United States Senate

WASHINGTON, DC 20510

November 18, 2016

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The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Chairman Wheeler,

Today, internet access is no longer a luxury; it is essential. That's why in 2015, the Federal Communications Commission (FCC) correctly adopted the Open Internet Order, reclassifying broadband under Title II of the Communications Act and applying the principle of nondiscrimination to the internet. These net neutrality rules prohibit Internet Service Providers (ISPs) from prioritizing, blocking, or throttling content distributed over their wire or wireless infrastructure. These rules protect the free flow of ideas that are creating new industries, educating our youth, and supporting the communications that we rely on every day.

During the past several years, the practice of zero-rating has grown. While zero-rating describes a range of different practices, zero-rating offerings generally allow internet subscribers to stream certain applications, websites, and services without that data usage counting against a user's data caps or toward overage charges. Without proper oversight and enforcement action, zero-rating can discriminate against certain services, potentially distorting competition, stifling innovation, and hampering user choice and free speech. When ISPs, not the consumer, choose online winners and losers, the very core tenants of net neutrality could be disrupted. We call on the Commission to take enforcement action against harmful zero-rating offerings that violate the principles of the Open Internet Order.

In reviewing zero-rating offers, we encourage you to take the following into consideration:

- Competition: The internet is the world's greatest platform for communications and commerce because it allows those with the best ideas, not simply the best access, to share their content with the world. This coveted characteristic of the free and open internet is threatened when ISPs use their privileged position as broadband gatekeepers to give certain content and applications an unfair advantage over competitors. An ISP zero-rating its own or unaffiliated content but excluding competitors – whether by requiring payment or otherwise – should be considered a violation of net neutrality.

- Paid Zero-Rating: For the internet to remain a permission-less environment where anyone with an idea or voice can participate, ISPs should not charge fees to content providers simply trying to reach their audience. This is a fundamental violation of net neutrality. Paid zero-rating gives established, well-funded applications and services an unfair competitive advantage over start-ups, small businesses, and anyone else seeking to share their creations with the world. Such plans can create an online ecosystem where dominant platforms can stifle the development and deployment of competing services

simply because they can afford for their content to be zero-rated. It can also stifle the speech of educators, independent artists, faith groups, activists, bloggers, or everyday Americans who can't afford to zero-rate their content. The FCC should view ISPs charging fees to zero-rate content as a violation of net neutrality.

- User Choice: Zero-rating plans in which ISPs impose technical standards on content providers can allow ISPs to choose how content providers access the information superhighway. Even when no fees are charged, ISPs can still impose transaction costs on content providers, who may first be required to comply with potentially cumbersome and expensive technical standards and then may have to wait to be approved by the ISP before enjoying a zero-rating designation. To ensure that the principle objectives of net neutrality are not violated, the FCC should closely review the impact of zero-rating plans in which an ISP, not the consumer, has the power to choose which applications, websites, and services are zero-rated and impose technical standards. After all, consumers pay for their data and should have the right to choose how they use their bandwidth.

- Application Agnostic Plans – Application agnostic plans in which ISPs do not require payment from zero-rated applications or favor specific content distributors should be reviewed, but do not necessarily raise major Open Internet concerns. This includes zero-rating of low-bandwidth applications or zero-rating at certain times of day.

We appreciate your attention to this important matter.

Sincerely,

Edward J. Markey
United States Senator

Ron Wyden
United States Senator

Al Franken
United States Senator

Bernard Sanders
United States Senator

Elizabeth Warren
United States Senator

Tammy Baldwin
United States Senator

Richard Blumenthal
United States Senator

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Richard Blumenthal
United States Senate
706 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Blumenthal:

Thank you for your recent letter expressing concerns about the potential negative impact of zero-rating services on consumers and competition.

In the 2015 *Open Internet Order*, the Commission observed that some zero-rating services might benefit consumers and competition, but others, depending on their structure, might restrict consumer choice, distort competition, and hamper innovation.[1] For this reason, the Commission explained that it would assess zero-rating offerings on a case-by-case basis under the general conduct standard.[2]

Consistent with this guidance, in 2016 staff at the Commission undertook an informal policy review of the various zero-rating offerings on the market. I recently directed staff in the Wireless Telecommunications Bureau to prepare a report presenting its analysis based on that review. Attached is that report.

The report puts forward a draft framework for evaluating zero-rating offerings generally.[3] It reaffirms that the core principles of consumer welfare and competition must be considered when determining whether an offering violates the general conduct standard. In addition to whether a particular zero rating plan is a vehicle for discriminatory conduct, relevant considerations include the impact of data caps in connection with a zero rating plan; whether consumers are given the ability to opt into or out of a plan; and whether consumers are given sufficient information about a plan.

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The report uses this framework to evaluate four sponsored data programs that were available in 2016. While reiterating that zero-rating *per se* does not raise concerns, it finds that two of the programs reviewed, AT&T's "Sponsored Data" program and Verizon's "FreeBee Data 360" program, present significant risks to consumers and competition. In particular, these sponsored data offerings may harm consumers and competition by unreasonably discriminating in favor of downstream providers owned or affiliated with the network providers. The Commission has long been concerned about the ability and incentives of network owners to thwart their downstream competitors' ability to serve consumers.

While observing that AT&T provided incomplete responses to staff inquires, the report states that the limited information available supports a conclusion that AT&T offers Sponsored Data to third party content providers at terms and conditions that are effectively less favorable than those it offers to its affiliate, DIRECTV. Unlike T-Mobile, which charges all edge providers the same zero rate for participating in BingeOn, AT&T imposes hefty per-gigabyte charges on third parties for use of Sponsored Data. All indications are that AT&T's charges far exceed the costs AT&T incurs in providing the sponsored data service. Thus, it would appear that AT&T's practices inflict significant unreasonable disadvantages on edge providers and unreasonably interfere with their ability to compete against AT&T's affiliate, DIRECTV. The structure of Verizon's FreeBee Data 360 program raises similar concerns. We are aware of no safeguards that would prevent Verizon from offering substantially more costly or restrictive terms to enable unaffiliated edge providers to offer services comparable to Verizon's affiliated content on a zero-rated basis.

Given the powerful economic incentives of network operators to employ these practices to advantage themselves and their affiliates in various edge service markets, staff is concerned that – absent effective oversight – these practices will become more widespread in the future.

The Commission adopted a case-by-case approach for evaluating zero-rating offerings and sponsored data arrangements because it most appropriately suited the realities of the broadband marketplace. Our experience to date has demonstrated the wisdom of this approach. Mobile broadband providers are experimenting with a variety of sponsored data and zero-rating initiatives. This dynamic environment has benefited consumers, but, as the report makes clear, there needs to be a referee on the field to be ready to act if necessary.

Thank you for your unwavering support for an open Internet. Please do not hesitate to let me know if you have any questions regarding this report.

Sincerely,

Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Tammy Baldwin
United States Senate
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Baldwin:

Thank you for your recent letter expressing concerns about the potential negative impact of zero-rating services on consumers and competition.

In the 2015 *Open Internet Order*, the Commission observed that some zero-rating services might benefit consumers and competition, but others, depending on their structure, might restrict consumer choice, distort competition, and hamper innovation.[1] For this reason, the Commission explained that it would assess zero-rating offerings on a case-by-case basis under the general conduct standard.[2]

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Thank you for your unwavering support for an open Internet. Please do not hesitate to let me know if you have any questions regarding this report.

Sincerely,

Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Al Franken
United States Senate
309 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Franken:

Thank you for your recent letter expressing concerns about the potential negative impact of zero-rating services on consumers and competition.

