

February 19, 2015

ELECTRONIC FILING

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Ex Parte Letter*, GN Docket No. 09-191, GN Docket No. 14-28

Dear Ms. Dortch:

I'm writing to submit a report showing that the experience in Latin American countries where network neutrality regimes have been established without a clear ban on all types of prioritization indicates that preferential treatments not based on "fast lanes" has proliferated. In particular, zero-rating apps and application-specific pricing became extremely frequent and have been used by strong players like Facebook, Twitter and Whatsapp to consolidate their market positions. Based on the Latin American experience, I contend that if the FCC wants to preserve network neutrality, it has to issue a rule banning any kind of prioritization, including "fast lanes", zero-rating, differential pricing, or any other form of discrimination.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

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# **Report - Network neutrality regimes established without a clear ban on all types of prioritization have experienced a proliferation of preferential treatments not based on “fast lanes”**

## **Introduction**

1. The experience in Latin American countries where network neutrality regimes have been established without a clear ban on all types of prioritization shows that preferential treatments not based on “fast lanes” has become recurrent. In particular, zero-rating apps and application-specific pricing have become extremely frequent and have been used by strong players like Facebook, Twitter and Whatsapp to consolidate their market positions.
2. An application is said to be zero-rated when its usage does not count against the monthly bandwidth cap hired by the user, making such application more attractive in comparison to others. Network providers may also establish different prices for packages depending on the number of applications that can be accessed, limiting the use of the network and making the use of certain applications more expensive than others (application-specific pricing). These practices are particularly common in the wireless industry, where bandwidth is subject to more strict limits.
3. Based on the Latin American experience, I contend that if the FCC wants to preserve network neutrality, it has to issue a rule banning any kind of prioritization, including “fast lanes”, zero-rating, differential pricing, or any other form of discrimination.

## **Network neutrality regimes that do not expressly ban all sorts of differential treatment experienced a proliferation of preferential treatment to players like Facebook, Twitter and Whatsapp**

4. Wireless telephony has been an important element in connecting people in Latin America. Pre-paid plans (plans without a contract) are extremely common and constitute an affordable option for low-income people to secure access to a communication device paying only for use. Wireless Internet plans in these countries are often subject to bandwidth caps given the high cost of this service and the low income of population.
5. Brazil, Colombia, Chile and Peru have issued network neutrality regulations recently. None of these countries expressly ban all sorts of preferential treatment and have experienced a proliferation of discriminatory practices based on zero-rating and application-specific pricing.

### *Zero-rating in Latin America*

6. In Brazil, Facebook has negotiated agreements with wireless network providers for preferential treatment<sup>1</sup>. Claro (a nationwide provider that is part of America Movil group) has stopped to count access to Facebook towards the monthly bandwidth cap since August 2013. Facebook has become a zero-rated app<sup>2</sup>: users do not incur in any immediate and direct expense for using Facebook, while the use of any other application (including other social medias like Google+) would “cost” consumers a share of the bandwidth hired with the network provider<sup>3</sup>.
7. Facebook also sponsored other promotions with a more limited time scope, as a way to experiment different agreements. In this regard, Algar Telecom (a local provider) released a promotion offering free Facebook from April 22 until June 30, 2014 (Facebook use will not count towards the monthly bandwidth cap for users that have a contract plan – not valid for prepaid users)<sup>4</sup> and Oi (a nationwide provider) did not count the use of Facebook Messenger towards the bandwidth cap for a few months in 2013<sup>5</sup>. Similarly, Twitter negotiated with Claro the provision of free access to its users. Since October 2013, access to Twitter does not count towards the cap<sup>6</sup>. By its turn, Whatsapp has recently become zero-rated at TIM, the Brazilian subsidiary of Telecom Italia<sup>7</sup>.
8. A similar situation is observed in Chile, where Claro temporarily offers pre-paid data packages in which usage of Twitter, Facebook and Whatsapp are zero-rated<sup>8</sup>. However, Subtel (the Telecommunication Agency) issued order on May 27, 2014, requiring the cease of this practice for violation of the network neutrality statute<sup>9</sup>.
9. In Mexico, Movistar (part of Telefonica Group) offers contract and pre-paid plans with zero-rated access to Facebook, Twitter, Whatsapp and one mail account from Hotmail, Gmail or

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<sup>1</sup> See <http://www.tudoocelular.com/claro/noticias/n29327/claro-facebook-de-graca.html>.

