



### *Preamble*

Facebook respectfully offers these comments on the Telecom Regulatory Authority of India's ("TRAI's") Consultation Paper on Differential Pricing for Data Services ("Consultation Paper").<sup>1</sup> For many years now, our company has been actively implementing our mission—to give people the power to share, and to make the world more open and connected. That mission dovetails well with the Indian government's overarching policy goal of Digital India. As a key part of that mission, Facebook has been entering into zero rating partnerships with carriers around the world to make Facebook services and other content available to consumers over their mobile devices without incurring data charges. These initiatives include Free Basics, which is available in 35 countries around the world.

Facebook has carefully structured its Free Basics initiative to serve the needs of unconnected people, and the entire Internet as a whole, since everyone benefits when more people come online:<sup>2</sup>

- i. Free Basics is non-exclusive. It is available to all operators on the same terms and conditions. Any operator can sign up and launch Free Basics on its own without any intervention from Facebook.
- ii. Free Basics is an open and non-discriminatory platform. Any content owner can participate as long as it meets the same technical criteria, which are openly published.<sup>3</sup>
- iii. Free Basics is free to both users and content owners. No user is charged for accessing the content available on Free Basics on a participating network. No content owner is charged for participating in the platform.
- iv. Free Basics is transparent. All of the technical standards are published and available online.
- v. Facebook does not pay carriers for the data people consume through Free Basics.
- vi. Facebook does not make money from Free Basics; it is not paid by content providers, carriers, or even advertisers, as there are no advertisements within the Facebook experience on Free Basics.

With no payment by consumers to the carrier for their access to Free Basics, no payment by Facebook to the carrier for the cost of free access, and no payment to Facebook of any kind, all of Facebook's zero-rated services, worldwide, are truly non-commercial on all sides.

The result of Facebook's Free Basics and related connectivity initiatives? These efforts have helped to bring more than fifteen million people online who otherwise would not be, with more coming online every day. These consumers gain access to online content that they

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<sup>1</sup> Facebook and its affiliates offer various popular online services, including, e.g., Facebook Messenger, WhatsApp, and Instagram.

<sup>2</sup> Declaration of Jeffrey A. Eisenach, Ph.D., Telecom Regulatory Authority of India Consultation Paper No. 8/2015, ¶¶ 12, 15 (Dec. 30, 2015) ("Eisenach Decl.")

<sup>3</sup> Free Basics: Participation Guidelines, <https://developers.facebook.com/docs/internet-org/participation-guidelines> (last visited Jan. 6, 2016).

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otherwise may not be able to afford, and in accessing that content, they come to understand more of what the Internet has to offer. Most upgrade to paid access—the majority of Free Basics users pay to access Internet content outside of Free Basics in their first month of use, and the number keeps rising over time. These arrangements therefore act as an on-ramp to the Internet. It is this on-ramp that Facebook has an interest in seeing flourish.

Many in India and elsewhere are aware of the benefits of Free Basics. Indeed, Facebook invited people in India to show support for Free Basics, both through Facebook and by running a “missed call” campaign (for those people who are unconnected). The results show that more than 11 million people sent TRAI an email supporting “digital equality” and Free Basics. Although these were not specifically framed as responses to the Consultation Paper’s questions on differential pricing, this strong endorsement of Free Basics demonstrates that Indians support innovative approaches to access and look to TRAI to ensure that telecommunications regulation helps advance the goals of Digital India by accelerating access rather than discouraging it.

Some have attacked Free Basics as a violation of net neutrality. These opponents say that one of the purported tenets of net neutrality is a ban on zero rating. This is incorrect.

Facebook is a strong supporter of net neutrality and believes that it is critical to the Internet’s continued dynamic growth. There is no inconsistency in supporting the core principles of net neutrality—including restrictions against blocking and throttling content—and offering zero-rated services that benefit consumers and promote competition. Most regulators agree. Zero rating is permitted in the vast majority of jurisdictions around the world. Those jurisdictions that have engaged in extensive deliberation over zero rating, including the E.U. and the U.S., have concluded that adoption of net neutrality rules does not require banning zero rating. We agree that differential pricing programs should be reviewed on a case-by-case basis, and that evidence of distortion to competition should be given careful consideration. But merely repeating that zero rating violates net neutrality does not make it so.

Facebook answers below the specific questions presented for comment in the Consultation Paper. In short, Facebook strongly agrees with TRAI that there are many different ways to expand Internet access and use to the benefit of consumers, carriers, and their communities.<sup>4</sup> Due in large part to the enlightened forbearance of TRAI, differential pricing arrangements have been allowed to flourish in India. And they are working here, as they are working in many other countries around the world. With a track record of increasing Internet access and use, differential pricing programs should be recognized as tools for economic development and encouraged within a flexible regulatory environment.<sup>5</sup>

Consistent with the approach taken in most other countries around the world, Facebook also believes that differential pricing plans should be evaluated case by case, based on a number of criteria. That evaluation shows that many categories of differential pricing offer unalloyed benefits in expanding digital literacy, boosting Internet adoption, and promoting content diversity all at once. This is especially true of zero rating, and particularly non-commercial zero rating

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<sup>4</sup> Eisenach Decl. ¶ 4.

<sup>5</sup> *Id.* ¶¶ 2-4.

programs where neither the consumer nor the content provider pays the carrier for data carriage. Differential pricing, and especially zero rating, should remain an essential tool in the work towards Digital India and getting the one billion unconnected Indians online.