In the 2015 *Open Internet Order*, the Commission observed that some zero-rating services might benefit consumers and competition, but others, depending on their structure, might restrict consumer choice, distort competition, and hamper innovation.[1] For this reason, the Commission explained that it would assess zero-rating offerings on a case-by-case basis under the general conduct standard.[2]

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Sincerely,

Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Bernard Sanders
United States Senate
332 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Sanders:

Thank you for your recent letter expressing concerns about the potential negative impact of zero-rating services on consumers and competition.

In the 2015 *Open Internet Order*, the Commission observed that some zero-rating services might benefit consumers and competition, but others, depending on their structure, might restrict consumer choice, distort competition, and hamper innovation.[1] For this reason, the Commission explained that it would assess zero-rating offerings on a case-by-case basis under the general conduct standard.[2]

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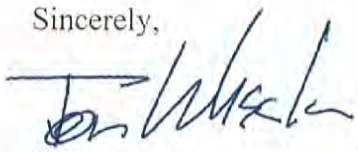

Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Warren:

Thank you for your recent letter expressing concerns about the potential negative impact of zero-rating services on consumers and competition.

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Sincerely,

Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Ron Wyden
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Wyden:

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Tom Wheeler

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

January 11, 2017

The Honorable Edward J. Markey
United States Senate
255 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Markey:

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[1] *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, paras. 151-52 (2015), *aff'd United States Telecom Ass'n v. F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016).

[2] *Id.* at para. 152.

[3] "Zero-rated" content, applications, and services are those that end users can access without the data consumed being counted toward the usage allowances or data caps imposed by an operator's service plans. "Sponsored data" arrangements are those in which edge providers offer their services to consumers on a zero-rated basis by arranging to "sponsor" the data these consumers use. During the 2016 staff review, staff of the Wireless Telecommunications Bureau assessed sponsored data plans; however, the principles and public interest concerns at issue also could arise if zero-rating or sponsored data plans were offered.

The report uses this framework to evaluate four sponsored data programs that were available in 2016. While reiterating that zero-rating *per se* does not raise concerns, it finds that two of the programs reviewed, AT&T's "Sponsored Data" program and Verizon's "FreeBee Data 360" program, present significant risks to consumers and competition. In particular, these sponsored data offerings may harm consumers and competition by unreasonably discriminating in favor of downstream providers owned or affiliated with the network providers. The Commission has long been concerned about the ability and incentives of network owners to thwart their downstream competitors' ability to serve consumers.

While observing that AT&T provided incomplete responses to staff inquires, the report states that the limited information available supports a conclusion that AT&T offers Sponsored Data to third party content providers at terms and conditions that are effectively less favorable than those it offers to its affiliate, DIRECTV. Unlike T-Mobile, which charges all edge providers the same zero rate for participating in BingeOn, AT&T imposes hefty per-gigabyte charges on third parties for use of Sponsored Data. All indications are that AT&T's charges far exceed the costs AT&T incurs in providing the sponsored data service. Thus, it would appear that AT&T's practices inflict significant unreasonable disadvantages on edge providers and unreasonably interfere with their ability to compete against AT&T's affiliate, DIRECTV. The structure of Verizon's FreeBee Data 360 program raises similar concerns. We are aware of no safeguards that would prevent Verizon from offering substantially more costly or restrictive terms to enable unaffiliated edge providers to offer services comparable to Verizon's affiliated content on a zero-rated basis.

Given the powerful economic incentives of network operators to employ these practices to advantage themselves and their affiliates in various edge service markets, staff is concerned that – absent effective oversight – these practices will become more widespread in the future.

The Commission adopted a case-by-case approach for evaluating zero-rating offerings and sponsored data arrangements because it most appropriately suited the realities of the broadband marketplace. Our experience to date has demonstrated the wisdom of this approach. Mobile broadband providers are experimenting with a variety of sponsored data and zero-rating initiatives. This dynamic environment has benefited consumers, but, as the report makes clear, there needs to be a referee on the field to be ready to act if necessary.

Thank you for your unwavering support for an open Internet. Please do not hesitate to let me know if you have any questions regarding this report.

Sincerely,

Tom Wheeler

Wireless Telecommunications Bureau Report:

Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services

I. INTRODUCTION

This report presents the results of the Wireless Telecommunications Bureau (WTB or the Bureau) staff review during 2016 of sponsored data and zero-rating practices in the mobile broadband market. Based on this review of these offerings, the report puts forward a draft framework for evaluating mobile zero rated data offerings generally.[1] WTB issues this report in fulfillment of its established responsibility to "advise[ ] and make[ ] recommendations to the Commission" regarding "policy goals, objectives, programs and plans for the Commission on matters concerning wireless telecommunications, drawing upon relevant economic, technological, legislative, regulatory and judicial information and developments."[2]

We note that this report expresses no concern with retail zero-rating *per se*. To the contrary, the Commission acknowledged in its *2015 Open Internet Order* that zero-rating-based business models may, in some instances, provide consumer and competitive benefits.[3] These benefits may include increased video competition by facilitating the availability of over-the-top (OTT) offerings. Rather than a *per se* approach, the Commission explained that it would "look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary."[4] Consistent with this guidance, we reviewed operators' offerings over the course of 2016 and have found that two of the plans present significant risks to consumers and competition in downstream industry sectors because of network operators' potentially unreasonable discrimination in favor of their own affiliates. Given the powerful economic incentives of network operators to employ these practices to advantage themselves and their affiliates in various edge service markets, we are equally concerned that – absent effective oversight – these practices will become more widespread in the future.

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[1] During this 2016 staff review, WTB staff assessed sponsored data plans involving mobile broadband Internet access service. However, the principles and public interest concerns at issue also could arise if zero-rating or sponsored data plans were offered by providers of fixed broadband networks.

[2] 47 CFR § 0.131(a)-(b).

[3] *Protecting and Promoting the Open Internet,* 30 FCC Rcd 5601, 5666-67, para. 151 (2015) (*2015 Open Internet Order*), *aff'd*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for reh'g pending*. As noted there, some commenters argued that zero-rating may "increase choice and lower costs for consumers" and "support continued investment in broadband infrastructure." *Id.* at 5666-67, para. 151.

[4] *2015 Open Internet Order*, 30 FCC Rcd at 5659-5669, paras. 133-53. The no-unreasonable interference/disadvantage standard is also known as the "General Conduct Rule." The General Conduct Rule prohibits practices that unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service (BIAS) or the lawful Internet content, applications, services, or devices of their choice, or that unreasonably interfere with or unreasonably disadvantage edge providers' ability to make lawful content, applications, services, or devices available to end users. 47 CFR § 8.11.

II. A FRAMEWORK FOR CONSIDERING ZERO-RATED SERVICES AND SPONSORED DATA ARRANGEMENTS

A. Background

"Zero-rated" content, applications, and services are those that end users can access without the data consumed being counted toward the usage allowances or data caps imposed by an operator's service plans. Thus, for example, if a consumer has subscribed to a broadband service plan that allows usage of 10 gigabytes of data per month, but then uses more than 10 gigabytes of cellular data[5] in a given month, the provider may impose surcharges for excess data usage or may reduce the consumer's data usage to a slower speed for the remainder of that monthly billing cycle. That consumer's use of data to access *zero-rated* edge services, however, does not count toward her monthly data usage allowance under her mobile broadband service plan. A zero-rated edge service therefore becomes inherently more attractive to the consumer as compared to a non-zero-rated service, other factors held constant, because it costs less.

Some mobile broadband providers offer "sponsored data" arrangements to edge providers that seek to provide their services on a zero-rated basis. Under these arrangements, edge providers offer their services to consumers on a zero-rated basis by arranging to "buy down," or "sponsor," the data these consumers use. This enables consumers to utilize those edge services without worrying that such usage could cause them to exceed the applicable data allowances under their broadband providers' service plans.

