Coase (1972, 67) seem particularly appropriate: "If an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be rather large, and the reliance on a monopoly explanation frequent." In short, new practices that are not well understood are often a sign of economic and innovative dynamism, and any such changes benefit some parties over others. Regulators should be careful not to erect policies that prevent innovative practices from emerging.

ZERO RATING PROMOTES COMPETITION, INTERNET ADOPTION, AND CONSUMER CHOICE

The empirical data increasingly shows that zero rating benefits consumers in three distinct ways by prompting competition, adoption, and consumer choice.

Regarding competition, the data suggest that zero rating is a practice predominantly used by smaller providers to challenge the market leaders (Elaluf-Calderwood 2015; Futter and Gillwald 2015; Galpaya 2015a, 2015b; Galperin 2015). These smaller providers use zero rating to compete on the basis service differentiation. Preventing them from doing so would limit the dimensions of competition to price and network quality (e.g., bandwidth, availability), factors that tend to favor the largest players. The chance of consumer harm disappears when the TSP lacks a dominant position and the plan is nonexclusive, in that it is open to all similarly situated content providers and content providers remain free to strike similar deals with other TSPs.

The evidence also suggests that zero rating promotes adoption (Jung 2015). A survey in Myanmar revealed that zero rating increased adoption rates to 49%, well above the national average of 17% (Galpaya 2015a). Facebook also reports that Free Basics leads to 50% faster adoption and that approximately 50% of Free Basics customers worldwide upgrade to a full data plan within 30 days (Martin 2015). In India, among the people who joined Free Basics, after one month the number of consumers who upgraded to the full Internet outnumbered the consumers that chose to remain on Free Basics by a factor of 8-to-1.

Finally, zero rating increases consumer choice. What is becoming clear is that although Internet users were once universally interested in email and web browsing, modern users are

placing increasingly divergent demands for services. The natural response is for the industry to diversify its offerings to meet this increasingly heterogeneous demand. In fact, zero rating is just a small facet of a much larger issue. A study conducted by the Alliance for Affordable Internet (A4AI) indicates that 51% of plans were service specific, while only 13% of the plans involved zero rating (Thakur 2015). Another study by Allot Communications (2014) revealed that 85% of operators offer at least one application-centric plan and that 49% of operators offer at least one zero rated app.

Neelie Kroes (2012) summed up the benefits of these plans nicely when she asked the rhetorical question, “If consumers want to obtain discounts because they only plan to use limited online services, why stand in their way?” Although every consumer should have the option of choosing the full Internet, “I do not propose to force each and every operator to provide full Internet: it is for consumers to vote with their feet.”² Prohibiting service differentiation would narrow the range of consumer choices and prevent consumers from purchasing cheaper plans that better tailored to the way they use the Internet.

CONCLUSION

A close review of global enforcement practices reveals that to date, no country has banned zero rating. On the contrary, every country that has enforced net neutrality laws against zero rating has done so on a case-by-case basis that takes context into account.

This means that adopting a blanket ban on service differentiation would put India out of step with the rest of the world. The empirical record reveals why other jurisdictions have declined to treat zero rating in a categorical manner. The evidence suggests that zero rating tends to be a practice that smaller companies use to compete with larger, more established TSPs. Zero rating also appears to promote Internet adoption, reduce the prices consumers pay, and give consumers greater latitude to choose plans better tailored to their specific needs.

The appropriate step would thus appear to harmonize with the rest of the world and adopt a case-by-case approach.

Sincerely,



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² See also Kroes (2013) (in translation) (“In my opinion, the public interest does not preclude consumers from subscribing to limited, more differentiated Internet offers, possibly for a lower price.”)