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

The short answer is yes. Differential pricing, as the term is used in the Consultation Paper, should generally continue to be allowed.<sup>6</sup> Such arrangements have been offered in India, as they have been elsewhere, for several years. The first response to claims that programs like Free Basics could have unwanted consequences in the future is to ask if similar programs have caused any harm in the past. There is no evidence of any such harm, either to Indian consumers who have enjoyed an economic benefit, to developers who continue to grow in number and ambition, or to carriers who continue to compete vigorously and draw more paying data subscribers through these plans. There is a similar absence of harm in the 35 countries where the Free Basics program operates.

It is an axiomatic principle of regulatory intervention that well-functioning services offering popular consumer benefits should not be restricted without concrete proof of harm. The opponents of zero rating may offer vocal speculation, but their concerns are unaccompanied by hard evidence, and they cannot even minimally bear that burden of proof. To the contrary, as shown below, the benefits of differential pricing are supported by concrete evidence in India and throughout the world. As for the supposed downsides, not only are they unproved; the available evidence suggests they do not exist.

### A. **There is substantial evidence to back up the benefits of differential pricing**

Economists and analysts, who have studied the effects of differential pricing, and in particular zero rating, have shown that zero rating spurs Internet adoption without any market-distorting effects.

For example, a study of mobile market effects in Chile, the Netherlands, and Slovenia,<sup>7</sup> both while zero-rated plans were widely used and after regulators in those countries banned or restricted their use, concluded that there was no evidence that consumers limited their access to the zero-rated content or that the practice resulted in any adverse market effects. In fact, the

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<sup>6</sup> By its terms, the 1999 Tariff Order non-discrimination requirement reaches only “discriminat[ion] between subscribers of the same class.” Thus, that prohibition would not appear to reach zero rating or sponsored data programs, since all subscribers pay the same price (zero), and are subject to the same terms, for the same class of service. In light of the narrow scope of treatment of the Tariff Order, it was no surprise that TRAI’s March 2015 Consultation Paper on a Regulatory Framework for Over-the-top (OTT) Services addressed zero rating as a practice that does not implicate price discrimination but rather as a *non-price* mechanism.

<sup>7</sup> The Netherlands and Slovenia are the only two among the 28 E.U. countries to presently have a ban on zero rating. These bans, however, have likely been superseded by the recently passed E.U.-wide net neutrality legislation. See below at 6.

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study concludes that consumers have been hurt by the regulators' ban on zero rating.<sup>8</sup> In the authors' words: "[i]t cannot be observed that zero rating has reduced innovation in any of the countries. I[f] anything bans on the practice have hurt users the most."<sup>9</sup> As another study observes, prohibiting zero rating would deprive consumers of several potential benefits.<sup>10</sup>

Similarly, various non-commercial zero rating plans have been in effect in many African countries for several years without causing any market distortion. As one paper states: "[p]erhaps some of the most promising examples of early zero-rating success in jumpstarting Internet ecosystems are in Africa. Many African countries have mobile operators that offered some form of zero-rating, starting as early as 2010. . . . These early indications of successful development of Internet ecosystems in countries with a low-connectivity equilibrium point to a promising role for zero-rating programs."<sup>11</sup>

These studies are consistent with Facebook's own experience with zero-rated applications: Facebook knows of no evidence that zero-rated plans have been associated with any adverse effects on the mobile Internet ecosystems, including with respect to their users. In fact, the evidence shows the exact opposite.

## B. Differential pricing arrangements promise dramatic benefits for Indian consumers, and any purported harm is speculative

The benefits of differential pricing, and especially zero rating, are greater still in countries with demographic and geographic hurdles to Internet adoption.<sup>12</sup> General all-access plans are often too expensive for significant portions of the population, especially for them to try for the first time. In contrast, zero-rated offerings create an on-ramp to the Internet. Once online, the consumer builds an understanding of the Internet's broader offerings and benefits. Ultimately, the entry of a greater proportion of the population into the Internet economy enhances economic growth.

Facebook has witnessed first-hand how zero rating plans can jump start Internet adoption. More than 15 million people have been able to come online as a result of Facebook zero-rated offerings around the world. As a result, providing people with access to free basic services, new users in markets where Free Basics has launched are coming onto mobile networks at an average rate that is 50% faster than they otherwise would. In other words, if a mobile network were

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<sup>8</sup> Roslyn Layton and Silvia Calderwood, *ZERO RATING: Do Hard Rules Protect or Harm Consumers and Competition? Evidence from Chile, Netherlands and Slovenia*, SOCIAL SCIENCE RESEARCH NETWORK 32 (Aug. 15, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587542).

<sup>9</sup> *Id.*

<sup>10</sup> Eisenach Decl. ¶ 4.

<sup>11</sup> Diana Carew, *Zero-Rating: Kick-Starting Internet Ecosystems in Developing Countries*, PROGRESSIVE POLICY INSTITUTE 8-9 (Mar. 2015), [http://www.progressivepolicy.org/wp-content/uploads/2015/03/2015.03-Carew\\_Zero-Rating\\_Kick-Starting-Internet-Ecosystems-in-Developing-Countries.pdf](http://www.progressivepolicy.org/wp-content/uploads/2015/03/2015.03-Carew_Zero-Rating_Kick-Starting-Internet-Ecosystems-in-Developing-Countries.pdf).

<sup>12</sup> Eisenach Decl. ¶ 16.



bringing on 10,000 new people per month before launching Free Basics, on average it would bring on 15,000 new people per month after launching Free Basics. Facebook expects that the increase in adoption may be even greater in countries such as India where the hurdles to adoption are higher. What is more, the beneficiaries of that adoption are often disadvantaged categories of the public: low-income communities, rural residents, women and minority groups.<sup>13</sup> Recognizing the connection between zero rating and Internet adoption, almost half of mobile operators around the world offer some type of zero-rated service.<sup>14</sup> As Professor Eisenach observes, this increased adoption enhances the value of the network both to the mobile operator and to all network users, and allows the operator to ultimately spread the costs of its network to a broader subscriber base.<sup>15</sup> Data from more than five years of other programs that offer free access to Facebook, WhatsApp and other services confirm this assessment.