2016 was a year of significant creativity and experimentation in mobile broadband offerings by wireless carriers. Over the course of 2016, carriers introduced numerous unlimited data programs, as well as launched a variety of zero-rated services and sponsored data arrangements. During the year, for example, T-Mobile significantly expanded the number of participating, zero-rated edge providers in Binge On, an offering introduced in November 2015 that zero-rated standard definition video.[6] T-Mobile later introduced its ONE, ONE Plus and ONE Plus International plans, which offer unlimited data and other features, depending on the particular plan.[7] Sprint has also introduced unlimited data through its Unlimited Freedom and Unlimited Freedom Premium plans, and experimented with zero-rating of the 2016 Copa America soccer tournament.[8] AT&T and Verizon did not introduce stand-alone unlimited data

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[5] Data accessed using Wi-Fi connections under current practice do not count toward consumers' usage allowances.

[6] T-Mobile Quadruples Binge On Services, Now Over 100 Video Providers Stream Data-Free (July 26, 2016), https://newsroom.t-mobile.com/news-and-blogs/binge-on-100-providers.htm; T-Mobile, Plans, https://explore.t-mobile.com/t-mobile-one/ (last visited Jan. 9, 2017).

[7] T-Mobile, Hello Un-carrier 12… R.I.P. Data Plans T-Mobile Goes All In on Unlimited (Aug. 18,2016), https://newsroom.t-mobile.com/news-and-blogs/rip-data-plans.htm; T-Mobile, T-Mobile Listens to Customers – Amps Up T-Mobile ONE and Doubles Down on Unlimited (Aug. 29, 2016), https://newsroom.t-mobile.com/news-and-blogs/t-mobile-one-amped.htm; T-Mobile, T-Mobile Shakes Things Up with T-Mobile ONE Plus (Dec. 21, 2016), https://newsroom.t-mobile.com/news-and-blogs/t-mobile-shakes-things-up-with-t-mobile-one-plus.htm.

[8] Sprint, Cell Phone Plans, https://www.sprint.com/landings/unlimited-cell-phone-plans/index.html (last visited Jan. 9, 2017); Sprint, Unlimited Freedom plan FAQs (Oct. 31, 2016), https://support.sprint.com/support/article/Sprint-Launches-Unlimited-Freedom/0db2c4e7-3a6a-4d46-9dff-84cd6c402527; Customers Score Big as Sprint Provides Exclusive Free Access with No Data Charges to Every Live Match of 2016 Copa América Centenario with fuboTV,

plans, but have eliminated overage fees in some instances for customers who exceed their data caps and launched their own zero-rating and sponsored data programs.[9] For example, AT&T Mobility offers a "Data Free TV" feature on its DIRECTV app that enables its broadband consumers who also subscribe to direct broadcast satellite service from AT&T's wholly-owned affiliate, DIRECTV, to view unlimited DIRECTV video content with no impact on the user's mobile data monthly allotment. In addition, AT&T Mobility zero-rates its subscribers' use of cellular data to watch DIRECTV Now – DIRECTV's recently launched multi-channel streaming video programming service which consumers can access over a variety of mobile and fixed broadband platforms.[10] Verizon launched its FreeBee Data and FreeBee Data 360 sponsored data programs in January 2016.[11] Through the FreeBee Data 360 program, Verizon Wireless offers zero-rating to its subscribers when they use "go90," a video platform featuring original programming, short clips from TV shows and movies, sports programming, and other content, over the Verizon Wireless network.[12] In this white paper, we discuss four of these programs that illustrate the main issues in our evaluation of zero-rating practices.

B. Evaluating Zero-Rating Practices

In the *2015 Open Internet Order*, the Commission observed that some sponsored data offerings might benefit consumers and competition, but others, depending on their structure, might restrict consumer choice, distort competition, and hamper innovation.[13] The Commission stated that it would assess sponsored data and zero-rating practices on a case-by-case basis under the General Conduct Rule.[14] In addition, sponsored data and zero-rating plans are not permitted

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(May 19, 2016), http://newsroom.sprint.com/news-releases/customers-score-big-as-sprint-provides-exclusive-free-access-with-no-data-charges-to-every-live-match-of-2016-copa-amrica-centenario-with-fubotv.htm.

[9] Although AT&T has not introduced stand-alone unlimited data plans, it does offer an unlimited data plan for AT&T subscribers who also subscribe to DIRECTV. *See* AT&T, "Our Best Unlimited Plan Ever! Stream and surf all you want with Unlimited Data when you have AT&T Wireless and DIRECTV," https://www.att.com/shop/wireless/unlimited-plan.html (last visited Jan. 9, 2017).

[10] AT&T, *Watch It Anywhere with AT&T DIRECTV (*Sept. 7, 2016), http://about.att.com/story/watch_it_anywhere_with_att_directv.html; AT&T, *The Revolution is Here: AT&T Offers 3 Ways to Stream Premium Video Content* (Nov. 29, 2016), http://about.att.com/story/att_offers_three_ways_to_stream_premium_video_content.html.

[11] Verizon, Introducing FreeBee Data: The New Sponsored Data Service from Verizon (Jan. 19, 2016), http://www.verizon.com/about/news/introducing-freebee-data-new-sponsored-data-service-verizon. Verizon's FreeBee Data program enables edge providers to sponsor short clips of content for consumers on a per-click basis, as compared to the FreeBee Data 360 program, which allows edge providers to sponsor longer programming content on a per-gigabyte basis.

[12] *See* Verizon, go90, http://www.verizonwireless.com/landingpages/go90/ (last visited on Jan. 9, 2017). Subscribers to any mobile broadband carrier's service can download the go90 app for free. Verizon, go90 FAQs, https://www.verizonwireless.com/support/go90-faqs/ (last visited Jan. 9, 2017). Unlike DIRECTV Now, go90 does not currently include a full-fledged multi-channel video package with a broad array of live programming or full-length movies or TV shows. Consumers who subscribe to both Verizon Wireless's mobile broadband service and Verizon's landline FIOS multi-channel video service can view FiOS programming on their smartphones using a separate FIOS TV app, but not using the go90 app; such FiOS usage is not zero-rated at this time.

[13] *2015 Open Internet Order,* 30 FCC Rcd at 5666-68, paras. 151-52 & notes 361-67.

[14] *Id.,* 30 FCC Rcd at 5668-69, paras. 152-53.

to violate the three *ex ante* "bright line" rules that narrowly target specific practices known to be harmful in the broadband Internet access context: the "no blocking," "no throttling," and "no paid prioritization" rules.[15] Zero-rating and sponsored data plans must also comport with the Commission's broadband transparency rule.[16] Below we offer a set of overall considerations that may assist providers, the public, and the Commission in analyzing claims that a particular zero-rating or sponsored data plan violates the *2015 Open Internet Order*. We emphasize that in describing these considerations, we do not intend to suggest any departure from the Commission's approach of "permission-less innovation" in broadband offerings.

Overall considerations underlying evaluation of how a practice affects Internet openness:

- Is the BIAS provider altering or influencing the unfettered flow of lawful Internet traffic between edge providers and end-users?
- Does the activity or practice in question have the effect (implicit or explicit) of favoring services provided by its affiliates, creating exclusionary relationships that benefit only selected edge providers, discriminating on the basis of content or other improper basis?

Do these practices amount to "blocking" or "throttling" (i.e., "impairing or degrading" lawful Internet traffic) or paid prioritization?

- Is the consumer likely to perceive any degradation or other meaningful difference in the data received?
- Did consumers and edge providers opt into the BIAS provider's plan or was it assigned as a new default without their affirmative choice? Do consumers and edge providers have the ability to easily opt into or opt out of the BIAS provider's practice? Are there comparable alternatives available to those who do opt-out?
- Is the practice clearly and transparently disclosed both to edge providers and end-users?
- Can the practice be justified as an exercise of reasonable network management?

