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FACEBOOK COUNTER-COMMENTS

Preamble

Facebook respectfully submits these counter-comments to the Telecom Regulatory Authority of India's ("TRAI's") Consultation Paper on Differential Pricing for Data Services ("Consultation Paper").[1] The vast majority of commenters in this proceeding recognize both the transformative potential of the Internet and the paramount importance of connecting the unconnected. They are all in accord that India and its people are best served by a rapid and widespread expansion of connectivity in the country.

This goal is consistent with Facebook's mission and the Government's vision of Digital India. It is also why we have been passionate about the subject of this Consultation. The concept of "differential pricing" may appear academic. But it can make an enormous difference for those who have not seen the benefits of how internet connection can change their lives. We wanted people, including those citizens of India who remain unconnected, to be aware that the thoughtful application of this seemingly dry concept can accelerate the success of Digital India. This is the tremendous responsibility facing TRAI.

After reviewing many of the comments filed, we make the following five points:

1. ***Facebook Supports Effective Regulation of Differential Pricing Programs to Prevent Anti-competitive Behavior and Promote the Public Interest.***

   Numerous commenters representing a wide range of perspectives—from consumers, civil society associations, developers and economists—recognize the benefits that zero-rating programs, whether or not they are deemed a species of "differential pricing,"[2] can offer consumers. These programs can bring more people online, receive the benefits of connectivity, demonstrate the value of the Internet and create a robust ecosystem—one that promotes competition and encourages the development of locally relevant services. Yet, Facebook also recognizes that effective and balanced regulation can promote programs that achieve such benefits while protecting consumers and competition.

2. ***Regulators Around the World Increasingly Recognize that Effective Regulation of Zero Rating Programs Requires Case-by-Case Review.***

   Commenters note that zero-rating programs should be subject to a case-by-case balancing of benefits and risks and highlight that this approach is increasingly being adopted by

[1] Facebook and its affiliates offer various popular online services, including, *e.g.*, Facebook Messenger, WhatsApp, and Instagram.

[2] For the purposes of this submission, and in accord with the usage in the Consultation Paper, we use the term "differential pricing" interchangeably with zero-rating. Nonetheless, we reiterate our view that, by its terms, the non-discrimination requirement in the 1999 Tariff Order reaches only "discriminat[ion] between subscribers of the same class." That prohibition would not appear to reach zero-rating programs, since all subscribers pay the same price (zero), and are subject to the same terms, for the same class of service.

regulators around the world. Facebook supports with this approach. Case-by-case evaluation of zero rating programs will allow TRAI to weigh the consumer benefits against potential harm to competition.

Around the world, the trend of national regulation has moved to a regime of case-by-case evaluation. Over the past 12 months, both the U.S. and E.U. have adopted net neutrality regimes that reject one-size-fits-all bans on zero rating. The reason for the decision not to ban zero rating is straightforward: both the U.S. and E.U. have recognized that zero-rated programs can enhance competition, increase consumer welfare, and raise the value of the Internet for all parties. These arrangements are driven solely by *consumer wants and preferences* and in no way prevent or discourage people from accessing Internet content outside of the zero-rated platform.

3. ***Opposition to Free Basics and Other Zero Rating Programs Are Often Based on Unproven and Misdirected Conjecture***

Many commentators have singled out the Free Basics program as an example of a zero rating program that should be prohibited. Unfortunately, these criticisms are often based on an inaccurate understanding of the program's design, operations and technical standards.

First, several commenters call for the prohibition of a Free Basics program that does not exist:

- They falsely claim that the technical requirements that apply to Free Basics developers do not apply also to Facebook. This is flatly incorrect; they do apply to Facebook.

- They falsely claim that Facebook uses the data obtained from developers using the Free Basics program to enhance Facebook products and improve advertising. That is incorrect; Facebook does not.

- They falsely claim that Free Basics is designed primarily to promote switching of existing users between operators, rather than to bring new users to the Internet. This is not true and evidence refutes it; in addition, this need not be a material concern since the program is open to all operators on the same terms in a non-exclusive manner.