Contrary to the speculation offered by some opponents, the benefit of dramatically expanding a country's Internet adoption base does not come at the cost of narrowing the content the adopters use. In fact, the contrary is true. Zero rating leads to the use of broader and more diverse online content. Users of zero-rated content do not end up in "walled garden" versions of the Internet:

- As a recent paper from the Brookings Institute concluded, increasing local demand for Internet content leads to more competitive markets with more diverse content.<sup>16</sup>
- More than half of the people who come online through Free Basics around the world are paying for data and accessing the full Internet after the first 30 days.<sup>17</sup>

The most telling evidence in this regard stems directly from Facebook's experience here. In India, of the people who have joined the Free Basics trial, after just one month, there are 8 times more people who have paid for, and are using, the full Internet than there are who have chosen to continue only using Free Basics.

Scholarly research has likewise concluded that "with respect to diversity of expression and related concerns, it is difficult to construct a scenario under which increasing access to online

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<sup>13</sup> *Id.* ¶ 20.

<sup>14</sup> Anne Morris, *Report: 45% of Operators Now Offer At Least One Zero-Rated App*, FIERCEWIRELESSEUROPE (July 15, 2014), <http://www.fiercewireless.com/europe/story/report-45-operators-now-offer-least-one-zero-rated-app/2014-07-15>.

<sup>15</sup> Eisenach Decl. ¶¶ 15, 20.

<sup>16</sup> Darrell M. West, *Digital Divide: Improving Internet Access in the Developing World through Affordable Services and Diverse Content*, CENTER FOR TECHNOLOGY INNOVATION AT BROOKINGS (Feb. 2015), [http://www.brookings.edu/~/media/research/files/papers/2015/02/13-digital-divide-developing-world-west/west\\_internet-access.pdf](http://www.brookings.edu/~/media/research/files/papers/2015/02/13-digital-divide-developing-world-west/west_internet-access.pdf).

<sup>17</sup> *One Year In: Internet.org Free Basic Services* (July 26, 2015), FACEBOOK, <http://newsroom.fb.com/news/2015/07/one-year-in-internet-org-free-basic-services/>.

information and adoption of digital communications services would be harmful to online speech. While regulatory authorities should remain vigilant in monitoring business practices, broad-based bans or restrictions on zero rating plans are far more likely to harm consumer welfare than improve it.”<sup>18</sup>

### C. Key jurisdictions have joined India in not prohibiting zero rating or sponsored data programs

Consistent with their benefits and lack of downsides, zero rating and sponsored data plans do not implicate discrimination under Indian law, for the simple reason that, as mentioned above, they do not implicate “discrimination between subscribers of the same class.” Likewise, both the U.S. and the E.U.—the two jurisdictions with the most rigorous open Internet regimes—have shown similar restraint towards zero rating and sponsored data plans, and neither regime treats such arrangements as per se unlawful discrimination. Many other jurisdictions have also taken a similar approach. Appendix 1 provides a brief overview of certain net neutrality regimes worldwide and their application to zero rating.

In the United States, the Federal Communications Commission (“FCC”) does not regulate the relationship between carriers and content providers as a telecommunications service, and zero rating is not evaluated under the standard antidiscrimination provision of the U.S. Communications Act. While the FCC has established a separate rule against prioritizing traffic in exchange for payment or other benefits, zero rating is not subject to that rule either. Zero rating and sponsored data programs are instead subject to a flexible general conduct rule—case-by-case evaluation.<sup>19</sup> Indeed, the FCC Chairman, Tom Wheeler, has recently spoken favorably of a plan that exempts certain types of data from consumer data usage plan limits and is open to all qualifying content, describing it as “highly innovative and highly competitive.”<sup>20</sup> We understand that the FCC will be reviewing this and other such plans, consistent with its case-by-case evaluation approach.

Similarly, the E.U. has adopted a permissive regime for zero rating, and has rejected any categorical restriction. Pan-European rules do not prohibit zero rating so long as it is not accompanied by prioritization of the relevant traffic on the network itself. The E.U. adopted these permissive rules notwithstanding objections by the Netherlands and Slovenia—the only two among the 28 E.U. countries that had banned individual zero rating offers. After enactment of the E.U. rules, any E.U. country’s categorical ban on zero rating offers has become impermissible. In this way, the E.U. treats zero rating on par with the United States: so long as consumers are not

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<sup>18</sup> Jeffrey A. Eisenach, *The Economics of Zero Rating*, NERA ECONOMIC CONSULTING 1 (Mar. 2015) <http://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf>.

<sup>19</sup> *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5666-67 ¶ 151 (2015). While the FCC referred to sponsored data plans as “sometimes called zero-rating,” it did not define or discuss zero rating in detail. *Id.*

<sup>20</sup> Dawn Chmielewski, *T-Mobile’s Binge On Service ‘Innovative,’ but FCC Chairman Keeping an Eye on It*, RECODE.NET (Nov. 20, 2015), <http://recode.net/2015/11/20/t-mobiles-binge-on-service-innovative-but-fcc-chairman-keeping-an-eye-on-it/>.

