The Mobile-Sierra Doctrine: An Unlikely Friend for Opponents of Zero-Rating

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I. INTRODUCTION

Like the politics of the presidents who appointed them, the Federal Communications Commission (FCC)'s zero-rating policies under former Chairman Tom Wheeler and current Chairman Ajit Pai are in marked contrast. Under Chairman Wheeler, zero-rating was regulated on a case-by-case basis, but Chairman Pai has yet to regulate the practice at all.[1] Zero-rating is an increasingly common pricing strategy where Internet service providers (ISPs) provide consumers with access to content, applications, and services without that access accruing towards their broadband or mobile data caps.[2] While popular with consumers, zero-rating is controversial because of its potentially discriminatory implications for edge providers and consumers: edge providers that cannot pay for zero-rating are less competitive, making their product less frequently used, which subsequently impedes users' choice.[3] Edge providers are considered to be "[a]ny individual or entity that provides any content, application, or service over the Internet."[4] Edge providers, like Google and Facebook, use the consumer's ISP to deliver content.[5] The FCC has never banned zero-rating outright because not all zero-rating practices are considered discriminatory and some, depending on their structures, can further competition and consumer choice.[6]

In 2016, under the directive of former Chairman Wheeler, the FCC's Wireless Telecommunications Bureau (WTB) issued a report concluding that AT&T's Sponsored Data and Verizon's FreeBee Data 360 zero-rating practices were potentially discriminatory because they appeared to favor downstream affiliates over unaffiliated edge providers.[7] Despite these findings, Commissioner Pai quickly ceased all investigations into AT&T and

1. *See* Sam Gustin, *Trump's New FCC Chief Just Opened the Floodgates for Zero-Rating*, MOTHERBOARD (Feb. 3, 2017), https://motherboard.vice.com/en_us/article/trumps-new-fcc-chief-just-opened-the-floodgates-for-zero-rating [https://perma.cc/WD5L-DSZM].

2. *See, e.g.*, Peter Nowak, *Why 'zero rating' is the new battleground in net neutrality debate*, CBC NEWS (Apr. 7, 2015 5:00 AM), http://www.cbc.ca/news/business/why-zero-rating-is-the-new-battleground-in-net-neutrality-debate-1.3015070 [https://perma.cc/UW7X-BXR6].

3. Barbara van Schewick, *Network Neutrality and Zero-Rating*, THE CTR. FOR INTERNET & SOC'Y 1–2, (Feb. 19, 2015), http://cyberlaw.stanford.edu/files/publication/files/vanSchewick2015NetworkNeutralityandZerorating.pdf [https://perma.cc/36BT-AJHY].

4. 47 C.F.R. § 8.2(b) (2015).

5. *See* Brian Feldman, *'Sorry ISPs Are Trying to Do What?' What to Know About Congress's New Internet-Privacy Rollback*, N.Y. MAG.: SELECT ALL (Mar. 28, 2017, 5:55PM), http://nymag.com/selectall/2017/03/why-congress-is-dismantling-the-fccs-internet-privacy-rules.html [https://perma.cc/Y9AS-DNNJ].

6. *See* WIRELESS TELECOMM. BUREAU, FED. COMM. COMM'N, POLICY REVIEW OF MOBILE BROADBAND OPERATORS' SPONSORED DATA OFFERINGS FOR ZERO-RATED CONTENT AND SERVICES 1 (2016) [hereinafter *Policy Review*].

7. *See id.* at 16–17.

Verizon's zero-rating practices upon taking office.[8] In a statement seemingly justifying his position, Pai stated, "[t]hese free-data plans have proven to be popular among consumers, particularly low-income Americans, and have enhanced competition in the wireless marketplace."[9] The FCC's current position on zero-rating should be troublesome to the American public because as it stands, the discriminatory practices associated with zero-rating will persist and likely expand.[10] This paper argues that a bold, but possible, solution for curtailing zero-rating during this administration is a lawsuit arguing that, pursuant to the *Mobile-Sierra* Doctrine, zero-rated contracts like those between AT&T, Verizon, and their affiliated providers are harmful to the public interest. A lawsuit of this nature will force the FCC to *at least* regulate *discriminatory* zero-rating practices.