Second, the record is devoid of evidence (as opposed to assertion) that the Free Basics program, which now operates in more than 35 countries and serves millions of people, has caused harm to either consumers or competition. Indeed, opponents of Free Basics raise generalized concerns with differential pricing arrangements. These concerns rest on three premises—the notion that an absolute ban on differential pricing is required by net neutrality; the notion that all differential pricing arrangements favor deep-pocketed developers; and, the idea that they all create walled gardens of content.

The first of these premises is simply wrong: Facebook is a strong supporter of net neutrality. As the accelerating trend of national regulation demonstrates, there is no inconsistentcy between supporting the core principles of net neutrality—including

restrictions against blocking and throttling content—and permitting zero-rated services that benefit consumers and promote competition. Whatever the validity of the other two points for a hypothetical or future differential pricing arrangement, they do not apply to Free Basics or many other zero-rated services worldwide.[3] Undaunted, some detractors invoke these inapplicable notions to insist that the program will produce results that it has not in fact produced based on characteristics it does not in fact have. Good public policy should not be based on false premises or unproven speculation.

4. ***Facebook Supports Regulatory Precautions Based on Clearly Prescribed Criteria***

Facebook strongly agrees that not every possible differential pricing arrangement is free of risk. In that respect, Facebook agrees with many commenters who recommend criteria that TRAI should apply as part of its case-by-case review. Among the factors to be reviewed as part of an inquiry would be:

(i) whether the carrier seeks to zero-rate a service its owns;
(ii) whether the carrier receives payment from the developer for the data consumed by its subscribers;
(iii) whether the program is otherwise anticompetitive;
(iv) whether the program advances the public interest; or
(v) whether the program is non-commercial in nature.

For example, Free Basics satisfies all the relevant factors. 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, an open invitation to all content developers to be included in the platform if they meet technical criteria, no payment to Facebook of any kind, and no ownership interest with any carrier, Free Basics combines the benefits of expanded adoption with the absence of any of the risks identified by well-intentioned skeptics.

5. ***Proposed Alternatives to Free Basics Are Unrealistic and Ineffective***

Concerns expressed by commenters about deep pockets and walled gardens mean that, whatever approach TRAI takes on differential pricing generally, it should not impede Free Basics or other non-commercial zero rating programs. Similarly, TRAI should not view mandatory coupon programs as a realistic alternative. Such requirements appear to contravene a fundamental axiom of telecom regulation the world over: it is telecommunications providers that are regulated. Coupon programs would instead train the regulator's sights on developers, forcing them, to become customers of every carrier and buy telecom services from them all at whatever price each carrier chooses to charge.

[3] For example, there are several other products currently in the Indian marketplace that have an exclusive arrangement with one operator and that offer differential pricing only for select websites. For example, Amazon has been offering free wireless connectivity on a few models of its e-book reading device named 'Kindle'. Amazon provides wireless coverage via Vodafone's 3G network in India. Kindle's built-in free 3G connectivity uses the same wireless signals that mobile phones use, but there are no monthly data charges. While utilizing this experimental browser, users can only access Amazon or Wikipedia.

Furthermore, such programs will be prohibitively expensive and administratively burdensome to execute—and would deter developers from participating in them. The end result will deprive people, who at present are getting access to some content through various zero rating programs, of any access at all.

I. Facebook Supports Effective Regulation of Differential Pricing Programs to Prevent Anti-competitive Behavior and Promote the Public Interest.

A number of commenters, including notable academics, carriers and other business entities, and above all consumers and their representatives, join Facebook in recognizing the manifold benefits that zero-rating arrangements, whether or not they are deemed a species of "differential pricing," can produce. These benefits include:

- bringing the unconnected online
- exposing new users to the potential of the Internet and encouraging richer use of diverse content far beyond the contours of a particular zero-rated program;
- enhancing the value of the Internet to all users through network effects; and
- increasing competition among TSPs.