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being hurt by a particular program, carriers are free to deploy zero rating to provide their subscribers with the packages that they want.<sup>21</sup>

And many other countries, while lacking specific open Internet regimes, have construed their existing laws as permitting zero rating: Bangladesh, Kenya, Nigeria, South Africa, Myanmar, Nepal, Tanzania, and Zambia are some examples. Indeed, Free Basics has been explicitly supported or even championed by government officials or regulators in an overlapping list of countries—Bangladesh, Cambodia, Colombia, Democratic Republic of Congo, Panama, Peru, Rwanda and the Philippines.<sup>22</sup>

The truth is that zero rating benefits users, carriers, and their communities. TRAI should continue its wise forbearance policy and disregard unsupported, and indeed counterfactual, speculation.

**II. *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?***

In light of the substantial and uncontested evidence of benefits, and the lack of proof of any downsides, TRAI should at most adopt an approach of case-by-case evaluation for differential pricing arrangements of the type discussed in the Consultation Paper. In conducting such an evaluation, TRAI should weigh a number of simple criteria:

- *Connectivity.* Does the plan help get more people connected? How many more can the plan be estimated to usher into the digital world?
- *Non-Discrimination.* Does the arrangement discriminate between different subscribers of the same class?
- *Free to Subscribers.* Does the subscriber pay nothing for the arrangement?
- *No payment by content provider.* Does the content provider pay the carrier in the form of cash, ad placements, coupons, rebates, or other consideration? If so, is the same arrangement open to other content providers on comparable terms?
- *Non-Exclusivity.* Is the content available to all carriers on the same terms and conditions? Are other carriers free to enter into an arrangement with a particular content provider or platform? Is the carrier free to enter into the same, or similar, arrangements with other content providers, or with other content platforms?

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<sup>21</sup> See Press Release, Roaming Charges and Open Internet: Questions and Answers, EUROPEAN COMMISSION (Oct. 27, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-5275\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm).

<sup>22</sup> See Appendix 1.

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- *Independence/Non-Affiliation.* Is the arrangement between a carrier and content provider that are affiliated with one another, or is it between independent entities?
- *Openness.* Is the content platform open to all content providers that qualify under objective standards?
- *Transparency.* Does the carrier disclose in clear terms the term of the offering, its scope, whether the content provider is paying for the data carriage, whether the content provider is affiliated with the carrier, and when and how the customer will know when he or she transitions from zero-rated content to content that will count against her data plan?

Restrained application of these criteria would secure the benefits of differential pricing arrangements while also ensuring that any speculative concerns about zero rating remain just that—speculation. Notably, even if someone could concoct a theory of non-price discrimination in connection with zero rating, and even if Indian law were changed to reach such supposed discrimination, application of these principles would be enough to avert any risk in that area, too.

Some have charged that zero rating involves discrimination for and against included and excluded content providers. Any such concern would be completely dispelled by the prudent application of the non-exclusivity criterion suggested above. So long as a carrier participating in a zero rating program is not bound by an exclusivity clause, the carrier is free to enter into similar (or the same) arrangements with other content providers, or platforms of content providers.

Similarly, any risk of discrimination against carriers that are not party to a differential pricing arrangement with a particular content provider is warded off if other carriers, too, are free to enter into a similar arrangement with that content provider.

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

A meaningful evaluation of various free service arrangements and their impact on competition and openness is aided by breaking them down into two general categories:

- *Commercial zero rating plans*, also known as sponsored data plans, where the content provider pays the carrier for the exemption of certain data from data caps or allowances. The payment may be in cash or may take other forms, such as coupons, rebates, or ad placement at the cost of the content provider. This category would include the Consultation Paper's proposed coupon program.
- *Non-commercial zero rating programs*, in which the carrier makes certain data exempt from data caps or allowances without payment from the content provider for the data. These plans translate into unalloyed benefits for the consumer.

They present no monetary hurdle for the end user to overcome, and without the prospect of payment, the carrier elects to offer zero-rated content for the value proposition it presents for its customers.<sup>23</sup> They survive only if they are delivering the content those consumers want and the arrangement adds value for the carrier. These are key drivers for a more competitive market.

Both of these categories may have a role to play in an Internet adoption-friendly ecosystem. For example, both can be used to achieve the objective of providing free Internet access to consumers. Facebook believes in choice—the availability of different solutions that serve the needs of consumers and operators in different ways. At the same time, some of the programs present competition-related concerns that must be analyzed but are not present when the carrier receives neither money nor an affiliate benefit from the arrangement.

In addition, alternative models—such as “universal coupons” provided by content providers redeemable on any carrier or simply free bandwidth—are unlikely to be effective methods for connecting the unconnected in the long term.

First, some have advocated for a rule that would require content providers who wanted to provide zero-rated services to offer a universal coupon—where a consumer exchanges a coupon issued by a content provider for free access to that specific content on any carrier. Such a rule would be, in effect, a “must buy” requirement on content providers for Internet access. Similarly, a rule requiring that zero-rated content be cost-free across “all carriers” compels the content provider to buy Internet access from every operator, regardless of the price. Not only would this amount to a regulation of content providers themselves, which would exceed the relevant jurisdictional authority, it would be contrary to traditional tariffing practices—which ordinarily do not compel anyone to become a customer and to purchase from a tariff.

Further, universal content-provider coupons would be economically unsustainable.<sup>24</sup> Issuance and redemption associated with such a model would be operationally challenging and costly to implement for content providers, consumers, carriers and their local agents. A universal coupon program would be more burdensome than sponsored data arrangements, as content providers would have to offer and carriers would be forced to accept the coupon. Zero rating plans, on the other hand, achieve the same result of bringing more people online, at no cost to the government, the content provider, or the consumer.

Second, free bandwidth is a potential complement, but not a substitute, for zero rating. While free bandwidth comes without content restrictions, its benefits are likely limited because of

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<sup>23</sup> Facebook does not pay carriers for the cost of providing free access under the Free Basics program. The only money spent by Facebook is devoted to programs intended to raise awareness of Free Basics’ availability to those that might benefit from it.