<sup>2</sup> It should be noted that all the zero-rated apps examples cited in this item refer to usage of the applications and not navigation through Internet browsers. It means that the usage of the Facebook app is zero-rated while the access of Facebook webpage in a browser is rated.

<sup>3</sup> Claro advertises the zero-rating of Facebook data as a promotional campaign (“Free Facebook and Twitter”) and reserves the right to terminate it at will. See <http://www.claro.com.br/celular/planos-pos/regiao/ddd11/SP-11/tv-1/>.

<sup>4</sup> See <http://www.algar telecom.com.br/section.do?CodSec=14150>.

<sup>5</sup> See <http://www.tudoocelular.com/oi/noticias/n28691/oi-facebook-messenger-de-graca.html>.

<sup>6</sup> See <http://www.claro.com.br/celular/planos-pos/regiao/ddd11/SP-11/tv-1/>.

<sup>7</sup> <http://www.tim.com.br/sp/para-voce/planos/controlle/controlle-whatsapp>.

<sup>8</sup> See <http://www.clarochile.cl/wps/portal/cl/pc/personas/movil/prepago#02-bolsas-y-servicios>

<sup>9</sup> See <http://www.subtel.gob.cl/noticias/138-neutralidad-red/5311-ley-de-neutralidad-y-redes-sociales-gratis>

Yahoo<sup>10</sup>. For contract plans, in addition to the regular data cap hired, users have extra 25 giga to specifically use these applications with full bandwidth capacity, and pre-paid plans offer 1 giga of access at full capacity. After this separate cap is reached, the navigation may proceed but the traffic speed is considerably slower<sup>11</sup>. Iusacell offers pre-paid plans in which e-mail applications, Facebook, Twitter, MSN Messengers, and LinkedIn do not count towards the data cap<sup>12</sup>.

10. Olo in Peru offers contract plans with zero-rated access to Facebook, Twitter, Gmail, Yahoo Mail and Hotmail<sup>13</sup>. Movistar (Telefonica Group) offers 3 months of zero-rated access to Facebook for new subscribers of contract plans<sup>14</sup>.

#### *Application-specific pricing in Latin America*

11. Network providers in Colombia and Peru provide interesting examples of plans that discriminate classes of applications. Social networks, e-mail and chat applications constitute the three separate classes of applications that often receive differential treatment. Movistar and Claro<sup>15</sup> in Colombia offer contract plans in which these classes of applications continue to be deployed even after the usage cap is reached. This practice is different from zero-rating described above because the use of these applications counts towards the data cap. Nevertheless, after the cap is reached, the Internet service is disrupted (unless additional data is acquired), except for the use of chats, e-mail and social network applications<sup>16</sup>. These are clear examples of discrimination based on differential pricing for diverse applications.

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<sup>10</sup> See <http://www.movistar.com.mx/movil-prepago-paquetes-ilimitado> and <http://www.movistar.com.mx/movil-planes-gigamove>.

<sup>11</sup> Interestingly, the contract plans include a premium subscription of Spotify. However, the usage of Spotify is not zero-rated and counts normally towards the data cap. See <http://www.movistar.com.mx/movil-planes-gigamove>.

<sup>12</sup> See <http://www.iusacell.com.mx/viva/vivapacks.php>.

<sup>13</sup> See <https://olo.com.pe/planes-y-servicios/planes-a-la-medida>

<sup>14</sup> See <http://www.movistar4glte.pe/>.

<sup>15</sup> Claro clearly lists the applications included in each group, limiting the beneficial treatment to a few selected applications within each class. The selected applications within the classes are:

Chat: Joyn, Whatsapp, Yahoo Messenger, and Gtalk in smartphones, tablets or wireless modem plans; Blackberry Messenger, Yahoo Messenger, and Gtalk in Blackberry devices.

E-Mail: Hotmail, Gmail, Yahoo Mail, "and other POP3 and IMAP4 accounts"; Blackberry devices do not have free access to e-mail.

Social Networks: Facebook, Twitter, and MySpace in smartphones, tablets, wireless modem, or Blackberry devices plans.