Greater and Faster Internet Adoption. Most importantly, zero rating programs have a key role to play in bringing more than one billion unconnected Indians online. For many of the unconnected, it is a combination of cost and unfamiliarity that keeps them on the sidelines. Yoo at 3. This is true in every country, and especially true in India. A recent study shows that more than half of the unconnected in India do not use the Internet because they do not see a need to do so. Yoo at 3 (reporting a Word Economic Forum report citing a Boston Consulting Group study). Dr. Layton explains that the success of zero rating plans centers on the complete removal of the cost barrier and the offering of content for which local consumers have already shown a preference. Layton at 8. In essence, zero rating programs give consumers otherwise unfamiliar with the benefits of the Internet "an incentive to try it." Layton at 8. This is precisely the reason why successful zero rating programs leverage popular content such as social media and Wikipedia. Yoo at 3. As Facebook has attested in its opening comments, Facebook has witnessed firsthand the success of zero rating programs. Facebook's connectivity initiatives have already brought more than 15 million people online around the world, and more are coming on board every day.

Greater and More Diverse Internet Use. Once online, these new users are exposed to the potential of the Internet and how to use this potential to better their lives. They quickly move beyond zero-rated content and find and take advantage of the Internet's myriad other uses. And many of them stay online and become part of the "connected" world. As Dr. Jeffrey Eisenach observes, programs such as Free Basics "expand participation in online content and applications, while also increasing mobile wireless penetration, especially in developing economies." Eisenach at 8. This expanded participation is the direct result of the new users' discovery of the Internet's significant resources. Yoo at 3. Facebook's experience is consistent with these

observations. More than half of Free Basics users are using paid Internet access within a month of signing up for the free program.

Greater Value for Each Network User. The benefits of greater connectivity are not limited to the new users themselves. Through network effects, the growth in participation enhances the value of the network for all users, not just the newly minted subscribers. Eisenach at 9. As Dr. Eisenach explains, these "network effects" of greater participation are "sometimes greatest within 'communities of use'"—*i.e.*, those communities most closely connected with the new users. Eisenach at 9. This is because the nature of network effects is to reverberate outward from their point of occurrence. Dr. Mandel of the Progressive Policy Institute ("PPI") agrees, finding that increased local access benefits *local* content and service providers by spurring the expansion of the local network and its local offerings. PPI at 1-3. In Dr. Mandel's words, non-commercial zero rating programs can "jump-start a virtuous feedback loop that moves the local economy into a high-connectivity equilibrium." PPI at 3. In sum, the greater online population gives "local content and service providers . . . a bigger market and more incentive to expand their Internet offerings . . . . As local content becomes more valuable, that in turn gives users more incentive to buy full data plans, creating a virtuous circle." PPI at 1-2.

More Competition. Many academics hone in on another potential benefit of zero rating programs: they can be a powerful tool to increase competition among TSPs, resulting in better services and better prices for all users of the network. As Professor Yoo explains, zero rating programs are more appropriately characterized as service differentiation by TSPs as opposed to price differentiation. Yoo at 1. This is because all customers of the TSP pay the same price for the program—zero. Instead, the zero rating program serves to differentiate the TSP's offerings from those of its competitors. Yoo at 1-2.

In the right circumstances, such service differentiation can allow upstart TSPs to compete with more established and larger competitors, compensating for the economies of scale associated with declining average costs of telecommunications networks. Yoo at 2. If new TSPs were not allowed to offer innovative packages of access or content, they could never compete with their larger brethren because the latter would always maintain its advantage in the one remaining differentiator—average total cost per subscriber. Yoo at 2-3. Dr. Layton agrees. She finds evidence that "bans on differential pricing [including zero rating] . . . hurt consumers and competition, *especially small content providers and entrant TSPs*." Layton at 2. Dr. Eisenach agrees and observes that the most prominent examples of zero rating in the U.S. are propounded by the smaller mobile carriers—MetroPCS, T-Mobile, and Sprint—all of which compete fiercely with their larger national competitors, Verizon and AT&T. Eisenach at 11. In India, too, we see zero rating used by non-incumbent players such as Reliance.