If the practice is not throttling or paid prioritization, does it violate the general conduct rule:

Non Discrimination/Competitive Effects

- Is zero-rating available, or available on materially favorable terms, only for a service directly affiliated with the BIAS provider?
- Does the zero-rating plan create exclusionary arrangements between the BIAS provider and unaffiliated content providers that raise reasonable competitive concerns from excluded parties?
- If a BIAS provider charges edge providers to be zero rated, are those charges imposed on affiliated and unaffiliated entities effectively on a non-discriminatory basis?

[15] 47 CFR §§ 8.5, 8.7, 8.9.

[16] *Id.,* § 8.3.

Data Cap

- Is the associated data cap sufficiently high as to make all data effectively zero-rated for the overwhelming majority of customers, both on a static and forward-looking basis, such that consumers really are not facing a choice between zero-rated and non-zero-rated activity?

Choice and End User Control

- Do consumers and edge providers have the ability to easily opt into and out of the zero-rated plan if they prefer to remain with offers in line with those available at the time the plan was introduced, or to control other aspect of using the zero-rated service?
- Do consumers have easy alternatives for switching to other BIAS providers with different zero-rating practices?

Transparency

- Are consumers and edge providers fully informed about the terms and conditions of the zero-rated plan in a timely, easy to understand and easy to execute manner?
- Do consumers have the ability to easily track usage and take actions to avoid hitting the cap without significant impacts on their usage behaviors?

Other

- Does the zero-rated traffic serve a civic engagement purpose, such as increasing broadband adoption or serving health care, education, government, non-profits, etc.?
- Is the offering a functionally-equivalent, non-BIAS data service being used to evade the net neutrality rules?

C. Principles for Assessing the Impacts of Mobile Broadband Providers' Zero-Rating Practices on Consumers and Edge Service Competition

The technology underlying today's mobile broadband services provides operators with the ability to tailor service offerings to subscribers in a much more dynamic and targeted manner. This creates the desirable potential for increased consumer benefits from more precisely crafted value propositions that reflect the varying needs of users. However, this also creates the undesirable potential for conduct harmful to the open Internet's "virtuous cycle," in which edge service competition and innovation promotes consumer demand for network usage and, consequently, broadband network investment by network owners (and vice versa).[17] Notwithstanding the powerful new attributes of the technology underlying today's mobile broadband networks, however, the core principles of consumer welfare and competition that have guided the design of government policy regarding network or infrastructure industries for many years continue to apply in our assessment of sponsored data practices for broadband networks.

[17] *See 2015 Open Internet Order*, 30 FCC Rcd at 5637, para. 91 ("the technology underlying today's mobile broadband networks . . . gives those operators a greater ability to engage in conduct harmful to the virtuous cycle in the absence of open Internet rules.").

The core goal of the Communications Act – and more fundamentally, of all federal public policies addressing business practices – is to protect and promote the interests of consumers. Consumers' interests in the availability of services at reasonably low prices, with heightened quality and improved features, and using advanced technology are served most effectively by competition in all sectors of the economy. The Commission over many years has consistently adhered to a pro-competition approach in addressing issues involving communications network services that deliver information services such as data processing applications and video, audio, or text content. The Commission's "statutory duty is to protect efficient competition, not competitors."[18]

Traditional competition policy does become more complex in the context of vertical relationships between providers of services in adjacent markets, a common condition in communications industry sectors, in which operators of network platforms supply "upstream" services that are inputs to – or function as critical "bottlenecks" for – the provision of "downstream" services by firms that rely on using those platforms to reach end user consumers.[19] Consumers benefit when competition prevails in the provision of both the upstream input services and the downstream retail services.

Difficulties often arise when a vertically integrated firm both provides upstream platform services that downstream firms use as inputs to their retail products *and* competes with the latter firms to provide its own comparable retail products. As a general matter, "[v]ertical integration by a firm across different markets is often desirable because it can produce significant economies of scope: cost efficiencies obtained by producing several products at once."[20] Where vertically-integrated firms face less competition in markets for some products or services than in other, adjacent markets, however, they may have opportunities to improperly "use [their] economic power in one market to restrict competition on the merits in another."[21]

Public policymakers are often called upon to address such vertically integrated firms' use of business practices such as foreclosing their downstream competitors' use of the critical upstream platform inputs or imposing excessive prices for those inputs ("raising rivals' costs") in

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[18] *SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, 20 FCC Rcd 18290, 18371, para. 151 (2005) (citing *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491-92 (D.C. Cir. 1995)).

[19] Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age,* 16-22 1st ed. (2005).

[20] *Id.* at 16 (emphasis omitted).

[21] *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 11 (1958); *cf. Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1991). In the merger review context, the Commission has itself long recognized that a vertically integrated company that has market power at one level and faces competition at another may be able to harm its rivals in the competitive market by discriminating against them or raising their costs to make them less competitive. *See*, *e.g.*, *Applications of General Motors Corp. and Hughes Electronics Corp., Transferors, and News Corp. Ltd.*, *Transferee*, *for Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473, 508, para. 71 (2004); *Applications of News Corp. and DirecTV Group, Inc. and Liberty Media Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3296, paras. 68-71 (2008).

order to enhance their downstream affiliates' competitive position.[22] It is this concern that, in the context of local bottlenecks and emerging long-distance competition, led to the breakup of the Bell System in 1984;[23] that, in the context of incumbent local network bottlenecks and emerging local phone competition, led a bipartisan Congress to enact the interconnection provisions in the Telecommunications Act of 1996;[24] and, in the context of "basic" telecommunications services and "enhanced" information services, led the Commission to promulgate the *Computer II* and *Computer III* frameworks.[25] The same concern has prompted a long series of antitrust rulings and regulatory decisions over the past hundred years.[26] And it is the same concern that led the Commission to establish open Internet safeguards in the mobile broadband context in the *2015 Open Internet Order*.[27]

Significantly, the Commission did not adopt the open Internet rules based on a finding that broadband providers have market power, but rather on the Commission's determination that broadband providers function as "gatekeepers" with the capability to control or restrict end user customers' ability to utilize Internet content and services as well as edge providers' ability to deliver their offerings to consumers. The Commission noted, for example, that the record at the time provided substantial evidence that "broadband providers have significant bargaining power in negotiations with edge providers and intermediaries that depend on access to their networks because of their ability to control the flow of traffic into and on their networks."[28] The Commission found that broadband providers' ability to act as gatekeepers occurred even in the absence of market power.[29] The Commission further found that mobile broadband providers

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[22] *See generally* Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 527-38 (1995); Thomas G. Krattenmaker and Stephen C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

[23] *United States v. American Telephone & Telegraph Co.,* 552 F. Supp. 131, 227 (D.D.C.1982).

[24] *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15508, para. 10 (1996) (*Local Competition Order*), *subsequent history omitted* ("An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions . . . .").

[25] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (*Computer II*), *aff'd in pertinent part sub nom. Computer & Communic'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), subsequent history omitted; *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958 (1986) (*Computer III*), *rev'd in part on other grounds*, *California v. FCC*, 905 F. 2d 1217 (9th Cir. 1990), subsequent history omitted.

[26] *See, e.g., United States v. Microsoft Co.*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*); *CCIA v. FCC,* 693 F. 2d 198 (D.C. Cir. 1982); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912).

[27] *2015 Open Internet Order*, 30 FCC Rcd at 5635-43, 5664-65, paras. 86-101, 146-49. *See also Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17918, para. 23 (2010) (*2010 Open Internet Order),* subsequent history omitted ("By interfering with the transmission of third parties' Internet-based services or raising the cost of online delivery for particular edge providers, telephone and cable companies can make those services less attractive to subscribers in comparison to their own offerings."); *Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (quoting *2010 Open Internet Order,* 25 FCC Rcd at 17916, para. 22).