<sup>24</sup> Commentators in favour of providing a direct benefit to consumers for free Internet have suggested that it would cost 2400 crore a year. See Nandan Nilekani and Viral Shah, *Free Basics Is a Walled Garden: Here's a Much Better Scheme — Direct Benefit Transfer for Internet Data Packs*, Times of India (Jan. 1, 2016), <http://blogs.timesofindia.indiatimes.com/toi-editorials/free-basics-is-a-walled-garden-heres-a-much-better-scheme-direct-benefit-transfer-for-internet-data-packs/> (recommending use of Universal Service Obligation fund).

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other limits that the carrier would need to place on the service (*e.g.*, data caps, limited time, speed limitations) or the extremely limited amount of bandwidth that the carrier could afford to provide. Consumers watching video can quickly consume an extraordinary amount of bandwidth—leading to the necessity of some kind of limitation. And consistent with TRAI’s recent rulemaking on data usage, a free data program, capped at a certain megabyte threshold, has greater potential for consumer confusion and inadvertent data usage than a plan premised on free use of certain applications—particularly for those who are new to the Internet. If the services people choose are not optimized for low bandwidth connections, and people do not clearly understand the bandwidth cost associated with their activity, they could quickly run through their free data by watching half a video. This would not show someone the full power of the Internet, so people would be unlikely to become full-time Internet users.

In the absence of exclusivity or affiliate deals, non-commercial zero rating plans have all of the strengths, and none of the weaknesses, of commercial zero rating plans and these alternative models. The subscriber does not pay for access; the content provider does not pay the carrier for the cost of providing that access; and the content provider does not make money from the zero rating program. There are no walls around the garden—in fact, most subscribers affected by the free service choose to upgrade to full paid access.

As noted above, Facebook has carefully structured its most recent initiative, Free Basics, to extend the benefits of zero-rated services to a broader set of Internet content. And Facebook has taken significant precautions that ward off any possible concern with differential pricing arrangements in general:

- Free Basics is non-exclusive for operators. It is available to all operators on the same terms and conditions, and all operators can offer both Free Basics and any other service, including zero-rated services, it wants. And an operator can sign up and launch Free Basics on its own without any intervention from Facebook.
- Free Basics is also non-exclusive for content providers. The Free Basics platform is open and non-discriminatory as to all content providers meeting objective, freely available technical criteria.
- Free Basics is free to both users and content owners. No one is charged for accessing the content on Free Basics. No content owner is charged for participating in the platform.
- Free Basics is transparent. All of the technical standards are published and available on line.
- Facebook does not pay carriers to exempt its content from usage limits.<sup>25</sup>
- Facebook does not make money from Free Basics; it is not paid by content providers, carriers, or even advertisers, as there are no advertisements within the Facebook experience on Free Basics.

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<sup>25</sup> See footnote 23 above.

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In sum, any concerns about other differential pricing arrangements should not extend to Free Basics, which satisfies all relevant factors, connects the most people at no cost, and is a win/win/win for Internet adoption, digital literacy and content diversity.

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

The goal of Digital India is rightly the lodestar guiding TRAI's decision making. It should continue to be. Pockets of Internet adoption are not enough. Despite tremendous strides, the statistics are well known and the road is long. Eighty percent of a country's population translates into many people in any country. In India, it means one billion Indians are still bereft of Internet access. One billion access plans need to be activated.<sup>26</sup> Zero rating should remain an essential tool in aiding TRAI's still enormous task. Facebook remains enthusiastically committed to deploying this tool and helping connect the remotest of Indian villagers to the Internet, under TRAI's aegis.

Facebook applauds TRAI's initiative to go behind labels and analyze separately each category of differential pricing. Facebook also commends TRAI on its willingness to act carefully and methodically in assessing the benefits that differential pricing offers to both current and potential users of the Internet. A scalpel, not an ax, is what is needed. Facebook also applauds the broader, separate inquiry undertaken by TRAI into the appropriateness of open Internet rules. Facebook supports strong net neutrality rules, including prohibitions on blocking, throttling, and paid prioritization. As explained above, these rules should be accompanied by flexible, case-by-case evaluation of differential pricing arrangements.<sup>27</sup>

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<sup>26</sup> While India has a very large absolute number of broadband subscribers, it is still ranked 142nd in terms of broadband penetration globally (below some of its neighbors)—making it among the Least Connected Countries—and has the lowest connectivity when compared to the other BRIC countries. See, e.g., *The State of Broadband 2015*, BROADBAND COMMISSION FOR DIGITAL DEVELOPMENT (Sept. 2015), <http://www.broadbandcommission.org/documents/reports/bb-annualreport2015.pdf> (ranking India 131st in fixed broadband subscriptions per 100 capita, and 155th in mobile subscriptions per 100 capita); *Measuring the Information Society Report*, INTERNATIONAL TELECOMMUNICATION UNION (2014), [http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2014/MIS2014\\_without\\_Annex\\_4.pdf](http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2014/MIS2014_without_Annex_4.pdf) (ranking India 129th in the ICT Development Index).

<sup>27</sup> The Consultation Paper asks whether differential pricing could lead carriers to try to charge extra for certain content. Facebook agrees unambiguously that such a practice would be problematic. Extra charges are inherently harmful to the consumer and likely to be applied to the content that the consumer most wants to access. But such an attempt could only be enforced by throttling or blocking content that consumers did not agree to pay extra to access. And it is this blocking or throttling of content that would be a violation of, and should be prohibited under, any open Internet rules ultimately adopted.