This paper examines how to address discriminatory zero-rating practices under the Commission's new Republican leadership in five stages. First, it provides a background framing the topic of zero-rating and contextualizes the zero-rating debate within broader net neutrality discussions. Second, it delineates the actors involved in zero-rating arrangements, the various zero-rating structures, the arguments for and against zero-rating, and the broader politics surrounding the debate. Third, it introduces the 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services associated with former Chairman Wheeler.

Fourth, it introduces and describes the *Mobile-Sierra* Doctrine – a doctrine that arose from two Supreme Court decisions and stands for the proposition that bilateral contract rates cannot be unilaterally changed.[11] Under the *Mobile-Sierra* Doctrine, courts, in extraordinary circumstances or when such rates are contrary to the public interest, can order the requisite commission to change rates that they find are not "just and reasonable."[12]

Lastly, it analyzes the current zero-rating landscape and concludes by proposing that a lawsuit applying the *Mobile-Sierra* Doctrine is the best mechanism for curbing discriminatory zero-rating practices during Chairman Pai's tenure.

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8. *See* Jessica Melugin, *FCC Chairman Pai Ends Obama-era Investigations of 'Zero-rating' Data Plan*, CEI, (Feb. 7, 2017), https://cei.org/blog/fcc-chairman-pai-ends-obama-era-investigation-zero-rating-data-plans [https://perma.cc/Y8ZD-HAZJ].

9. Richard Lawler, *The FCC Stops Investigating Carrier's 'Zero-Rating' Plans*, ENGADGET (Feb. 3, 2017), https://www.engadget.com/2017/02/03/the-fcc-stops-investigating-carriers-zero-rating-plans/ [https://perma.cc/E9VW-MB8M].

10. *See* Melissa Repko, *Trump's FCC Drops Investigation Into Zero-Rating*, DALLAS NEWS (Feb. 3, 2017), http://www.dallasnews.com/business/technology/2017/02/03/trumps-fcc-drops-investigation-zero-rating-saying-denying-americans-free-data [https://perma.cc/6H2Q-Y7G2].

11. Michael A. Rosenhouse, Annotation, *Construction and Application of the Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard*, 62 A.L.R. Fed. 2d 427, *2 (2012).

12. *Id.*

II. BACKGROUND ON NET NEUTRALITY AND ZERO-RATING

A. FCC Regulatory Powers as It Pertains to Zero-Rating

The Communications Act of 1934 created the FCC and authorized it to regulate wire and radio communications, both interstate and foreign.[13] The Communications Act of 1934 was amended by the 1996 Telecommunications Act which Congress intended to spur competition within the telecommunications market by removing unnecessary barriers to entry.[14] The most notable change, for the purpose of this paper, in the 1996 Act was the reclassification of broadband cable services, otherwise known as ISPs, from a telecommunication service to an information service.[15] These two classifications are distinguishable in that telecommunication services offer "telecommunications for a fee directly to the public … regardless of the facilities used"[16] while information services provide "a capability for [processing]… information via telecommunications."[17] This change is significant because telecommunications services are subject to stricter regulatory controls pursuant to Title II of the 1934 Communications Act compared to information services under Title I of the 1934 Act.[18]

In the early 2000s, the FCC's decision to regulate ISPs as information services began to take center-stage starting with *National Cable and Telecommunications Ass'n v. Brand X Internet Services*.[19] Brand X argued that regulating ISPs under Title I would lead to a slippery slope where any communications provider could circumvent common carrier regulations by bundling information services with telecommunications.[20] Ultimately, the Supreme Court ruled against Brand X, using *Chevron* deference,[21] with the majority finding that the statutory definitions between the two classifications were ambiguous and therefore, the FCC's statutory construction was reasonable and permissible.[22]

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13. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

14. Telecommunications Act § 101, 47 U.S.C. §§ 251-261 (2012).

15. *See* Sara Kamal, *If It Isn't Broken, You're Not Looking Hard Enough: Net Neutrality and Its Impact on Minority Communities*, 68 FED. COMM. L.J. 329, 332 (2016).

16. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977 (2005).

17. *Id.* at 987.

18. *See* Kamal, *supra* note 23 at 332.

19. *See* Brand X Internet Servs., 545 U.S. at 967.

20. *See id.* at 997.

21. *Chevron* deference "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980.

22. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE, 196 (2007).

B. *Net Neutrality: An Internet Structure That Treats All Information Equally*

The subject of net neutrality is the crux of the zero-rating controversy because the rules that govern net neutrality will subsequently impact the regulation of zero-rating.[23] Net neutrality is

> An Internet structure that does not favor one application over another… whereby each node connected to the Internet passes data bound for some other destination on a 'first-come, first-served' basis, without prioritizing, degrading, or blocking a transmission based on the kind of information contained . . . .[24]

In other words, under net neutrality, all information transferred over the Internet should be equally prioritized and accessible to consumers. This information structure was in place when the Internet came into existence.[25] As the Internet began to expand, the companies providing Internet services began to consolidate and realize their power to prioritize and degrade certain content.[26] Following the Brand X decision in 2005, diverging political opinions began to further emerge about this traffic-management system that has been in place since the Internet's conception.[27]

Proponents of net neutrality contend that without this Internet safeguard, ISPs will act as gatekeepers and favor the transmission of certain content at the expense of other content.[28] For example, because Comcast and NBC are affiliated, Comcast would be incentivized to promote NBC's content over ABC's to its customers, which would lead to a slower load time for ABC.[29] Conversely, opponents assert that the principles of the free-market are capable of neutralizing discriminatory implications arising from an Internet structure without net neutrality.[30] Opponents also contend that FCC regulation only hinders innovation as well as business opportunities for content providers.[31]

The FCC's position on net-neutrality was illustrated by a 2005 policy statement adopting four principles ensuring that "broadband networks are

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23. *See id.* at 350.
24. JONATHAN M. EISENBERG ET AL., CAL. ANTI. & UNFAIR COMP. L. § 10.13 (2016).
25. *See id.*
26. *See id.*
27. NUECHTERLEIN & WEISER, *supra* note 30 at 196.
28. *See* EISENBERG, *supra* note 37.
29. Alyson Shontell, *EXPLAINED: 'Net Neutrality' For Dummies, How It Affects You, And Why It Might Cost You More*, BUS. INSIDER (Jan. 15, 2014, 4:29 PM), http://www.businessinsider.com/net-neutralityfor-dummies-and-how-it-effects-you-2014-1 [https://perma.cc/M8X8-NM3X].
30. *See* Nisha Ragha, *The Fall of Net Neutrality: The End of an Era and A Call for Reform*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 559, 566 (2015).
31. *See* EISENBERG, *supra* note 37.

widely deployed, open, affordable, and accessible to all consumers."[32] Despite this policy statement, the FCC did not adopt any formal rules regarding net neutrality.[33] However, when evidence from 2007 showed that Comcast was interfering with its customers' peer-to-peer file sharing traffic, the FCC issued an order in 2008 which deemed Comcast's behavior, and the like, unlawful unless "it further[s] a critically important interest and [is] narrowly or carefully tailored to serve that interest."[34] In 2010, the D.C. Circuit vacated the 2008 order finding that Title I did not contain the authority to proscribe the conditions set forth upon Comcast.[35]

The FCC responded with the first Open Internet Order which set forth transparency, anti-blocking, and anti-discrimination requirements for broadband providers.[36] Under the 2010 Order, "transparency" required broadband providers to disclose things like their network management practices, performance characteristics, and terms and conditions of their broadband services.[37] And "anti-blocking" regulations ensured that providers would not obstruct lawful content, applications or services that compete with their services.[38] Moreover, "anti-discrimination" regulations under the 2010 Order provided that broadband providers would not preference some network traffic at the expense of others.[39]