[28] *2015 Open Internet Order*, 30 FCC Rcd at 5629, para. 80.

[29] *Id.*, 30 FCC Rcd at 5633, para. 84 (citing *Verizon v. FCC*, 740 F. 3d at 648). In reviewing the *2010 Open Internet Order*, the D.C. Circuit rejected the proposition that the absence of a finding of market power undermined or

"have the incentives and ability to engage in practices that would threaten the open nature of the Internet, in part due to consumer switching costs." The Commission concluded that evidence of the level of wireless churn, viewed in conjunction with data on consumer satisfaction, was "consistent with the existence of important switching costs for customers" and that "switching costs are a significant factor in enabling the ability of mobile broadband providers to act as gatekeepers."[30] The Commission also found that the evolution of technologies underlying mobile broadband networks had given providers a greater ability than in 2010 to engage in conduct harmful to the virtuous cycle.[31]

III. THE ZERO-RATED SERVICES AND SPONSORED DATA ARRANGEMENTS UNDER REVIEW

Our policy review over the course of 2016 focused on the following sponsored data offerings:

- **T-Mobile Binge On**. First introduced in November 2015, T-Mobile's "Binge On" is a zero-rated service for streaming video services that meet certain technical standards.[32] Participating edge providers can offer to T-Mobile's mobile broadband subscribers zero-rated video programming at 1.5 Mbps or 480p+/DVD quality – comparable to standard definition (SD), not high definition (HD), television format. During the course of our review of Binge On, T-Mobile did not compel edge providers or consumers to participate in Binge On, and did not charge them anything if they opt to do so.[33]

- **AT&T Data Perks**. In a variant of zero-rating launched October 2015, AT&T Mobility's "Data Perks" app enables providers to offer AT&T's mobile broadband subscribers extra data in addition to their monthly plan allowances as a reward for engaging in broadband activities that typically involve smaller amounts of data, such as purchasing products,

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conflicted with the Commission's rationale for adopting rules, and agreed with the Commission's finding that "broadband providers' ability to impose restrictions on edge providers does not depend on their benefitting from the sort of market concentration that would enable them to impose substantial price increases on end users." *Verizon v. FCC,* 740 F.3d at 648 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17923, para. 32).

[30] *2015 Open Internet Order*, 30 FCC Rcd at 5640-41, paras. 97-98.

[31] *Id.*, 30 FCC Rcd at 5637, para. 91.

[32] T-Mobile, T-Mobile Goes All In on Unlimited (Aug. 18, 2016), https://newsroom.t-mobile.com/news-and-blogs/rip-data-plans.htm.

[33] *See* T-Mobile, Binge On - Video Now Streams Free without Using Your Data, only from T-Mobile, https://www.t-mobile.com/offer/binge-on-streaming-video.html (last visited Jan. 9, 2017); T-Mobile, T-Mobile Unleashes Mobile Video with Binge On (Nov. 10, 2015), https://newsroom.t-mobile.com/media-kits/un-carrier-x.htm; T-Mobile, Binge On How-Tos, https://support.t-mobile.com/docs/DOC-24294 (last visited Jan. 9, 2017). Some music may also be available on a zero rated-basis through Binge On. Binge-On is a zero-rating feature that was applied to T-Mobile customers who subscribed to certain tiered data plans. T-Mobile no longer offers tiered data plans with the Binge On feature to new customers, and instead offers them the ONE line of unlimited plans. T-Mobile, One Size Fits All: T-Mobile Says Unlimited Plans Will be Only Option (Jan. 6, 2017), http://abc7chicago.com/news/one-size-fits-all-t-mobile-says-umlimited-plans-will-be-only-option/1690368.

viewing advertising, using promotional games or apps, completing surveys, or the like. Surfing the pages of the Data Perks app is zero-rated for users and the app enables users to access advertising and marketing offers without depleting their monthly data allowances by crediting users' accounts with the amount of data used to download the app or game.[34] The extra data AT&T Mobility subscribers "earn" by completing offers through Data Perks can then be used for any edge service.

- **AT&T Sponsored Data**. AT&T Mobility's "Sponsored Data" program, first piloted in January 2014[35] prior to its 2015 acquisition of DIRECTV, enables edge providers to supply streaming video programming and other content and edge services to AT&T's mobile broadband consumers on a zero-rated basis – *i.e.*, without consumers' data usage counting toward the monthly data usage allowances imposed by their AT&T service plans.[36] In the fall of 2016, AT&T began to zero-rate affiliated programming to its AT&T Mobility customers on its DIRECTV App and its DirecTV Now over-the-top video product.[37]

- **Verizon FreeBee Data 360**. Verizon Wireless launched its "FreeBee Data 360" program in January 2016,[38] enabling edge providers to pay on a per-gigabyte-used basis for sponsored data to supply zero-rated content to Verizon's mobile broadband subscribers.[39] Verizon's go90 video platform offers zero-rated content to Verizon Wireless subscribers through this program.[40]

During our policy review we analyzed these plans on a case-by-case basis under the General Conduct Rule[41] using the criteria in the framework above. The *2015 Open Internet*

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[34] *See* AT&T, Data Perks, http://www.att.com/att/dataperks/en/index.html (last visited Jan. 9, 2017). AT&T offers this service in conjunction with a firm called Aquto that specializes in data rewards and sponsored data programs.

[35] AT&T, AT&T Introduces Sponsored Data for Mobile Data Subscribers and Businesses (Jan. 6, 2014), https://www.att.com/gen/press-room?pid=25183&cdvn=news&newsarticleid=37366. Few edge providers participated in the program initially. Sam Becker, Here's Why No One is Buying into AT&T's Sponsored Data Plan (July 29, 2014), http://www.cheatsheet.com/business/heres-why-no-one-is-buying-into-atts-sponsored-data-plan.html.

[36] *See* AT&T, Sponsored Data, Frequently Asked Questions, http://www.att.com/att/sponsoreddata/en/index.html (last visited Jan. 9, 2017).

[37] AT&T, The Revolution is Here: AT&T Offers 3 Ways to Stream Premium Video Content (Nov. 29, 2016), http://about.att.com/story/att_offers_three_ways_to_stream_premium_video_content.html; Letter and Legal Analysis from Robert W. Quinn, Jr., Senior Vice President, External and Legislative Affairs, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Nov. 21, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342940A1.pdf).

[38] Verizon, Introducing FreeBee Data: The New Sponsored Data Service from Verizon (Jan. 19, 2016), http://www.verizon.com/about/news/introducing-freebee-data-new-sponsored-data-service-verizon.

[39] *See* Verizon, FreeBee Data FAQs, http://freebee.verizonwireless.com/business/support/faqs (last visited Jan. 9, 2017).

[40] Verizon, go90 FAQs, https://www.verizonwireless.com/support/go90-faqs/ (last visited Jan. 9, 2017).