See <http://www.claro.com.co/wps/portal/co/pc/personas/movil/catalogo-promociones/promocion/planes-todo-incluido#tab-1>.

<sup>16</sup> See <https://www.movistar.co/4GLTE/> and <http://www.claro.com.co/wps/portal/co/pc/personas/movil/catalogo-promociones/promocion/planes-todo-incluido#tab-0>

12. Pre-paid plans offered by Movistar in Colombia have a different structure, in which different layers of access may be hired at different prices. In Colombia, Movistar's customers may choose among daily, weekly or monthly caps of data for an unrestricted access plan (meaning access to any chosen application) or plans in which the data cap usage is limited to (i) chat apps; (ii) e-mail; (iii) chat + e-mail; (iv) chat + e-mail + social networks<sup>17</sup>.
13. Similarly, Claro in Peru offers special plans (contract and pre-paid) for Blackberry devices, allowing consumers to choose plans with Internet access limited to a few applications or classes of applications, or a data cap for unrestricted usage and unlimited bandwidth for a certain application or class of application. For instance, consumers may hire (i) only unlimited access to BlackBerry Messenger; (ii) unlimited access to BlackBerry Messenger plus a Blackberry mail account; (iii) unlimited access to chat apps<sup>18</sup> plus social networks<sup>19</sup>; (iv) unlimited access to 10 mail accounts; and (v) combine any of the four options before with a data cap to deploy any other application<sup>20</sup>. By its turn, Movistar offers a plan for BlackBerry devices with Internet access limited to social networks<sup>21</sup>.
14. Furthermore, the Mexican Unefon offers special plans for Blackberry phones. Unefon offers plans with Internet access limited to Blackberry Messengers and/or social networks<sup>22</sup>, while Movistar in Argentina offers a plan for tablets or wireless modems that has unlimited access to e-mail, social networks and apps for children. Unfortunately, it is unclear how applications are selected to integrate a given group.
15. Finally, Colombia provides an interesting example of discrimination in favor of an owned-application. Like Movistar, Tigo (Colombia Móvil)<sup>23</sup> offers pre-paid and contract plans for mobile phones in which different layers of access may be hired. Consumers may choose to hire

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<sup>17</sup> The selected applications within the classes are:

Chat: Whatsapp, Yahoo Messenger, Windows Live Messenger and Gtalk.

E-Mail: Hotmail, Gmail, Yahoo Mail, and Latinmail.

Social Networks: Facebook, Twitter, and MySpace.

See [http://www.movistar.co/Internet/Internet\\_para\\_tu\\_celular/Planes/Internet\\_prepago/](http://www.movistar.co/Internet/Internet_para_tu_celular/Planes/Internet_prepago/)

<sup>18</sup> The class of chat apps include BlackBerry Messenger, Windows Live Messenger, ICQ, AOL Instant Messenger, Yahoo! Messenger and Google Talk.

<sup>19</sup> Social networks include Facebook, MySpace and Twitter.

<sup>20</sup> See <http://www.claro.com.pe/wps/portal/pe/sc/personas/movil/postpago#info-04b>

<sup>21</sup> See <http://www.movistar.com.pe/movil/postpago/planes-y-tarifas/planes-blackberry>

<sup>22</sup> See <http://www.unefon.com.mx/planes.html>.

<sup>23</sup> Tigo is the commercial brand of Colombia Móvil, a company controlled by Millicom International Cellular. See [http://www.bnamericas.com/company-profile/en/Colombia\\_Movil\\_S,A,-Tigo\\_,Colombia](http://www.bnamericas.com/company-profile/en/Colombia_Movil_S,A,-Tigo_,Colombia),

access (i) only to chat apps; (ii) only to e-mail; (iii) only to social networks; (iv) chat + e-mail; (v) chat + social networks; and (vi) data caps with unrestricted access<sup>24</sup>.

16. In addition, Tigo also offers plans with a data cap plus unlimited access to Tigo Music. Tigo Music is an on-line repository of songs offered by Tigo in which users may download songs in their mobiles, tablets or laptops<sup>25</sup>. It constitutes a clear example of a favorable treatment of an application owned by the network provider, as the download of music through this subscription service does not count towards the bandwidth cap.