In response to "[e]merging Internet trends since 2010" which gave the FCC "more, not less, cause for concern about [net neutrality threats]," the Commission adopted the 2015 Open Internet Order to "[ground their] open Internet rules in multiple source of legal authority." In 2015, the FCC adopted a new Open Internet Order, which delineated bright-line rules for regulating threats to the open Internet.[40] The order explicitly bans blocking, throttling, and paid prioritization –the three primary practices the FCC identified as jeopardizing an open Internet.[41] The 2015 Order was also significant in its decision to reclassify broadband service as a telecommunications service and subject broadband providers to certain common carrier regulations under Title II of the Communications Act.[42] Moreover, the Order provided that service

32. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, FCC 05-151, para. 4 (2005), https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf [hereinafter 2005 Policy Statement].

33. NUECHTERLEIN & WEISER, *supra* note 30 at 199.

34. *Id.* at 199.

35. *Id.* at 200.

36. *Id.*

37. FCC, Report and Order on Preserving the Open Internet (Dec. 23, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

38. *Id.*

39. *Id.*

40. 2015 Open Internet Order, 30 FCC Rcd. at 60 (Mar. 12, 2015) https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

41. *Id.*

42. *Id.*

providers cannot unreasonably interfere with consumers' ability to access the Internet or with edge providers' ability to provide services to consumers.[43]

C. Zero-Rating: A Catch-22 for Consumers

It was only a matter of time before zero-rating took center stage in the net neutrality debate, because while the FCC had prohibited fixed ISPs from charging application providers for zero-rating, it did not articulate how it specifically planned to regulate zero-rating.[44] To reiterate, zero-rating is a pricing strategy where ISPs provide consumers with access to content, applications, and services without that access accruing towards their broadband or mobile data caps.[45] To understand zero-rating and the nuances that accompany it, this section will proceed by looking at its actors, the primary site-selection models and sponsorship models.

1. Zero-Rating Actors

The main actors in the zero-rating debate are ISPs and edge providers.[46] As their name suggests, ISPs provide companies and individuals with access to the Internet.[47] Some well-known ISPs are AT&T, WorldNet, and IBM Global Network.[48] There are effectively two types of ISPs under the 2010 Order: fixed-line providers and mobile providers.[49] A fixed-line provider is a "broadband Internet access service that serves end user primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network."[50] mobile provider is "a broadband Internet access service that serves end users primarily using mobile stations."[51] Alternatively, an edge provider is any entity that provides access to Internet content, applications, or services.[52] AT&T's Sponsored Data and Verizon's FreeBee Data 360 are examples of powerful edge providers that will be elaborated upon later.[53] Interestingly, "individuals who generate and share content such as personal blogs or Facebook pages are both end users and edge providers, and a single

43. *See* Kelley Drye, *A First Look at the FCC'S Open Internet Order*, KELLEY DRYE CLIENT ADVISORY (Mar. 26, 2015), http://www.kelleydrye.com/publications/client_advisories/0965 [https://perma.cc/JP3T-VRP7].

44. *See* van Schewick, *supra* note 5.

45. *See* Nowak, *supra* note 2.

46. *See, e.g.*, van Schewick, *supra* note 5 at 3-4.

47. *See* Margaret Rouse, *ISP (Internet Service Provider)*, TECHTARGET (last updated Feb. 2006), http://searchwindevelopment.techtarget.com/definition/ISP [https://perma.cc/LH5A-S8HH].

48. *Id.*

49. 2010 Open Internet Order, *supra* note 51.

50. *See id.* at § 8.11(b).

51. *See id.* at § 8.11(c).

52. *See* Rouse, *supra* note 70.