[41] As noted above, *see supra* note 4, the General Conduct Rule provides for *ex post* review of specific business practices, rather than categorical *ex ante* constraints. We recognize that there has been some concern that T-

Order explained that case-by-case application of the general conduct standard is intended to protect against harms to the open nature of the Internet while accommodating emerging technologies in the dynamic Internet ecosystem, facilitating innovation in business arrangements and service offerings, and enabling broadband providers to introduce and modify their service offerings without prior regulatory approval.[42] The General Conduct Rule prohibits practices that unreasonably interfere with or unreasonably disadvantage *end users'* ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or that unreasonably interfere with or unreasonably disadvantage *edge providers'* ability to make lawful content, applications, services, or devices available to end users.[43] The Commission articulated a non-exhaustive list of factors to guide its case-by-case application and interpretation of the rule.[44]

In the context of the zero-rating and sponsored data practices at issue here, the *competitive effects* factor has the most direct bearing on our evaluation under the General Conduct Rule, and is the focus of the discussion below.[45] We also note that as the General Conduct Rule represents the Commission's interpretation of Sections 201 and 202 of the Communications Act in the broadband Internet access context, the discussion below equally represents the Bureau's analysis of these practices under the Communications Act itself and not only under the *2015 Open Internet Order*.[46]

IV. EVALUATION OF MOBILE BROADBAND PROVIDERS' SPONSORED DATA PRACTICES AFFECTING ZERO-RATED EDGE SERVICES

In evaluating the four sponsored data programs under review, we focused on the relevant principles outlined in Part II to assess the potential of these practices to harm competition and consumers. Based on the actual practices we reviewed, the major focus for our evaluation was the potential harm to consumers and competition in downstream industry sectors that could result

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Mobile's Binge On program involved the reduction in speed of a class of applications. Our review of the specific prices, terms, and conditions associated with Binge On, including end user perceptions, the extent of end user control, and the targeted network management elements suggests that the likelihood of harm to consumers and edge providers is low and that it should be assessed primarily under the General Conduct Rule.

[42] *2015 Open Internet Order,* 30 FCC Rcd at 5659-61, paras. 136-38. The *Order* particularly stressed the benefits of applying this standard in the context of rapidly-changing mobile broadband platforms. *Id.* at 5665, para. 149.

[43] 47 CFR § 8.11.

[44] Those seven factors are: (1) end user control; (2) competitive effects; (3) consumer protection; (4) effect on innovation, investment, and deployment; (5) free expression; (6) application agnostic; and (7) industry standard practices. *2015 Open Internet Order,* 30 FCC Rcd at 5661-64, paras. 139-45. The D.C. Circuit rejected claims that the General Conduct Rule is impermissibly vague and ambiguous, relying in large part on this articulation of factors. *USTA v. FCC*, 825 F.3d at 735-37.

[45] *2015 Open Internet Order,* 30 FCC Rcd at 5662, 5729, paras. 140, 295.

[46] *Id.*, 30 FCC Rcd at 5660, 5729, paras. 137, 295. It also made clear that the General Conduct Rule, in this context, is informed by the goals of promoting deployment of broadband Internet facilities and services established in Section 706 of the Telecommunications Act of 1996. *Id.*

from upstream network operators' unreasonably discriminating in favor of select downstream providers that are affiliates.

A. T-Mobile's Binge On

T-Mobile, like other operators of mobile broadband networks, has "gatekeeper" control over edge providers' access to its subscribers at any particular point in time, and therefore might have the ability to restrict or interfere with edge providers' ability to distribute content or services to their end users. Moreover, Binge On is an "input" that enables the provision of retail edge services by firms in an industry sector downstream of T-Mobile's mobile broadband service, and thus theoretically might create risks to competition and innovation in edge services. Given the prices, terms, and conditions of Binge On, however, we believe it is unlikely that the offering violates the General Conduct Rule.

T-Mobile does not charge edge providers or end users to participate in or use Binge On. From the consumer's side, T-Mobile subscribers can easily enable or disable Binge On from their user settings and opt-out or opt-in to zero-rating as they choose.[47] Although T-Mobile does establish technical standards governing video transmissions for edge providers who wish to participate in Binge On, it appears that many edge providers have been able to meet these technical criteria, with T-Mobile announcing that over 100 edge providers were participating in Binge On as of July 26, 2016.[48] Given these facts, we find it difficult to envision that Binge On in the form the Bureau reviewed in 2016 could "unreasonably interfere with edge providers' ability to make lawful content, applications, services, or devices available to end users."[49]

Moreover, T-Mobile provides little streaming video programming of its own at present, and while it (or affiliated entities) might seek to more fully establish affiliated content arrangements in the future, for now T-Mobile does not compete substantially with downstream edge providers that supply video programming using Binge On (such as, for example, DIRECTV Now).[50] Accordingly, T-Mobile is not likely to have strong incentives to "unreasonably disadvantage" unaffiliated edge providers, and we are not aware of any evidence that it is doing so. Finally, T-Mobile charges all edge provider participants an identical zero price and, so far as we are aware, has uniform technical requirements for all interested edge providers that numerous providers have been able to meet. Binge On thus appears not to discriminate against or

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[47] In January 2016, T-Mobile streamlined Binge On's website and app settings and added dialer codes to enable or disable Binge On. T-Mobile, T-Mobile adds Amazon Video to Binge On, makes it easier to turn off throttling (Jan. 28, 2016), http://www.theverge.com/2016/1/28/10859920/t-mobile-binge-on-adds-amazon-video-wwe-fox-news. As of December 2016, there are three ways for a user to enable or disable Binge On. T-Mobile, Support Page, Binge On how – to's, https://support.t-mobile.com/docs/DOC-24294 (last visited Jan. 9, 2017).

[48] T-Mobile, T-Mobile Quadruples Binge On Services, Now Over 100 Video Providers Stream Data-Free (July 26, 2016), https://newsroom.t-mobile.com/news-and-blogs/binge-on-100-providers.htm.

[49] 47 CFR § 8.11.

[50] T-Mobile does have a subscription-based video app, T-Mobile TV app, which offers a variety of programming. A November 2015 press release from T-Mobile indicates that T-Mobile TV participates in Binge On. T-Mobile, T-Mobile Unleashes Mobile Video with Binge On (Nov. 10, 2015), https://newsroom.t-mobile.com/media-kits/un-carrier-x.htm.

disadvantage (much less unreasonably discriminate or unreasonably disadvantage) any edge provider or end user.

B. AT&T's Data Perks

At this time, AT&T's Data Perks appears to be designed for use primarily by marketing firms and advertisers seeking to entice consumers to view their online ads or interact with their marketing apps by offering "free" data to those consumers for use with any content of the consumer's choosing. Data Perks also can be used to enable marketers to deliver content or applications to consumers effectively on a zero-rated basis – *i.e.*, to let consumers view their ads or download their games, surveys, or other apps, without affecting their monthly data usage allowances. [51]

Based on information we have on Data Perks, we believe it is not likely that this program unreasonably interferes with or disadvantages any edge providers' or end users' ability to use the Internet to reach one another. As an initial matter, Data Perks benefits consumers by allowing them to get additional data to use for whatever purpose they choose. Additionally, based on the information we have, it appears that most Data Perks participants are not marketing services that run over BIAS. Also, providers have other avenues through which to advertise to consumers. Moreover, we are not aware of any Data Perks participants who use the Data Perks app to provide services that compete with AT&T or AT&T affiliates at this time. Importantly, Data Perks, as a marketing device, seems to be designed for zero-rating small amounts of data.

C. AT&T's Sponsored Data

AT&T's Sponsored Data program is designed to enable third party edge providers to deliver streaming edge content on a zero-rated basis to AT&T's mobile broadband subscribers. Unlike the two sponsored data programs discussed above, we have serious concerns that AT&T Mobility's Sponsored Data program presents competitive problems and, to date, nothing in AT&T responses to the Bureau's requests for information has addressed our concerns. Based on the information gathered to date, we believe there is a substantial possibility that some of AT&T's practices may violate the General Conduct Rule. [52]

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[51] *See* AT&T, Data Perks, http://www.att.com/att/dataperks/en/index.html (last visited Jan. 9, 2017). AT&T credits Data Perks users with the same amount of data used to download a game or app from the Data Perks app, although completion of some offers requires steps beyond downloading and users are not reimbursed for this additional usage. Data is credited to subscribers' Data Perks accounts and may be used after subscribers transfer that data to their AT&T accounts.