In sum, many commenters submit evidence that zero rating in general, and Free Basics in particular, can make significant contributions to Internet adoption, increase Internet use far beyond the contours of the zero-rated program itself, and create a virtuous circle for connectivity and competition for the Indian economy at large. On the other side, the record is devoid of any persuasive evidence of harm from existing zero rated programs. Instead, the evidence to date shows that widespread bans on zero rating only result in "punishing those who can least afford service." Layton at 7.

II. Effective Regulation of Zero Rating Programs Requires Case-by-Case Review.

A. The record is devoid of any convincing evidence of actual harm

Instead of proffering any convincing evidence of harm from Free Basics or from any other currently existing zero-rated program, certain opponents of zero rating confine themselves to concerns about what a theoretical zero rating program would look like, and what it would do. Examples abound—ranging from general invocations of the need to nurture start-ups and not throw them out to "deep-pocketed incumbents," CUTS at 2, to assertions that "Differential Pricing will create artificial distortions that would impact the entire ecosystem for OTT business and will negatively affect innovation and investment in this sector," FICCI at 1, to equally conclusory assertions that "[d]ifferential pricing…would cause severe harm to the Internet," Internet Society India Chennai Chapter at 1.

Even where these commenters cite facts, the facts do not support a ban on all zero rating. For example, One97 Communication cites the existence of "[c]lose to 92 vertically price discriminated zero rated mobile services in OECD countries as of November 2014," the fact that "36 mobile operators were zero-rating their own data-hungry mobile video services while 10 operators were zero-rating their own mobile cloud storage services," and a German court's ban on a service planned by Deutsche Telekom. One97 Communication at 2. But this information is both insufficient and inapposite. First of all, it is confined to the existence of such arrangements, not to their effects. Second, and most important, all, or at least most, of these arrangements appear to be between carriers and affiliated developers and thus fundamentally different from Free Basics, where there is no such affiliation. The referenced plans of Deutsche Telekom were for precisely such an inter-affiliate arrangement. Potential competitive issues with affiliate deals are and should be one of the criteria against which zero rating plans are assessed, but they should not be an excuse to ban all zero rating programs even when such concerns are wholly absent.

In the end, the only proffer of actual "harm" associated with zero rating that we identified among the comments we reviewed is an isolated statement originating from Hacker News and reported secondhand to the effect that one unnamed commenter, to the effect that one German individual and some of his friends switched to Facebook from a German social network because of Facebook Zero. That questionable testimony is a slender reed on which to base any policy determination.

B. The opposition to zero rating is based on premises that are incorrect or inapplicable

Facebook respects the expressions of concern on the part of many opponents of zero rating, and does not question those commenters' good faith or devotion to the goal of Digital India. But crucially, these concerns are based on three premises:

- the over-arching notion that net neutrality means a ban on all differential pricing;
- the idea that all differential pricing arrangements favor deep pocketed developers; and
- the notion that they all create walled gardens of content, to the detriment of those developers left outside the supposed walls.

The first of these premises is simply wrong. Whatever the validity of the other two for a hypothetical or future differential pricing arrangement, they do not apply to Free Basics or Facebook's zero-rated services worldwide, or any zero-rated service currently existing in India.

First, opponents contend that net neutrality is synonymous with a ban on all zero rating.[4] It is not. Both the U.S. and E.U. net neutrality regimes have rejected one-size-fits-all bans on zero rating. In the words of the FCC: "we will look at and assess such [zero rating] practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary."[5] Indeed, the recently enacted E.U. net neutrality rules, which prohibit categorical bans on zero rating, are having the effect predicted by Facebook in its opening comments on inconsistent rules of individual countries. The Netherlands, one of only two European countries with a ban on zero rating, is in the process of abolishing that ban to harmonize its rules with those of the E.U.[6]