53. *See* Giuseppe Macri, *Internet, Edge Providers Unite Against FCC Privacy Regulation* (Feb. 12, 2016), http://www.insidesources.com/fcc-internet-privacy-rules-face-opposition/ [https://perma.cc/5MLD-S5K8].

firm could both provide broadband Internet access service and be an edge provider, as with a broadband provider that offers online video content."[54]

2. Zero-Rating Site-Selection Models

Zero-rating exists in basically three models:[55] single-website plans, website bundles, and sponsored data as seen in Figure 1.[56] Single-website plans provide consumers with unlimited access to one website with no impact on their data.[57] The websites are often hand picked according to a provider's own agenda.[58] The second model, website bundles, provides consumers with access to multiple preselected websites[59] for any content provider who is willing to pay.[60] Alternatively, sponsored data plans allow content providers to provide their services to consumers via zero-rating by "sponsoring" the data consumers use so that there is no effect on data usage.[61]

Figure 1: Site-Selections Models in order of increasing user choice.[62]

3. Zero-Rating Sponsorship Models

The sponsorship models and subsequent costs of zero-rating exist in three states, as seen below in Figure 2. Under the self-sponsorship model, edge providers can contract to take on data costs[63] and subsequently, users can only visit the sponsored site(s).[64] WhatsApp, a popular messaging app, uses this model.[65] Under the hybrid-sponsorship model, edge providers pay for their own data while simultaneously subsidizing data that consumers can use towards additional websites of their own choosing.[66] The most altruistic model of the three is the general sponsorship model, where a "benefactor pays for Internet use without promoting its own services."[67]

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54. 2010 Open Internet Order, *supra* note 51 at ¶ 20.
55. *See* van Schewick, *supra* note 5.
56. *See* BJ Ard, *Beyond Neutrality: How Zero Rating Can (Sometimes) Advance User Choice, Innovation, and Democratic Participation,* 75 MD. L. REV. 985, 990-96 (2016).
57. *See id.* at 990.
58. *Id.*
59. *See id.* at 993.
60. *See id.* at 990.
61. *Policy Review*, *supra* note 8.
62. Ard, *supra* note 79 at 993.
63. *See* Rebecca Curwin, *Unlimited Data, but a Limited Net: How Zero-Rated Partnerships Between Mobile Service Providers and Music Streaming Apps Violate Net Neutrality*, 17 COLUM. SCI. & TECH. L. REV. 204, 221 (2015).
64. *See* Ard, *supra* note 79 at 998.
65. *See* Aturo J. Carillo, *Having Your Cake and Eating It Too? Zero-Rating, Net Neutrality, and International Law*, 19 STAN. TECH. L. REV. 364, 373 (2016).
66. *See* Ard, *supra* note 79 at 998.
67. *Id.*

Figure 2: Sponsorship Models in order of increasing user choice.[68]

4. Arguments Surrounding the Zero-Rating Debate

Opponents of zero-rating advocate that it is discriminatory to start-up innovation, free speech, and consumers and undermines the spirit of the Internet. Exchanging fees for zero-rating is harmful to start-ups and small businesses because, unlike established companies, they do not have the extra capital to pay the fees to participate in the zero-rating service.[69] These smaller companies are disproportionally affected by zero-rating plans because larger companies will be able to pay for faster loading speeds or to avoid their content being calculated against users' bandwidth caps which will make them more appealing to consumers.[70] Start-up services will be less competitive and less likely to be used, which infringes upon their ability to exercise their right to free speech.[71] While there is little to no data about how users adjust their behavior in response to mobile data pricing practices, one South African study found that when Twitter was zero-rated, the average user went from exchanging 10 MB to 40 MB per day.[72] Furthermore, opponents contend that despite proponents' arguments that zero-rating lowers the costs for mobile Internet services, there is no evidence or guarantee of this.[73] In reality, "[a]pplication providers will have to recoup the costs of zero-rating somehow – e.g., through higher prices or more advertising on the site. Thus, users will [likely] pay the price."[74] For example, a study found that consumers in Europe were experiencing negative ramifications from ISPs that zero-rated their own applications in the form of increased prices and slower loading speeds.[75]

Underlying these practical implications is the theoretical argument that zero-rating disrupts the fundamental freedom that the Internet was built upon.[76] The Internet has been viewed as an environment where anyone can participate, but without net neutrality, it will be regulated by gatekeepers of sorts.[77] Opponents contend that these gatekeepers will favor ISPs with whom they have contracts or who have the largest audiences,[78] thus negating the spirit of the wide-open web that services like Facebook or Twitter were able to capitalize upon.