[52] The discussion in this section expands on the issues addressed in an exchange of letters between the Bureau and AT&T in November and December of 2016. *See* Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, to Robert W. Quinn, Jr., Senior Vice President, External and Legislative Affairs, AT&T (Nov. 9, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342939A1.pdf); Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, to Robert W. Quinn, Jr., Senior Vice President, External and Legislative Affairs, AT&T (Dec. 1, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342941A1.pdf); Letter and Legal Analysis from Robert W. Quinn, Jr., Senior Vice President, External and Legislative Affairs, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Nov. 21, 2016); Letter from Joan Marsh, Senior Vice President, Federal Regulatory, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Dec. 15, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342942A1.pdf).

To alleviate the concerns we have identified to date as detailed in the letters of November 9 and December 1, 2016, we would need information to confirm that AT&T Mobility offers Sponsored Data to unaffiliated third parties on effectively non-discriminatory terms compared to the terms maintained with its wholly-owned affiliate, DIRECTV. We lack any such evidence. In response to our requests for information, AT&T asserted that it offers Sponsored Data to DIRECTV Now and to unaffiliated edge providers at the same terms and conditions but did not provide any response to our questions that would support its assertion. AT&T's responses do not enable us to compare the terms and conditions of AT&T Mobility's offerings to Sponsored Data customers with the terms and conditions of its treatment of DIRECTV; indeed, they do not even provide a complete picture of the terms of the Sponsored Data program standing alone.

The limited information we have obtained to date, however, tends to support a conclusion opposite from AT&T's contentions – namely, that AT&T offers Sponsored Data to third party content providers at terms and conditions that are effectively less favorable than those it offers to its affiliate, DIRECTV. Such arrangements likely obstruct competition for video programming services delivered over mobile Internet platforms and harm consumers by inhibiting unaffiliated edge providers' ability to provide such service to AT&T's wireless subscribers.

In theory, transactions among vertically-integrated corporate affiliates, in which the upstream "gatekeeper" network operator supplies inputs to its affiliated provider of downstream services, do not necessarily have anti-competitive impacts. But in past cases where the Commission has found such arrangements to be "just and reasonable" and "not unreasonably discriminatory" under Sections 201 and 202, structural and/or conduct safeguards have been in place to ensure that the network entity supplied the inputs on reasonable terms that did not diverge significantly from the terms faced by the downstream affiliate. Thus, in numerous contexts the Commission adopted rules (and in some cases, Congress enacted statutory provisions) that allowed vertical integration (*i.e.*, common ownership) of upstream network operators and downstream service providers, but required full structural separation of the network operators and downstream service provider affiliates.

For example, in 1996 Congress adopted provisions requiring Bell operating companies and their electronic publishing affiliates, for the first four years after enactment of the statute, to (1) operate as strictly separated corporate entities, with separate books, records, accounts, and financial statements; [53] (2) have no officers, directors, or employees in common and refrain from jointly hiring or training employees;[54] (3) own no property in common and refrain from joint purchasing or maintenance of equipment;[55] (4) refrain from jointly marketing one another's services except in narrowly limited circumstances;[56] and (5) conduct all inter-corporate transactions on an arm's-length basis, pursuant to publicly-filed tariffs or written contracts with terms that are made available to unaffiliated third parties.[57] Congress enacted similar structural

[53] 47 U.S.C. § 274(a), (b)(1), (f).

[54] *Id.*, §274(b)(5)(A), (7)(A).

[55] *Id.*, §274(b)(5)(B), (7)(B).

[56] *Id.*, §274(b)(6), (c).

[57] *Id.*, §274(b)(3), (b)(4), (d).

safeguards with respect to Bell operating companies and their separate affiliates that provided in-region long distance and information services for the first few years after obtaining permission to engage in those activities.[58] Those statutory restrictions are comparable to structural safeguards that the Commission promulgated in the context of incumbent telecommunications carriers and their wholly-owned, separate affiliates that provided customer premises equipment, information services, and broadband mobile wireless services.[59]

In other contexts, Congress and/or the Commission declined to impose structural safeguards, but imposed strict conduct requirements designed to address the same concerns: ensuring that network operators would not unreasonably discriminate in favor of their downstream affiliates and protecting against distortion of competition for downstream services. In various contexts, these conduct requirements included accounting safeguards and cost allocation rules designed to prevent cross-subsidies from network operations to competitive downstream services.[60] Elsewhere, statutes or rules imposed obligations to offer network inputs to unaffiliated parties on an unbundled basis at nondiscriminatory terms,[61] and in some cases, subject to detailed cost-based pricing requirements.[62]

The Commission, in the *2015 Open Internet Order*, decided to forbear from imposing most traditional common carrier requirements on broadband providers, including many of the structural separation and conduct restrictions described above.[63] It reasoned that such requirements were unnecessary and instead opted to establish a "'light-touch' approach for the use of Title II[,] . . . include[ing] no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules," in order to establish "a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband."[64] Rather than prescriptive structural separation or conduct requirements to protect prophylactically against anti-competitive conduct, the General Conduct Rule contemplates the *ex post* review of practices that raise anticompetitive risks and such actions as may be necessary to address those risks.

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[58] *Id.*, §272(a).

[59] *Computer II*, 77 FCC 2d at 475-83, paras. 322-54; *CCIA v. FCC*, 693 F.2d at 218-19; *Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668 (1997), *aff'd*, *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000) (finding Commission had reasonably concluded that incumbent local carriers had "both the incentive and the opportunity to use their exclusive control of local exchange facilities to engage in anticompetitive behavior," and that, in this case, "non-structural safeguards were insufficient, standing alone, to combat the possibility of interconnection discrimination.").

[60] *See, e.g., Computer III*, 104 FCC 2d at 1074-76, paras. 234-36 (information services and customer premises equipment); 47 U.S.C. § 272(b) (in-region long distance and information services).

[61] *See, e.g.,* 47 U.S.C. §§ 251(c)(1), 275, 276 (network elements used by competitive local exchange carriers, alarm monitoring service, and payphone service).

[62] *See, e.g.,* 47 U.S.C. §§ 252(d)(1), 274 (pole attachments used by cable TV companies and telecommunications carriers and unbundled network elements used by used by competitive local exchange carriers).

[63] *2015 Open Internet Order*, 30 FCC Rcd at 5804-67, paras. 434-542.

[64] *Id.* at 5612, para. 37.

Our concerns about the potentially anticompetitive impact of AT&T's conduct are based in part, but not entirely, on the fact that unaffiliated mobile video service providers must pay a significant, clearly identifiable amount of money for the sponsored data needed to offer streaming video programming to AT&T Mobility's subscribers on a zero-rated basis – by comparison to AT&T, which need not incur a comparable out-of-pocket expenditure to offer DIRECTV Now on a zero-rated basis. Rather, any imputed "charges" that DIRECTV "pays" AT&T Mobility for sponsored data, even if formally recorded on the corporate books as internal transfer payments, would result in no net expenditure at the holding company level.

AT&T Mobility's treatment of unaffiliated edge providers is therefore materially *different* in its effect from its treatment of its corporate affiliate; but that difference is not necessarily *unreasonable* if it does not "unreasonably disadvantage" those unaffiliated parties. For instance, the overall arrangement could comply with the General Conduct Rule if the unaffiliated edge providers' out-of-pocket expenditure per gigabyte of sponsored data was consistent with the economic cost, expressed on a per-gigabyte basis, of supplying the AT&T Mobility data used to offer DIRECTV Now service on a zero-rated basis. That cost of course is not zero; as the *2015 Open Internet Order* recognized, broadband providers must make necessary returns on their substantial capital investments to construct, maintain, and improve their networks, as well as incurring significant operating expenses.[65] We lack the information at this time, however, needed to assess whether AT&T's current sponsored data price to third party providers – which we have estimated could be $5/GB based on AT&T's reference to wholesale market pricing as an appropriate benchmark – is reasonable under this standard.[66] Given that vast quantities of data are transmitted over AT&T's network and that the incremental cost of data transmitted under its network's peak capacity is close to zero, we would expect that per-gigabyte amount, though non-zero, to be quite low – and in all likelihood lower than the wholesale rates AT&T currently charges to wireless resellers.