The reason for the decision not to ban zero rating is straightforward: both the U.S. and E.U. have recognized that, in many cases, zero-rated programs enhance competition, increase consumer welfare, and raise the value of the Internet for all parties. As the FCC has explained, "evidence in the record suggests that [zero rating] business models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile services . . . [and] depending on how they are structured, could benefit consumers and competition." Open Internet Order ¶ 151. There is simply no evidence for the contention from opponents (*e.g.*, IT for Change) that zero-rated programs somehow impede the competitive nature of Internet access and people's access to the broader Internet. To the contrary, all evidence indicates that zero rating results in greater connectivity to *all* of the Internet. It is difficult to see any net neutrality or competition-related concern with non-commercial programs between a TSP and an unaffiliated developer, especially. These arrangements are driven solely by *consumer wants and preferences* and in no way prevent or discourage people from accessing Internet content outside of the zero-rated platform.

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[4] *See, e.g.*, 50+ Start-ups Comments (arguing that net neutrality means that "[n]o consumer Internet service may give one website or application a competitive advantage over another. Under this definition, nondiscrimination in pricing is absolutely essential to net neutrality — just as nondiscrimination in speed or the ability to access."); Mozilla Comments ("subsidization that makes some content available for free, and other content only available at a cost that is prohibitively expensive to some, raises similar concerns . . . differential pricing can enable gatekeepers who exercise market powers to disrupt the Internet's level playing field."); Takshashila Institution Comments ("a specific set of OTT players being given preferential access through lower pricing rates (which could even be as low as being free) goes against the basis of net neutrality . . . .").

[5] Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5668 ¶ 152 (2015) ("Open Internet Order").

[6] *See* HOUSE OF REPRESENTATIVES OF THE NETHERLANDS, Bill 34 379 (Dec. 23, 2015), http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2015Z25289&dossier=34379.

Second, opponents allege that non-commercial zero rating programs such as Free Basics favor companies with deep pockets.[7] While this can indeed be a concern for certain possible differential pricing arrangements, it does not implicate Free Basics and similar programs, where the content company does not pay the TSP for the data access. The TSP elects the zero-rated content on the basis of consumer wants and preferences, not the prospect of the content company's direct contribution to the TSP's bottom line. Popular content is an incentive to try the program. The TSP's decision to make such a zero-rated program available is driven by an objective to increase users on its network. There is no other benefit to the TSP when there is neither payment nor affiliation. More users enhance the value of the network for everyone. Without payment for access, there is no preference for deep pockets. And consumer popularity is not a function of global size and breadth but of local interest and preferences.

In contrast, it is some of the alternatives to programs such as Free Basics that have a greater risk of favoring deep pockets—commercial zero rating, paid quality of service ("QOS") differentiation, and bundling.[8] This is precisely the reason why case-by-case evaluation is necessary. For example, a coupon that would be redeemable on any operator as proposed in the Consultation Paper and advocated by several commenters[9] would be one of the most expensive means of providing zero rated services. As described below, operators would be able to charge whatever they wanted without that price being regulated by TRAI and content owners would be forced to buy from all of the operators if they wanted to offer the tariff to anyone. Such a program would be prohibitively expensive to all but the largest content owners. And it would favor the richest operators who have the largest existing user base—taking away the competitive tool that zero rating provides to the smaller carriers in other countries around the world.

[7] *See, e.g.*, Hon. Panda Comments ("[differential pricing] unfairly advantages big corporations with deep pockets over new entrepreneurs and start-ups who cannot afford to enter into such agreements with TSPs."); ISPAI Comments (arguing that "[o]nly established CSPs/TSPs having deep pockets would resort to [providing free Internet] tactics . . . in the beginning," but "[t]otal cost paid by the consumers would actually turn out to be higher."); Hon. Satpathy Comments (Attachment 3) ("[t]elecom companies are seeing an opportunity to make more money by regulating the internet, by signing deals with these startups and giving their OTT apps free access. This move will essentially kill any new startups that don't have enough resources to get permission from TRAI or tie-up with big telecom companies").

