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Binge of Regulation: Wireless Pricing and the FCC

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Wireless data caps, the annoying limits on how much data you can use from your phone, have been a fact of mobile life for several years. Now, a new pricing concept in the wireless marketplace, known as "zero-rating," promises to relieve consumers of the fear that streaming one too many videos will trigger extra charges. But, instead of receiving plaudits, zero-rating has come under attack by many pro-regulation advocates as a violation of the network-neutrality rules adopted by the Federal Communications Commission (FCC) in 2015. The controversy underscores the danger that the FCC's rules—which are now under review in federal court—pose for consumers and the growth of the Internet.

Binge On

The latest dispute involves T-Mobile, the number three wireless carrier in the U.S. Since 2014, T-Mobile has offered a "Music Freedom" program under which consumers can stream content from music sites such as Pandora and Spotify, without it counting against their limit. In November 2015, the firm launched a similar program for video—"Binge On"—allowing subscribers to access video content from sites such as ESPN, Hulu, and Netflix outside of their caps. No participation fees are charged to consumers or content providers, and all video providers are able to join. To do so, however, they need to conform to certain technical standards, limiting the bandwidth used by the video. Essentially, this means limiting the video to standard quality, rather than high definition.

Complicating T-Mobile's situation is the fact that bandwidth for all videos, regardless of whether the provider participates in the Binge On plan, is limited for consumers who join the program. Importantly, consumers can turn the Binge On plan on or off at their discretion.

T-Mobile now finds itself under attack for two reasons. First, critics say that the whole concept of zero-rating is discriminatory and violates the newly established neutrality regime adopted by the FCC. Second, critics hold that the limits on video bandwidth use violate the ban on "throttling" content based on application type, also imposed as part of the net-neutrality order.

Zero-Rating Background

Zero-rating itself is not unique to T-Mobile. Market leaders Verizon and AT&T are expected soon to launch zero-rating plans under which content providers can also exempt data from counting against a subscriber's data cap, albeit for a fee. Also known as "sponsored data," the system would work much like an 800 phone number, with charges paid by a business, rather than the customer.

Other zero-rating plans have been developed by content providers themselves. Facebook, Wikipedia, and Twitter all offer plans providing content free of data charges to subscribers in the developing world, who otherwise may not be able to afford mobile data service at all.[1]

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On the wireline side, Comcast also offers a service under which subscribers can use broadband without being constrained by their data cap. However, this service uses Comcast's cable connection, rather than a true Internet connection, so it does not directly implicate neutrality rules.[2]

The benefits of these various programs are significant. According to T-Mobile, 37 percent of wireless users do not stream content on their phones, mostly due to fear of overage charges.[3] Removing that fear not only benefits consumers directly, but also encourages greater use of the network itself. It's a win-win-win for consumers, network operators, and content providers alike.

Misplaced Criticism

The problem, say critics, is that the idea of zero-rating plans is inherently discriminatory. Allowing the network operator to charge different prices to consumers based on the kind of data and provider of data, goes the argument, gives that network operator too much power. This, in turn, could make it difficult for upstart providers to get a foothold in the market. As Susan Crawford of Harvard Law School put it: "Can you imagine trying to launch a competitor to Facebook in a country where most of your potential customers will have to pay data charges for your service—while the incumbent Facebook is exempt?"[4] The end result, say critics, is that small, innovative content providers will be frozen out of the marketplace, leaving only the big players in business.

This reasoning is flawed. If anything, zero-rating is likely to increase competition and innovation, not constrain it. First, under the Binge On program, any provider can participate, with no fee required. But even fee-based "sponsored data" plans such as AT&T's raise no special concerns. A small content provider is no more disadvantaged by paying a fee to add zero-rating service than by having to pay for an 800 number, advertising, rent, or any other expense. In fact, by having the ability to reduce potential costs of using their content, zero-rating would be an important tool for newcomers in the marketplace.

Moreover, network operators have no incentive to systematically discriminate against start-ups. Their interest is in maximizing use of their networks. In that regard, they want more providers offering the most diverse range of content possible.

The Benefits of Zero-Rating Plans

Plans such as Binge On could help supercharge competition among wireless networks as well. T-Mobile is now a distant third in the wireless marketplace with 15 percent of subscribers, far behind leaders AT&T and Verizon. It needs to differentiate itself to consumers, and Binge On is one big part of its plan to do that. Efforts to block such innovative approaches that expand the network will hobble competition and consumer choice, not increase it.

T-Mobile's alleged "throttling" of videos streamed by Binge On users raises similar considerations. Despite the hand-wringing by neutrality advocates, the limits seem aimed at decreasing congestion on the network for the benefit of its users, rather than the result of anti-competitive motives. The restrictions can be turned off at any time by consumers with the press of a button. Moreover, given T-Mobile's puny market share, the firm is well-constrained by competition: Customers not in favor of the policy can and will migrate elsewhere.