In light of the rates at which DIRECTV is offering its DIRECTV Now service to end users,[67] the information we have indicates that AT&T (including both the network operator and

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[65] *Id.* at 5603, 5605, 5612-13, paras. 2, 9, 39-40.

[66] The Bureau's December 1, 2016 letter asked AT&T to provide relevant information but AT&T, in its December 15, 2016 letter, declined to provide data in response to this request. The Bureau's letter also contained calculations concerning the $5/GB estimate. Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, to Robert W. Quinn, Jr., Senior Vice President, External and Legislative Affairs, AT&T (Dec. 1, 2016); Letter from Joan Marsh, Senior Vice President, Federal Regulatory, AT&T, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Dec. 15, 2016).

[67] Analysts estimate that the programming cost alone for DIRECTV Now's most basic 60-channel package is around $30, and $34 for the 100-channel package. MoffettNathanson, AT&T and DirecTV Now: Did AT&T Really Blink? Running with Scissors (Part II) at 1-2 (Nov. 29, 2016). At the $35 promotional price for the 100-channel package and $35 regular price for the 60-channel package, there would be $1 and $5 net margin, respectively, after programming costs. *Id.*; Jon Lafayette, AT&T Sets Launch Event for Streaming DirecTV Now (Nov. 18, 2016), http://www.broadcastingcable.com/news/currency/att-sets-launch-event-streaming-directv-now/161270 ("at the $35 price point, AT&T would be netting $1 above the cost of programming. Adding in other expenses, including customer service, DirecTV Now's margin would be negative"). The company is increasing the price of the 100-channel DIRECTV Now plan to $60 on January 9, 2017. Chris Welch, DIRECTV Now's $35, 100-channel plan

edge provider affiliates) does not consider zero-rating to be a real cost of business. Instead, AT&T appears to view the network cost of Sponsored Data for DIRECTV Now as effectively *de minimis*. Unlike T-Mobile, however, which charges *all* edge providers the same zero rate for participating in Binge On, AT&T imposes hefty per-gigabyte charges on unaffiliated third parties for use of Sponsored Data. All indications are that AT&T's charges far exceed the costs AT&T incurs in providing the sponsored data service. Thus, it would appear that AT&T's practices inflict significant unreasonable disadvantages on edge providers and unreasonably interfere with their ability to compete against AT&T's affiliate, in violation of the General Conduct Rule.

These practices are not comparable with certain other arrangements in which suppliers of goods or services offer consumers those products at no charge and obtain revenues from other entities providing related goods or services. To be sure, e-commerce portal operators offer end user consumers free shipping and recover the cost from retailers, while phone companies enable consumers to originate some long-distance calls on a "toll-free" basis and recover the costs from the businesses to which the calls are terminated.[68] But such arrangements do not inhibit competition unless the intermediary "platform" firms (such as the e-commerce portal operators, or phone companies in the examples above) (i) possess gatekeeper power enabling them to restrict the ability of the businesses that pay such costs from distributing their goods or services to consumers by alternative means; and (ii) have incentives to disadvantage those businesses because, for example, they compete directly with those businesses in downstream markets. It is those two considerations – broadband operators' ability and incentives to thwart their downstream competitors' ability to serve consumers – that give rise to the vertical competition concerns at issue here.

D. Verizon's FreeBee Data 360

The structure of Verizon Wireless's FreeBee Data 360 sponsored data program offering may pose concerns for the same reasons as AT&T's Sponsored Data program discussed above, given the contrast between the manner in which it supplies the platform for the zero-rating activities of third-parties as compared with the manner in which it offers its own zero-rated go90 service. We are aware of no safeguards that would prevent Verizon from offering substantially more costly or restrictive terms to enable unaffiliated edge providers to offer services comparable to Verizon's go90 on a zero-rated basis. And we have no data to confirm Verizon's unsupported assertion, submitted as part of its response to our request for information, that the FreeBee Data 360 sponsored data program offers third parties prices and terms equivalent to the economic net cost by Verizon to zero-rate its affiliated go90 video service.[69]

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will jump to $60 on January 9 (Dec. 29, 2016), http://www.theverge.com/2016/12/29/14118134/directv-now-100-channels-35-deal-ends-january-9.

[68] Letter from Kathleen M. Grillo, Senior Vice President and Deputy General Counsel, Public Policy and Government Affairs, Verizon, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Dec. 15, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342944A1.pdf).

[69] The discussion in this section expands on an exchange of letters between the Bureau and Verizon in December 2016. *See* Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, to Kathleen Grillo, Senior Vice

We observe that go90 is a nascent service that offers only a limited array of short video clips and sports programming, while DIRECTV Now offers a full range of live TV as well as streaming of full-length movies and shows.[70] In that regard, DIRECTV Now may be more likely to be viewed by mainstream consumers as a substitute for, and thus a direct competitor to, major providers of video programming delivered over the Internet – such as Netflix, Amazon Prime, Sling TV, or Hulu[71] – whereas it is less likely that as many consumers would view the existing version of go90 as a serious competitor to those services. In that regard, because Verizon's go90 competes in a less developed segment of the marketplace than AT&T's DIRECTV Now, the current magnitude of any anticompetitive effects of Verizon's practices may be smaller than AT&T's. Nonetheless, as noted above, there is the same potential for discriminatory conduct in favor of affiliated services, and its competitive impacts in the short-form portion of the market exist today. Moreover, in the future Verizon could decide to expand the long-form content on go90 and/or include a mobile version of its FiOS MVPD service in FreeBee Data 360. That development, depending on the terms of Verizon's offering of sponsored data services to unaffiliated edge providers, could result in a similar magnitude of anticompetitive effects in the full-length video streaming segment of marketplace compared to AT&T's inclusion of DIRECTV Now in its sponsored data program.

CONCLUSION

Mobile broadband providers are experimenting with a variety of sponsored data and zero-rating initiatives. While this dynamic environment has benefited consumers, these business arrangements may raise many of the same economic and public policy issues involving network owners that the Commission has long considered. In particular, sponsored data offerings by vertically integrated mobile broadband providers may harm consumers and competition in downstream industry sectors by unreasonably discriminating in favor of select downstream providers, especially their own affiliates.

President and Deputy General Counsel, Public Policy and Government Affairs, Verizon (Dec. 1, 2016) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-342943A1.pdf); Letter from Kathleen Grillo, Senior Vice President and Deputy General Counsel, Public Policy and Government Affairs, Verizon, to Jon Wilkins, Chief, Wireless Telecommunications Bureau (Dec. 15, 2016).

[70] go90, About Us, https://www.go90.com/about-us (last visited Jan. 9, 2017); AT&T, The Revolution is Here: AT&T Offers 3 Ways to Stream Premium Video Content (Nov. 28, 2016), http://about.att.com/story/att_offers_three_ways_to_stream_premium_video_content.html.

[71] Daniel Victor, AT&T Appeals to Cord-Cutters with DirecTV Now, a New Streaming Service (Nov. 28, 2016), http://www.nytimes.com/2016/11/28/business/media/att-appeals-to-cord-cutters-with-directv-now-a-new-streaming-service.html.