[8] Some opponents allege that Free Basics is not really free for consumers, likening it to toothpaste that is not really free if the consumer must also buy the toothbrush. Founders of 457 Start-up companies Comments at 2. The premise is false. Free Basics is *not* bundled with paid access. Stated differently, the purchase of access is not a prerequisite to receiving Free Basics. As explained above, most Free Basics users become sufficiently motivated and interested in the Internet experiences that they elect to upgrade to paid access. But none is required to do so.

[9] *See, e.g.,* CUTS at 3; Medianama at 28; IAMAI at 5.

Third, opponents seek to equate Free Basics with the "walled garden" access from the Internet's early portal days.[10] The label is unwarranted. As Facebook has explained, any developer can join Free Basics if it meets openly published technical standards necessary to assure measured use of bandwidth, standards that apply to Facebook itself. Correspondingly, any carrier can offer Free Basics; indeed, the platform is available to any TSP without the need for any relationship with Facebook at all.

One commenter questions the technical standards that should be met for inclusion in the platform.[11] Facebook responds to these concerns in detail below. As relevant here, that commenter complains that the standards do not allow JavaScript/Video/Large or SVG Images/Flash. This does not introduce any favoritism to Facebook content, which is subject to exactly the same limitation. Free Basics is open to all content that meets the criteria necessary to keep it desirable and free.

C. Facebook Agrees that Scrutiny is Appropriate, Especially for Inter-Affiliate Arrangements

While the concerns expressed by the opponents of zero rating are abstract and devoid of any convincing evidentiary basis, Facebook agrees that regulatory vigilance is warranted. The absence of harm from existing zero-rated programs does not mean that all future possible differential pricing arrangements are free of risk. Facebook agrees that the regulator should recognize the risks and guard against them.

Thus, many commenters properly cite concerns about a carrier favoring its affiliate developers or receiving a king's ransom from those developers that can afford it. In the words of the Hon. Chandrasekhar:

> TSPs could be free to zero-rate or offer discounted access to websites as part of promotion or improving affordability or mandated by Government for public service. But this cannot be on the basis of financial arrangements or Interests between websites/apps and TSPs, i.e., No financial benefit must accrue to TSPs by providing cheaper tariffs to access some parts of the net. TSPs must also have no financial interest (including direct or indirect equity/ ownership) in the sites that are being offered price-offs or any form of evidence or action of subsidy.
>
> Hon. Chandrasekhar at 5.

[10] *See, e.g.*, Hon. Panda Comments ("[differential pricing] affects the inherently egalitarian nature of the Internet by providing what is effectively only a 'walled garden' of those sites and apps that are willing to pay more to the TSP . . . ."); Hon. Satpathy Comments ("[t]his company wants to start 'Free Basics' in India (earlier known as Internet.org) which would give selective access to certain websites and applications."); 9 Start-up CEOs Comments ("[a]t this stage, there is no reason to create a digital divide by offering a walled garden of limited services in the name of providing access to the poor.").

[11] Free Basics Myths and Facts, https://tinyurl.com/freebasicsresponse (last visited Jan. 12, 2016).

As R Street likewise observes, affiliate deals risk distorting the market by tying the TSP's incentive to carry the content, not on the wants and desires of its customers, but the desire to advance its affiliate content at the expense of a competitor's. *See* R Street at 2.

This is precisely why Facebook has supported guiding principles to be used in evaluating zero rating programs. In fact, the criteria proposed by Facebook are even more inclusive than those suggested even by stern zero rating skeptics. They include: whether the plan helps get more people connected to the digital world; whether it is non-discriminatory between different subscribers of the same class; whether it is free to subscribers; whether it is free to developers; whether it is available to all carriers on the same terms and conditions, and whether the carrier is free to enter into arrangements with other developers or platforms; whether it is between a carrier and an unaffiliated developer; whether the content platform is open to all developers that qualify under objective standards; and whether it is transparent to the customer.