## APPENDIX 1

### OVERVIEW PAPER FOR TRAI NET NEUTRALITY REGIMES AND APPLICATION TO ZERO RATING

#### 1. Introduction

Zero rating is the practice of providing access to certain online content or services (such as a mobile app or website) free of data charges. This paper provides an overview of the current status of net neutrality regulations in certain jurisdictions around the world. Please note that the list below is not exhaustive, and that these regimes are both complex and subject to interpretation and amendment.

Please find below observations of certain regulatory schemes outside of India:

- 1.1. Comprehensive net neutrality regimes are by and large a relatively recent development on the international landscape. *Countries that have enacted net neutrality rules have generally found that zero rating plans may be permitted under those rules; while allowing zero rating offers to be reviewed on a case-by-case basis, these regulatory regimes do not categorically bar zero rating.*
- 1.2. Generally, net neutrality ensures that broadband access providers do not exercise any gatekeeper role to block and otherwise unreasonably discriminate against content. There does not appear to be any jurisdiction that construes net neutrality in such a manner as to require operator parity.
- 1.3. This is certainly true of the rules adopted by the Federal Communications Commission (“FCC”) in the United States and the European Union’s recent Net Neutrality Regulation (Regulation (EU) 2015/2120). The FCC has endorsed a case-by-case review of zero rating plans, while rejecting an outright ban. Furthermore, as will be discussed below, the FCC Chairman observed that a zero rating plan that resembles the Free Basics platform in significant respects was pro-competitive, innovative, and in effect consistent with net neutrality principles. Similarly, the E.U. Net Neutrality Regulation adopted a permissive regime for zero rating and rejected any categorical restriction. Netherlands and Slovenia (who each have comprehensive net neutrality legislation) raised concerns that their national rules, under which regulators in those countries have previously banned individual zero rating offers, would breach the Net Neutrality Regulation’s treatment of zero rating. In response to the Dutch and Slovenian concerns, the E.U. legislature has indicated that national legislation in these countries should be interpreted in line with the Net Neutrality Regulation. In practice, this means that any broad national policy that categorically bans zero rating offers would be impermissible under the new Net Neutrality Regulation. In taking the positive decision not to ban zero rating, the E.U. legislature has acknowledged at various stages that zero rating offers may be pro-competitive, and that an automatic ban on zero rating also could stifle innovation.
- 1.4. In other geographical regions, such as Latin America (“LATAM”), those countries that have adopted net neutrality regimes have done so on a high-level principled basis to ban activities such as blocking, throttling and/or slowing down of traffic. For the most part, these regimes do not contain outright bans on zero rating offers, and many zero rating offers exist across these markets.

- 1.5. The overwhelming majority of countries have not adopted specific net neutrality regimes as the existing legal regimes provide sufficient protection against truly distortive behaviour by operators without stifling innovative offers that enable smaller competitors to enter the market. This is certainly the trend in most African jurisdictions, and is achieved, for example, by a combination of general non-discrimination provisions, pricing caps, universal service obligations and/or anti-trust regimes that seek to identify truly abusive behaviour that is not otherwise objectively justifiable.
- 1.6. By contrast, there are only a handful of jurisdictions (e.g., Chile, Netherlands, and Slovenia) that have at some point banned zero rating offers. As discussed below, even in these three countries, the zero rating bans appear to be out of line and incompatible with subsequent rules and enforcement practice. This is contrary to erroneous reports that suggest a greater number of countries restrict zero rating.<sup>1</sup>

## 2. Overview of key net neutrality regimes:

### 2.1. U.S.

In new net neutrality rules adopted earlier this year, zero rating is not banned and is reviewed on a case-by-case basis. The FCC determined that strong net neutrality protections do not prohibit zero rating and expressly declined to ban zero rating practices in the U.S. The FCC has elected not to ban zero rating based, in part, on the benefits zero rating programs have for both competition and consumers – particularly those using mobile services. In its decision, the FCC also cited arguments that zero rating models increase choice and lower costs for consumers.

Accordingly, the FCC reviews zero rating practices on a case-by-case basis under a “*no-reasonable interference/disadvantage*” standard. Under this standard, zero rating practices are permissible as long as they do not unreasonably interfere with or unreasonably disadvantage the ability of consumers to access the Internet content and services of their choosing, or of edge providers to reach consumers using the Internet.

The FCC Chairman, Tom Wheeler, has voiced support for a plan that exempts certain types of data from consumer data usage plan limits and is open to all qualifying content. That plan closely resembles the structure of Free Basics—both of them are open to any content providers who want to participate, as long as they meet the programs’ technical guidelines. In response to questions about whether the former complies with the FCC’s net neutrality rules, Chairman Wheeler complimented the plan, calling it “*highly innovative and highly competitive*”—strongly suggesting that the program comported with net neutrality principles. We understand that the FCC will be reviewing this and other such plans, consistent with its case-by-case evaluation approach.

### 2.2. E.U.

The E.U. Net Neutrality Regulation also does not ban zero rating. As noted above in paragraph 1.1, zero rating was debated hotly as part of the legislative development of the Regulation and an outright ban was expressly rejected by the E.U. legislature. Similar to the

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<sup>1</sup> <http://timesofindia.indiatimes.com/tech/tech-news/Zero-rating-What-are-countries-doing-about-it/articleshow/47001571.cms>.

position in the U.S., a rule of reason approach should be followed to avoid dangerous stifling of innovation and competition. Zero rating offers can be reviewed on a case-by-case basis but only where this type of zero rating commercial practice—i.e., taking a number of factors into account, including scale of such offers on the market and other market factors—leads to a situation where end-users' choice is materially reduced in practice. An automatic, categorical ban on all zero rating offers by individual member states, such as the Netherlands and Slovenia, will no longer be permitted under the Net Neutrality Regulation. Additionally, the E.U. legislature has recognised that zero rating offers can bring benefits for competition and innovation (e.g., connected cars, e-Health/telemedicine, etc.). Zero rating offers are an inherent part of daily life across the EU. Nearly all mobile network operators, ISPs, cable and satellite providers have, for some time now, provided some form of zero rating offers in the market.