### **Zero-rating and application-specific pricing result in prioritization and may subvert the nature of the Internet**

17. Wireless Internet has become fundamental for competition in the Internet industry. The use of smartphones to navigate the Internet is increasingly common, so network providers have invested in the expansion of the wireless network and application developers have adapted their tools and services to fit and be manageable in small screens.
18. Wireless Internet plans are often subject to bandwidth caps given the high cost of the technology and the limited exploration of the spectrum available. Scarceness of bandwidth makes it valuable: users are willing to pay more for additional bandwidth, and application developers work to reduce the amount of bandwidth consumed by their services. As users often avoid using certain applications that consume more bandwidth, like video streaming or photo downloads, application developers compete for reducing bandwidth usage, trying to make their apps more efficient and less bandwidth demanding.
19. In this context, an application that uses less bandwidth while still delivering a good performance would be preferable to users if compared to a similar application with more use of bandwidth. This efficiency would legitimately confer such application a substantive competitive advantage over rivals. Similarly, zero-rated apps also have a considerable advantage over rivals - in fact, they gain an even bigger advantage, as the zero-rate does not consume any bandwidth and the app continues functional even after the bandwidth is entirely

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<sup>24</sup> The applications included in each group are:  
Social networks: Facebook, Linked In, Hi5, MySpace and Twitter.  
Chats: MSN, Yahoo Messenger and Google Talk.  
Email: POP3 mail applications  
See <http://www.tigo.com.co/arma-tu-plan/?desktop=&device=desktop>.

<sup>25</sup> The music service website is <http://www.tigomusic.co>.

consumed. Nevertheless, this advantage is not based on a superior product, but on a better deal with the network provider.

20. Like fast-lanes, zero-rated agreements result in direct prioritization, allowing network providers to pick winners. Applications with better deals will be substantially favored, discouraging entry and limiting competition from rivals. As a result, users won't be freely choosing the best apps. They will end-up using the one that is advantageous in terms of saving bandwidth, subverting the nature of the Internet and the goals that network neutrality regulation aims to achieve.
21. Network neutrality opponents may contend that zero-rating may benefit users in the wireless context. It might be argued that zero-rating may offer access to a given application without any incremental cost and any opportunity cost (as the bandwidth is preserved and may be used to access other applications).
22. These propositions do not stand. The preferential treatment of specific applications distorts the nature of the Internet as an open space where any application can be successful and consumers may freely elect winners. In this scenario, network providers elect the applications or classes of applications that will have more chances to succeed, reducing the value of the network for users and diminishing the incentives to innovate.
23. In the long-run, zero-rated applications become substantially more attractive to users, impairing rivals' ability to effectively compete and creating important barriers to the entry of new players. The successful applications will not be the best or preferred ones, but those able to get better deals with network providers. This scenario substantially discourages innovation and reduces consumer choice.
24. Furthermore, the offer of zero-rated applications is usually sponsored by the application. It means that the application has its costs increased and may pass this increase on to consumers, either through higher subscription fees in case of paid services or through the showing of more advertisements and less respect to privacy in case of advertisement-based applications. In other words, the application is not really zero-rated, as the user may end-up paying by other means.
25. Finally, zero-rated apps may become a great source of revenue to network providers, that will have incentives to maintain bandwidth caps. In other words, zero-rated apps will only be valuable to application developers if plans have a bandwidth cap. Therefore, network providers will have fewer incentives to develop networks and provide unlimited plans as they would lose an important source of revenue. In any event, network providers will have incentives to

offer unrestricted access plans at higher prices and restrict the number of people that may have it.

26. By its turn, application-specific pricing usually happens when certain plans offer access to a limited number of applications (i.e. the data plan gives access only to Facebook or to certain e-mail providers) or when different levels of service are offered for different applications (i.e. some applications will keep running even after the data cap is over).
27. These practices also favor certain applications and subvert the nature of the Internet. Network providers will be able to favor certain applications, making them cheaper or more advantageous through the continuous use, even after the total use of the data cap. Importantly, people will only value limited access plans, if unlimited plans are expensive. Therefore, the rate differential fosters the maintenance of highly expensive unlimited plans, restraining access to the Internet.
28. These elements show that zero-rating and rate differential may harm network neutrality principles and distort the Internet. If the FCC wants to protect network neutrality, it has to ban these forms of discrimination. In particular, the experience in Latin American countries indicate that an express ban on these practices is advisable.