Non-exclusive, non-commercial zero rating plans between a TSP and an unaffiliated content owner pass this necessary scrutiny with ease. As R Street states in its comments, "[c]ontent-agnostic zero-rating, and zero-rating provided by Internet companies being available on all services, will ensure that barriers to market entry are minimized and that competition can be preserved among both TSPs and content providers who seek to zero-rate their services." R Street at 4.

On the other hand, Facebook agrees that some differential pricing arrangements would fail to pass this scrutiny. A glaring example is when a consumer is forced to pay a surcharge or enhanced rate to access designated content. This would be a blatant violation of net neutrality because it *raises barriers to* Internet content. This is in contrast to zero rating, which *lowers barriers* to access. Another highly suspect arrangement would be an exclusive deal by a TSP to carry its affiliate's streaming music service as a zero-rated program without making the same arrangement available to competing services. Again, there are competitive concerns here that are simply not present with Free Basics.

Facebook further agrees with the Hon. Patnaik that, in policing the market, "legitimate and limited regulation should not turn into overregulation." Hon. Patnaik at 3. Indeed, as Hon. Chandrasekhar observes, "[r]egulating the Internet and the technology space needs to be innovative and creative—balancing the rights of consumers versus the need to ensure regulation does not stifle the innovation and creativity that is the hallmark of the Internet." Hon. Chandrasekhar at 1. This is precisely why a case-by-case review of zero rating programs ought to be adopted, as the U.S. the E.U. have done. Indeed even some opponents of Free Basics such as Hon. Panda urge TRAI to look at these other countries and specifically point to the determinations made by the U.S. as "the stance that must be taken in our country as well." Hon Panda at 3. And that stance excludes zero rating from the strict network neutrality prohibitions and instead evaluates it on a case-by-case basis. Such an approach can distinguish between those programs that advance competition and connectivity, such as Free Basics, and those that serve an anti-competitive goal.

III. Many Alternatives Can and Should Be Tried, But Some Recommended Options Would Be Ineffective and Discriminatory

Some commenters have suggested alternative approaches to expanding Internet access in India. Facebook agrees that the goals of Digital India are best served by a large and diverse toolkit. Universal connectivity is a hard and challenging problem that requires creative and varied solutions. Some of the proffered alternatives, however, are either simply non-starters because they are unsustainable, or represent risks to net neutrality far larger than zero rating programs even theoretically present. Facebook addresses some of these problematic alternatives below.

Minimal free access to all content (*e.g.*, 5 MB/day) fails to recognize that common features of standard Internet sites today risk consuming this limit after a few pages. Banner advertisements on a page, for example, typically consume far larger amounts of data than the site's actual content. Free Basics is designed to avoid certain features that are bandwidth hogs, making the program a more efficient way for the TSP to offer its customers access to the Free Basics content. In addition, new users to the Internet may be less familiar with what such MB caps will mean in practice. In contrast, applications that meet technical limitations may use similarly limited data but be much easier to understand and be less intimidating for first time users.

Quality of service discrimination, for its part, can be a euphemism for throttling. After all, what is one party's prioritization is another party's slow-down. And both the application and extent of throttling activity are notoriously difficult to ascertain in the shadow of the network mechanics. True transparency is therefore almost impossible to obtain. In addition, a throttled offering is hardly an auspicious invitation to sample more of the Internet experience. A seemingly endless rebuffering circle before the user can access a video is not an encouraging introduction to the Internet. New users unable to connect to the site or content of their choice, or who experience high latency or jitter in their browsing, are less likely to recognize the value of the Internet.