### **2.3. LATAM**

Several LATAM jurisdictions have adopted net neutrality rules. However, the rules do not specifically relate to/ban zero rating offers. For example, we understand the following to be the case:

#### **2.3.1.Argentina**

The Argentinian Digital Law (2014) requires content, apps, and services to be provided to all users without restriction, discrimination or blocking. Although we are cognisant of the fact that Argentina is currently consulting on additional regulations in this area, at present we understand that the relevant net neutrality provisions in the Argentinian Digital Law mean prices should not be determined based on content (i.e., no price discrimination). We are not aware of any examples of the regulator having banned zero rating offers on the market under this law. We understand that there are a number of zero rating offers in the market from mobile network operators (e.g, Claro's offer, launched in May 2015, which allows users to send SMS and use data after the voice/internet bundle has been exhausted).<sup>2</sup>

#### **2.3.2.Bolivia**

The relevant rules contain merely a broad principle of technology neutrality and do not apply to zero rating offers.

#### **2.3.3.Brazil**

Brazil's Internet law addresses network neutrality by requiring operators to treat traffic equally from a technical standpoint. In other words, while it prohibits filtering, traffic shaping and blocking, the law protects companies' freedom to create commercial offers as long as it does not affect the technical restrictions above.

The law does not prohibit zero rating, and zero rating offers do exist in the market. In fact, many operators have been offering zero rating services for the last five

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<sup>2</sup> <http://www.claro.com.ar/portal/ar/pc/personas/movil/pospago/>.

years in Brazil. Three out of the four largest Brazilian carriers (Claro, TIM and Oi) are offering or have offered zero rating plans to Brazilian consumers, and the Brazilian Telecommunications Authority (“ANATEL”) has been openly in favour of such offers. Additionally, ANATEL’s vice-president, Marcelo Bechara, has also recognised the need for Brazil to have as a priority the opportunity to provide Internet to 100 million people who are currently unconnected, regardless of the type of access they are granted. And in the context of Free Basics, he has stated he personally considers that the model does not violate net neutrality principles.<sup>3</sup>

We are also aware that during the consultation process on Brazil’s Internet Law (Law 12,965/2014) earlier this year (the consultation process ended 19 May 2015), some of the contributions from public and private entities set out the necessity of determining some exceptions to the net neutrality principle and the need for network management to guarantee the adequate functioning and lending of the services, among others.<sup>4</sup>

#### 2.3.4. Colombia

While the relevant net neutrality legislation (Law 1450 of 2011) prohibits outright blocking of content, it does not apply to zero rating offers. We understand that zero rating offers exist in the market on both a categorical basis (e.g., all social media services or all dating websites) and on an individual application basis (specific service).

#### 2.3.5. Chile

Despite initial media reports, Chile has not issued a blanket ban over zero rating. In April 2014, the regulator issued a circular that cited Article 8.2 of net neutrality regulations prohibiting arbitrary discrimination, and defined as “*arbitrary*” any prioritization or discrimination that affects contents or applications of a “*similar nature*.” This establishes that Internet access providers cannot discriminate between content and applications that provide similar services (for example, zero rating one social media app without zero rating others), but this is not a ban on zero rating. In fact, in a subsequent clarification, the regulator said that the circular was meant to apply to bundling of social media with voice and data plans, and is not meant to be generalized to other services. In the meantime, operators continued to offer zero rating and special promotional offers. A number of zero rating offers continue to exist in the market and have been developed alongside the regulator in such a way that the offers do not discriminate between specific apps, but extend to all apps of a similar nature. This is similar to Free Basics, which is open to any app or service that meets the program’s technical guidelines (i.e., there is no minimum/maximum number on apps, including apps in specific subject categories), and Free Basics is designed to encourage maximum participation of as

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<sup>3</sup> [http://sinttel-es.org.br/novo/wpcontent/uploads/2015/07/resumo\\_noticias\\_Sinttel-ES\\_01072015.pdf](http://sinttel-es.org.br/novo/wpcontent/uploads/2015/07/resumo_noticias_Sinttel-ES_01072015.pdf)

<sup>4</sup> For further information: <http://signaltelecomnews.com/contribuciones-piden-que-la-reglamentacion-no-enyese-al-marco-civil-de-internet-en-brasil/>; <http://www.telesintese.com.br/consulta-da-anatel-termina-com-147-contribuicoes/>.

many different apps and services as possible, with a focus on innovative, locally relevant content.

#### 2.3.6. Mexico

The relevant provision in the Mexican legislation (Telecoms Law) is one of non-discrimination. Although the Mexican telecoms authority is currently developing regulations to implement the net neutrality provisions in the Mexican Telecoms Law, this has not yet occurred, and to date, no specific bylaws or guidelines on the subject of zero rating have been issued.

#### 2.3.7. Peru

Draft net neutrality legislation is expected to be adopted shortly. The framework in the legislation distinguishes broadly between three categories of measures: (i) clearly arbitrary measures such as blocking and throttling, (ii) measures that are clearly non-arbitrary; and (iii) measures that, depending upon their application, may have the potential to be arbitrary. Zero rating is not categorised as a clearly arbitrary measure. Indeed, the regulator (“OSPITEL”) specifically acknowledged in its report accompanying the draft legislation (No. 347-GPRC/2015) that zero rating offers such as Free Basics can bring benefits to customers and the economy as a whole, and that the project has been rolled out successfully in a number of other LATAM jurisdictions where net neutrality rules exist without giving rise to a regulatory issue under those rules. OSPITEL also points out the fact that even in a number of jurisdictions where net neutrality principles have been adopted, such as Brazil, Colombia, Chile, Ecuador, and Mexico, zero rating is not currently prohibited, and various operators in these countries have active zero rating offers. OSIPTEL’s report also states that arrangements like zero rating have benefited consumers and have been beneficial for competition.