REFERENCES

- Allot Communications. 2014. "App-Centric Operators on the Rise."
<http://www.allot.com/resource-library/mobiletrends-charging-report-h1-2014/>.
- Bode, Karl. 2015a. "FCC Boss: New T-Mobile Zero Rating Plan 'Pro Competition.'" *DSLReports*. <http://www.dslreports.com/shownews/FCC-Boss--New-T-Mobile-Zero-Rating-Plan--Pro-Competition--135692>.
- . 2015b. "Videotron Tests Net Neutrality with New Zero Rated Music Plan." *DSLReports*. <http://www.dslreports.com/shownews/Videotron-Tests-Net-Neutrality-With-New-Zero-Rated-Music-Plan-134934>.
- Coase, R.H. 1972. "Industrial Organization: A Proposal for Research." In *Policy Issues and Research Opportunities in Industrial Organization*, edited by V.R. Fuchs, 59. New York, National Bureau of Economic Research.
- Cooper, James C., Luke M. Froeb, Dan O'Brien, and Michael G. Vita. 2005. "Vertical Antitrust Policy as a Problem of Inference." *International Journal of Industrial Organization* 23: 639.
- Council of the European Union. 2015d. Draft Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (first reading), Statements.
<http://data.consilium.europa.eu/doc/document/ST-12279-2015-ADD-1-REV-1/en/pdf>
- Elaluf-Calderwood, Silvia. 2015. "A Dialogue on "Zero Rating" and Network Neutrality." *Internet Governance Forum*. <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2874-2015-11-12-a-dialogue-on-zero-rating-and-network-neutrality-main-meeting-room-finished>.
- Futter, Ariel, and Alison Gillwald. 2015. "Zero-Rated Internet Services: What Is to Be Done?" *Broadband 4 Africa*, Policy Paper 1, 2015.
http://www.researchictafrica.net/docs/Facebook%20zerorating%20Final_Web.pdf.
- Galpaya, Helani. 2015a. "Zero Rating: Are We In Danger of Killing the Goose Before Knowing If Its Eggs Are Golden?" *Council on Foreign Relations*.
<http://blogs.cfr.org/cyber/2015/10/05/zero-rating-are-we-in-danger-of-killing-the-goose-before-knowing-if-its-eggs-are-golden/>

- . 2015b. “A Dialogue on “Zero Rating” and Network Neutrality.” *Internet Governance Forum*. <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2874-2015-11-12-a-dialogue-on-zero-rating-and-network-neutrality-main-meeting-room-finished>.
- Galperin, Hernan. 2015. “Zero Rating, Open Internet and Freedom of Expression.” *Internet Governance Forum*. <https://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2932-2015-11-13-ws-79-zero-rating-open-internet-and-freedom-of-expression-workshop-room-8-finished>.
- Guha, Robin, and Gulveen Aulakh. 2015. “Zero Rating: What Are Countries Doing About It.” *The Times of India*. <http://timesofindia.indiatimes.com/tech/tech-news/Zero-rating-What-are-countries-doing-about-it/articleshow/47001571.cms>.
- Kroes, Neelie. 2012. “Next Steps on Net Neutrality - Making Sure you get Champagne Service if that's What You're Paying For.” *European Commission*. http://ec.europa.eu/archives/commission_2010-2014/kroes/en/blog/netneutrality.html.
- . 2013. “Internet et applications de filtrage: une histoire de choix et de recettes.” *Libération*. http://www.liberation.fr/medias/2013/01/16/internet-et-applications-de-filtrage-une-histoire-de-choix-et-de-recettes_874443.
- Jung, Juan. 2015. “Can Internet Rights and Access Goals Be Reconciled?” *Internet Governance Forum*. <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2858-2015-11-10-ws-126-can-internet-rights-and-access-goals-be-reconciled-workshop-room-1>.
- Lafontaine, Francine, and Margaret Slade. 2008. “Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy.” In *Handbook of Antitrust Economics*, edited by Paolo Buccirossi, 392. Cambridge, MA: MIT.
- Martin, Kevin. 2015b. “A Dialogue on “Zero Rating” and Network Neutrality.” *Internet Governance Forum*. <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2874-2015-11-12-a-dialogue-on-zero-rating-and-network-neutrality-main-meeting-room-finished>.
- Nowak, Peter. 2015. “Why ‘Zero Rating’ is the New Battleground in Net Neutrality Debate.” *CBC News*. <http://www.cbc.ca/news/business/why-zero-rating-is-the-new-battleground-in-net-neutrality-debate-1.3015070>.
- Thakur, Dhanaraj. 2015. “A Dialogue on “Zero Rating” and Network Neutrality.” *Internet Governance Forum*. <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2874-2015-11-12-a-dialogue-on-zero-rating-and-network-neutrality-main-meeting-room-finished>.
- Yoo, Christopher S. 2010. “Innovations in the Internet’s Architecture that Challenge the Status Quo.” *Journal on Telecommunications and High Technology Law* 8: 79.