As for coupon programs, Facebook has already explained that they are complex and expensive to offer. Such programs favor "deep pockets" far more than non-commercial zero rating programs such as Free Basics. Only companies that can afford to cover the costs of the consumer's access could offer them. Of course, a requirement that any coupon program be "universal" (*i.e.*, TSP agnostic) would amount to a "must buy" requirement for developers. Even leaving jurisdictional questions aside, such a requirement would turn telecom regulation on its head in more than one way. First, it is an axiom of telecom regulation that it regulates providers of telecom services. It generally does not regulate buyers. And it never requires a person to become a buyer of service from all telecom providers, as a mandatory coupon program would do. Second, telecom regulation is customarily aimed at checking the ability of telecom providers to charge excessive rates. But again, requiring developers to buy access from every carrier irrespective of its rates would achieve the reverse. And a coupon program unaccompanied by the ability of smaller operators to use zero-rating would deprive these operators of a competitive tool that they are using in the U.S. and in other countries. Eisenach at 11.

In contrast to coupon programs, Free Basics involves no payment to the carrier for access to non-commercial zero-rated content, either from the developer or from the user. Any developer that can design a zero-rated application can offer it to a TSP or include it on Free Basics.

IV. Facebook also Supports a Public Interest Exception That Would Allow Non-commercial Services to be Free to Consumers

Facebook is committed to expanding access in India. Our data, from over 35 countries, show not only that Free Basics has been successful in helping people access a host of basic online services in important categories like health, education, job search, communication etc. that they would otherwise not be able to afford, but that it has helped in bringing people online faster and incentivized them to access the broader Internet. We believe this program is aligned with the vision of creating a Digital India; and we are eager to work with TRAI to ensure that millions of people continue to benefit from greater opportunities for access.

Several commenters suggested that even if differential pricing is prohibited, regulation should permit a limited public interest exception for non-commercial offerings. Commenters proposed that any such exemption must (i) require regulatory oversight, (ii) be limited to non-commercial offerings, and (iii) require independent oversight and control. A non-commercial service is a service where there is no direct commercial benefit resulting from the program. By ensuring that only access programs that are truly non-commercial are allowed, regulatory concern that any differential pricing could be used to extract value is inapplicable. This categorization achieves the twin objectives of preventing abuse and expanding access and connecting the unconnected.

Facebook believes TRAI should carve out zero-rating programs that are non-commercial. Below is a framework of principles that Facebook believes TRAI could consider to create accountability and oversight for such a non-commercial exception, in addition to the criteria suggested above.

(i) **Payments to any participating TSP prohibited.** To guarantee against any extraction of value or non-competitive behavior by a network operators, any program qualifying for a non-commercial exemption must not generate revenue for a participating TSP. This ensures that the value generated by the program will accrue to others, either by greater usage of the internet or by broader access.

(ii) **Developers participate free of any payment or charge.** The program should be authorized only if it does not require any payment to be made by participating developers. As we have repeatedly stated, Free Basics is free for all developers; no developer is charged any money for participating in the platform. Such a requirement would ensure that small startups or innovative developers would always have the opportunity to introduce their products and services to new entrants to the internet.

(iii) **Open to all developers with no gatekeepers as intermediary.** To serve the public interest, any program must establish objective and non-discriminatory criteria based on clear technical standards. Any developer willing to meet these standards should be qualified to participate in good standing. TRAI can establish basic requirements

for these technical standards, including, for example, that participating developers must certify that they derive no direct commercial benefit (from payments or advertising) as a condition of their participation. For its part, Facebook has committed to make its contribution to the Free Basics experience advertising free, that the program pays no fees to operators and that no developer need pay to participate in its open and transparent platform -- and would be happy if these commitments were codified as TRAI requirements.

(iv) **Independent review and oversight.** To ensure that the program satisfied the conditions above, a program should establish a mechanism for independent oversight and review of key decisions. TRAI could provide guidance on the definition of independence, for example by requiring credible individuals representing different stakeholders independent of the TSP or others participating in the program. Among the decisions subject to review and certification would be (i) that no payments have been made to participating TSPs, (ii) no payments have been made or required of participating developers, (iii) that the technical standards have been applied fairly and reasonably. Any payment made in violation of (i) or (ii) must be returned. Any developer excluded from the program in violation of (iii) would be required to be included in the program in order for the non-commercial exemption to be maintained.