### 2.4. Africa / EMEA

As noted above, we are not aware of any African jurisdiction that has seen the need to adopt specific rules governing net neutrality. The launch of innovative services / offers has flourished in Africa, with jurisdictions such as **Kenya**, **Nigeria**, **Tanzania** and **Zambia**, which represent some of the fastest growing Internet-connected nations in the African continent. These markets accommodate a number of zero rating offers (e.g., South African OpenWeb’s recent November offer where free mobile data is provided with certain home broadband ADSL packages, and Nigerian provider Kaymu’s current partnership with the MTN network to enable users to shop via its mobile app without incurring any data costs. According to Kaymu, “*high data costs are a major barrier for entry into the e-commerce space,*” and “*the decision to zero-rate data usage on the Kaymu mobile app was necessary to drive internet usage and education.*” Free Basics has enabled operators and content developers to spark innovation and Internet adoption in those countries where it has launched. It has also assisted in a number of key areas such as improved health awareness (e-Bola), support of young girls/women in becoming key players in their communities, and overall promotion of innovation in the ICT sector.

## **2.5. Asia**

The ability to offer innovative free services has been an important contributing factor to opening up certain economies in Asia and sparking growth. For example, **Nepalese** consumers have expressed clear preference for free services available from NCell (including Free Basics, and NCell's offer for customers to browse its website and e-care services free of cost for its customers), which might motivate other operators such as NTC to offer more competitive packages. **Bangladesh's** Telenor has seen huge take-up of its WowBox service—part of Telenor's “Internet for All” corporate strategy—with take-up of the specific app having reached the 1.5 million user mark at the end of October/start of November. Another interesting jurisdiction is **Myanmar**, where the ability of users to access free online services has led to tangible benefits across a number of sectors (e.g., tourism, and overall growth in market economy).

## **Countries Where Free Basics Has Launched and Public Statements by Government Officials in Support of Free Basics**

Below is a list of countries where Free Basics has launched and is permitted (excluding India). Public statements made by regulators or government officials in support of Free Basics are listed below.

### **1. Colombia**

**President Juan Manuel Santos of Colombia:** “Internet.org [Free Basics] aims to provide access to millions of people deprived of the internet due to its cost. It aims to offer access and make the internet available. And that can have fantastic, positive effects in terms of promoting equality and education. Any Colombian with a mobile phone, no matter how simple it is, will now have access several contents like information about farming, health and education. Many services will be available to Colombians that, otherwise, would not have access.”

### **2. Peru**

**Peru’s Minister of Communications, Jose Gallardo Ku:** “Internet.org [Free Basics] will allow people to access a set of basic services and will give the government the opportunity to offer useful information about agriculture, gender, and youth issues, among others . . . This is another example of how partnerships between the public and private sector can yield amazing results and help with development.”

### **3. Cambodia**

**Kan Channmeta, Secretary of State, Ministry of Posts and Telecommunication:** “The new [Free Basics] partnership is in line with the government’s policy of encouraging more people to go online. Our policy is aimed at increasing Internet connectivity in Cambodia.”

### **4. Panama**

**President Juan Carlos Varela of Panama:** “This digital tool [Free Basics] will not only connect people for free, but also strengthen the development of an efficient and modern electronic government.”

### **5. Rwanda**

**Jean-Philbert Nsengimana, Rwanda’s Minister for Youth and ICT:** “The introduction of Freebasics.com . . . will enable Rwandans to have free web access to a variety of popular websites on the internet. With categories ranging from education, jobs, to local information, we are confident that Rwandans will have a service that they can be proud to use and benefit from.”

### **6. Bangladesh**

**Press coverage of the State Minister’s remarks regarding mobile operator Robi’s launch of Free Basics in Bangladesh:** “State minister for ICT Division Zunaid Ahmed Palak . . .

said all other mobile operators should follow the footstep of Robi to enable the people with the power of internet.” Link: Robi internet users to get free access to 25 websites.

#### **7. Democratic Republic of Congo**

**Deputy Prime Minister Thomas Luhaka Losenjola, Telecommunications and New Technologies:** “I support the Tigo-Facebook partnership, and the availability of free access to Internet.org [Free Basics] and to Facebook. My wish is to see the adoption of this and all innovative technologies that drive the Democratic Republic of the Congo’s re-emergence.”

#### **8. Maldives**

**Hon. Umar Naseer, Minister of Home Affairs:** “Affordable access to information is crucial to the well-being of our citizens. And what can be more affordable than being free? Free Basics, I understand will do just that.”

#### **9. Philippines**

**President Aquino :** “President Aquino today added his signature to the Connectivity Declaration, marking his commitment to join world leaders in making universal internet access a reality in the Philippines. Studies show that internet access can help lift people out of poverty through access to critical health, economic and education services. As part of this effort, we are working with partners such as Facebook, the country's major telecommunications operators (Smart and Globe) and nonprofit organizations to connect more Filipinos to valuable internet services and public information such as the Online Official Gazette of the Republic of the Philippines through Free Basics. This has benefitted our people, like Riza Mae Tachado from Culasi Antique, who used Free Basics to complete her studies and earn a university degree when her island was hit by a typhoon. It is stories like this that fuel our commitment to do what we can to help as many Filipinos as possible get connected to basic services to help them improve their lives”.