Zero-Ratings Plans and Questions of Legality

T-Mobile, however, did commit a major error in not fully revealing to its customers the extent of its bandwidth limits on video. The practice was

1. These plans have been controversial abroad as well as in the U.S. India, in fact, temporarily shut down Facebook's program this past December. Pankaj Doval, "Put FB's Free Basics Service on Hold, TRAI Tells Reliance Communications," *The Times of India*, December 23, 2015, http://timesofindia.indiatimes.com/tech/tech-news/put-fbs-free-basics-service-on-hold-trai-tells-reliance-communications/articleshow/50290490.cms?from=mdr (accessed January 21, 2016).
2. For background on other practices accused of violating net-neutrality rules, see James L. Gattuso and Michael Sargent, "Beyond Hypothetical: How FCC Internet Regulation Would Hurt Consumers," Heritage Foundation *Backgrounder* No. 2979, November 25, 2014, http://www.heritage.org/research/reports/2014/11/beyond-hypothetical-how-fcc-internet-regulation-would-hurt-consumers (accessed January 21, 2016).
3. Dawn Chmielewski, "T-Mobile Offers Music Streaming Free of Data Charges," Re-code.net, June 18, 2014, http://recode.net/2014/06/18/t-mobile-offers-music-streaming-free-of-data-charges/ (accessed January 21, 2016).
4. Susan Crawford, "Zero for Conduct," *Backchannel*, January 7, 2015, https://medium.com/backchannel/less-than-zero-199bcb05a868#.rpufvjwe2 (accessed January 21, 2016).

revealed only this month in a report by the Electronic Frontier Foundation.[5] If its subscribers were misled, T-Mobile's lack of disclosure could be a contractual violation. Nevertheless, such non-disclosure is easily remedied and does not change the overall pro-consumer nature of Binge On.

The current legal status of Binge On and other zero-rating programs is unclear. The supposedly "bright line" rules adopted by the FCC in February 2015 are not as bright as advertised. "Throttling" bandwidth based on application type is banned, but the question is whether that ban includes limits imposed at the consumers' own discretion.

The legality of zero-rating itself is even muddier. The 2015 rules ban "paid prioritization," or "fast lanes." These are defined as "the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic."[6] However, while a zero-rating system does make some content cheaper than others from the consumers' point of view, that content is not handled any differently and is not delivered any faster. The rule also requires that the prioritization be "paid"—i.e., a fee be charged—in order for the practice to be illegal.

The FCC was aware of the zero-rating controversy when it wrote the rules last year, but deliberately punted on the issue, saying it would address the issue on a case-by-case basis, under a catch-all "general conduct" rule.[7] This rule prohibits Internet service providers from "unreasonably interfering" with end users' access to content of their choice, or providers' ability to offer that conduct. The FCC left this rule largely undefined, aside from offering a half-dozen factors to consider, ranging from consumer control to the effects on investment. This vagueness has left the FCC with enormous discretion. As Randy May of the Free State Foundation said, the rule "means anything that Wheeler's Enforcement Bureau says it means on any given day."[8]

Conclusion

It is unclear how the FCC will ultimately view zero-rating. The good news for T-Mobile is that FCC chairman Tom Wheeler has said that he thinks Binge On is "highly innovative and highly competitive."[9] No official decision has been made, however, as the FCC staff continues to investigate the offering.[10] Little has been said regarding AT&T and Verizon's planned fee-based plans.

A rejection of zero-rating plans would be bad for consumers, who could benefit from the programs. Equally disturbing is the subjective, extemporaneous nature of the FCC's decision-making process, which would create unpredictability, forcing firms to go to the FCC for permission before adopting any new practice. In a dynamic marketplace, outside-the-box innovation should be the rule, not the exception. The question is whether the FCC can pass judgment on each such innovation without stifling dynamism.

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5. Jeremy Gillula, "EFF Confirms: T-Mobile's Binge On Optimization Is Just Throttling, Applies Indiscriminately to All Video," Electronic Frontier Foundation, January 4, 2016, https://www.eff.org/deeplinks/2016/01/eff-confirms-t-mobiles-bingeon-optimization-just-throttling-applies (accessed January 21, 2016).
6. Federal Communications Commission, "Report and Order on Remand, Declaratory Ruling and Order: In the Matter of Protecting and Promoting the Open Internet," GN Docket No. 14–28, March 12, 2015, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (accessed January 21, 2016).
7. Ibid.
8. John Eggerton, "Wheeler: Binge On Is Pro-competitive, Pro-Innovation," *Broadcasting and Cable*, November 19, 2015, http://www.broadcastingcable.com/news/washington/wheeler-binge-pro-competitive-pro-innovation/145940 (accessed January 21, 2016).
9. Ibid.
10. Jon Brodkin, "FCC Had 'Productive' Net Neutrality Talks with Comcast and T-Mobile," *Ars Technica*, January 15, 2015, http://arstechnica.com/business/2016/01/fcc-had-productive-net-neutrality-talks-with-comcast-att-t-mobile (accessed January 21, 2016). See also Jon Brodkin, "Comcast, AT&T, and T-Mobile Must Explain Data Cap Exemption to FCC," *Ars Technica*, December 17, 2015, http://arstechnica.com/business/2015/12/comcast-att-and-t-mobile-must-explain-data-cap-exemptions-to-fcc/ (accessed January 21, 2016).