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To: The Body of European Regulators of Electronic Communications (BEREC)
Fr: R Street Institute
Re: Zero-rating and Net-neutrality Guidelines

This letter represents a response by R Street Institute to recent public comments on your proposed guidelines for network-neutrality rules. Because R Street interprets some of these comments as demanding overbroad, needlessly categorical guidelines that could discourage net-neutrality strategies designed to improve access, we at R Street urge that BEREC's guidelines forbear from prescribing any categorical ban on zero-rating. We respectfully offer this letter, even though the comments period for BEREC's proposed guidelines has passed, in response to more recent (post-deadline) public comments and submissions that argue (mistakenly in our view) that net-neutrality principles require a blanket prohibition of zero rating.

The R Street Institute is a non-profit, nonpartisan, public policy research organization ("think tank"). Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. Consistent with our mission, we support strategies that improve access to internet resources, especially for underserved and economically disadvantaged communities. Because the issue of improving internet access is so acute, we would reject regulations that would slow internet access and development by prohibiting providers from exploring zero-rating or other approaches that lower barriers to entry for poorer communities.

In reaching this position, we have taken our direction primarily from the U.S. Federal Communications Commission (FCC) Open Internet Report and Order of March 2015, a strongly pro-net-neutrality regulation that nonetheless makes an express point of forbearing from banning zero-rating categorically. Despite what some commenters in different regulatory proceedings around the world have said, the FCC acknowledged in its final Report and Order that there is no consensus among stakeholders (or even among pro-net-neutrality stakeholders) as to zero rating and its relationship to network neutrality. See, generally, FCC Open Internet Report and Order at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.



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As the Commission put it, there is evidence on the record in support of both sides of the zero-rating debate, and on whether regulators can allow for possibly pro-competition, pro-access benefits of zero rating:

While our bright-line rule to treat paid prioritization arrangements as unlawful addresses technical prioritization, the record reflects mixed views about other practices, including usage allowances and sponsored data plans. Sponsored data plans (sometimes called zero-rating) enable broadband providers to exclude edge provider content from end users' usage allowances. On the one hand, evidence in the record suggests that these business models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile services. [...] On the other hand, some commenters strongly oppose sponsored data plans, arguing that "the power to exempt selective services from data caps seriously distorts competition, favors companies with the deepest pockets, and prevents consumers from exercising control over what they are able to access on the Internet," again with specific reference to mobile services.' [...]

We are mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans. [footnote omitted] At the same time, new service offerings, depending on how they are structured, could benefit consumers and competition.

The Commission goes on to explain that it will apply "case-by-case" analysis both as to zero-rating by internet providers and as to exemptions from usage allowances (also known as "data caps"). See paragraphs 151-153 of the FCC's Open Internet Report and Order at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

R Street believes that regulators like the FCC are capable of making case-by-case determinations about the pro-internet-access or anti-competition outcomes of zero rating, and we urge that BEREK not yield to calls by some commenters to make its net-neutrality guidelines (a) more categorical and restrictive and (b) less sensitive to whether zero-rated internet services and content promote both access and competition in reaching underserved communities (especially rural communities and poor communities). Our view is that policies



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that promote greater access to these communities need to be considered carefully by regulators rather than categorically banned from the outset.

There are models for regulators considering whether or how to regulate possible zero-rated services. R Street outlines one possible rubric or framework for regulators in its comments on India's regulator's consultation on sponsored data. See http://traf.gov.in/Comments_Data/Organisation/R_Street.pdf.

And R Street is not alone in believing that flexibility under the BEREC guidelines is appropriate. For a generalized discussion of how zero rating can be assessed by regulators for its pro-access or anticompetitive impact, see the Center for Democracy and Technology's January 2016 policy paper, "Zero Rating: A Framework for Assessing Benefits and Harms," at <https://cdt.org/insight/zero-rating-a-framework-for-assessing-benefits-and-harms/>. (CDT also filed this paper directly with India's regulator.)

India's Center for Internet and Society also published, in the context of the Indian regulator's consultation, an analytical framework that distinguishes between "negative discrimination" (which CIS urged should be categorically banned) and "positive discrimination" (which CIS argued may be allowed by the regulator 'in those cases where such discrimination does not harm user choice, competition, or access'). CIS argued that "positive discrimination" merits a case-by-case analysis, notable in the context of mobile (wireless) internet services, which most stakeholders believe will be the central platform for internet access for decades to come. (The CIS filing can be found here: http://cis-india.org/internet-governance/resources/net-neutrality/2016-01-07_cis_traf-submission_differential-pricing/view.)

For a general discussion of how a specific internet service might apply a properly designed zero-rating framework, consistent with broad principles of network neutrality but allowing for cross-subsidization in support of access to underserved countries and communities, see, generally, the Wikipedia Zero https://wikimediafoundation.org/wiki/Wikipedia_Zero and in particular the Wikipedia Zero Operating Principles https://wikimediafoundation.org/wiki/Wikipedia_Zero_Operating_Principles.



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In summary, R Street believes that, while some activists have called for guidelines that would discourage regulators from experimenting with some forms of pro-access zero-rating on the presumption that all zero-rating is anti-competitive, BERC should ultimately provide guidelines that allow different nations to reach different conclusions about zero-rated services, consistent both with broad network-neutrality principles and pro-access principles.

Thank you for consideration of R Street's letter in this matter.

Respectfully,
Mike Godwin
Senior Fellow
R Street Institute