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68. *Id.*
69. *See* van Schewick, *supra* note 5.
70. *Id.*
71. *Id.*
72. *See* Nick Feamster, *How Does Zero-Rating Affect Mobile Data Usage*?, FREEDOM TO TINKER (Feb. 10, 2016), https://freedom-to-tinker.com/2016/02/10/how-does-zero-rating-affect-mobile-data-usage/ [https://perma.cc/5EH4-GUV7].
73. *See* van Schewick, *supra* note 5.
74. *Id.*
75. *See id.*
76. *See* Jeremy Malcom et al., *Zero Rating: What It Is and Why You Should Care*, EFF (Feb. 18, 2016), https://www.eff.org/deeplinks/2016/02/zero-rating-what-it-is-why-you-should-care [https://perma.cc/5J5P-K9GA].
77. *See id.*
78. *See id.*

Proponents of zero-rating in developing markets counter that the practice expands the number of people who would otherwise be unable to access the Internet, while simultaneously decreasing costs and increasing consumer choice.[79] By providing differentiated Internet services and varying degrees of access, Internet Service Providers can decrease prices, which increases the number of customers who can afford the service.[80] Because the costs of mobile data services are higher than some people's per capita incomes, many people go without Internet access.[81] However, mobile Internet providers in developing countries have started to offer services like Facebook or local job-search websites as a non-profit public interest service, which means that consumers are no longer faced with preclusive data charges.[82] While proponents concede that these non-profit public Internet services provide limited Internet access, they assert that, "limited access is better than no access because it allows people to communicate and improve their lives using tools that would otherwise remain out of reach."[83] Consequently, the tug of war between zero-rating and net neutrality has been framed as a human rights issue.[84] Proponents for zero-rating contend that disenfranchised people have a right to improve their socio-economic position by accessing the Internet and expressing their fundamental human rights, even if it comes at the expense of curtailing access to the open Internet.[85]

In the U.S., the argument for zero-rating is not centered on its human rights merits but rather on how it advances free market principles.[86] Proponents contend that zero-rating encourages competition because it is a mechanism for smaller service providers to differentiate themselves.[87] By providing customized content, like Sprint with FuboTv, smaller providers are able to attract customers who would otherwise go to larger competitors.[88] Furthermore, proponents advocate that concerns about zero-rating promoting anti-competitive practices are overstated.[89] Many zero-rated programs are "carrier initiated and do not involve payments to carriers by the providers of zero-rated content," which means that start-ups or small businesses will not be that greatly disadvantaged.[90] Moreover, proponents contend that there is

79. FCC, Notice of Proposed Rule to Protect and Promote the Open Internet, (May 15, 2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1_Rcd.pdf.

80. *See* Ellen P. Goodman, *Zero-Rating Broadband Data: Equality and Free Speech at the Network's Other Edge*, 15 COLO. TECH. L.J. 63, 80 (2016).

81. *See* Jeffrey A. Eisenach, *The Economics of Zero Rating*, NERA (Mar. 2015), http://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf [https://perma.cc/JDK5-9XGF].

82. *See* Ard, *supra* note 79 at 993.

83. *Id.* at 986.

84. *See* Carillo, *supra* note 88 at 417.

85. *See id.* at 419.

86. *See* Eisenach, *supra* note 104.

87. *See id.*

88. *See id.*

89. *See id.*

90. *Id.*

no evidence that zero-rated programs lead to discrimination and subsequent exclusivity.[91]

D. Comparing Zero-Rating Under Republican and Democratic Leadership

1. Obama Administration: Pro Regulation and Anti Discriminatory Practices

Under the Obama Administration, the FCC approached zero-rating on a case-by-case basis via the General Conduct Rule.[92] The FCC's 2015 Open Internet Order said that it would not ban zero-rating outright, because zero-rated plans can sometimes be advantageous to consumers.[93] The General Conduct Rule prohibits broadband providers from participating in conduct that:

> Unreasonably interfere[s] with or unreasonably disadvantages[s] (i) 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 (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users.[94]

a. 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services

The Wireless Telecommunications Bureau (WTB) conducted the 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services for the FCC.[95] This report was careful to explain that the WTB did not take issue with zero-rating as a general practice *per se*.[96] The report chose to focus on four zero-rating programs that illustrate the repeated issues that arise from zero-rating; these programs were T-Mobile Binge On, AT&T Data Perks, AT&T Sponsored Data, and Verizon FreeBee Data 360.[97] The WTB analyzed these four plans using the General Conduct Rule.[98]

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91. *See id.*
92. *See* Notice of Proposed Rule to Protect and Promote the Open Internet, FCC Rcd. at 10 (Mar. 12, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1_Rcd.pdf.
93. *See id.* at 66.
94. 2015 Open Internet Order*, supra* note 59.
95. *See Policy Review*, *supra* note 8 at 1.
96. *See id.*
97. *See id.* at 8–9.
98. *See id.* at 3.

b. (a) T-Mobile Binge On

T-Mobile's Binge On is a zero-rated service that streams video services that meet certain technical standards.[99] Essentially, content providers can provide T-Mobile customers with video programming that is comparable to standard definition television, as opposed to high definition.[100] The WTB report found that T-Mobile's Binge On was not discriminatory towards edge providers and customers.[101] Central to this finding was the fact that T-Mobile did not force edge providers or customers to participate in Binge On.[102] T-Mobile does have technical requirements for edge providers that want to stream data but many edge providers have been able to meet these stipulations.[103] Moreover, T-Mobile does not stream its own video programming and is therefore not incentivized to favor its own "downstream" affiliates over unaffiliated edge providers.[104] Also, T-Mobile charges all content providers an identical price.[105]

c. AT&T Data Perks

AT&T Data Perks provides customers with extra data for participating in various activities like watching advertisements, buying products, using promotional games or apps, and completing surveys.[106] Advertisers who want customers to view and interact with their products mostly utilize AT&T Data Perks.[107] The report found that Data Perks does not violate the General Conduct Rule.[108] Once consumers watched a video or downloaded an application, they had relative freedom to use the additional data however they wished.[109] Like T-Mobile's Binge On, AT&T does not have downstream affiliates who use the Data Perks app, which means that unaffiliated providers are not discriminated against in favor of affiliated providers.[110] Furthermore, Data Perks only zero-rates small amounts of data.[111]

d. AT&T Sponsored Data

AT&T Sponsored Data allows third-party edge providers to supply streamed video programming to customers without them having to use their monthly data allotment.[112] The report voiced serious concerns that AT&T

99. *See id.* at 11.
100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *Id.*
105. *See id.*
106. *See id.* at 12.
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.* at 12.

Sponsored Data induces anti-competitive effects and stated that some of AT&T's practices may violate the General Conduct Rule.[113] Specifically, the report noted that AT&T has not provided evidence to counter the presumption that it may be providing Sponsored Data to unaffiliated third parties on less favorable terms than its downstream affiliate, DIRECTV.[114] Such a practice would violate the General Conduct Rule because "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."[115]

e. Verizon FreeBee Data 360

Verizon FreeBee Data 360 allows content providers to pay on a per-gigabyte-used basis for sponsored data to supply Verizon customers with zero-rated content.[116] The WTB found that similar to AT&T Sponsored Data, Verizon's FreeBee Data 360 might also violate the General Conduct Rule by favoring downstream affiliates.[117] The report stated that it was not aware of any safeguard that would prevent Verizon from offering different terms to both affiliated and unaffiliated edge providers.[118]

2. Trump Administration: Seemingly Anti Regulation of Zero-Rating

The election of President Trump in 2017 spurred the reversal of several pro-consumer initiatives like the investigations into AT&T's and Verizon's discriminatory zero-rating practices[119] that were championed by former Chairman Wheeler.[120] President Trump designated Ajit Pai as the new Chairman of the FCC and Chairman Pai's stance on zero-rating is in marked contrast to the Obama Administration's as evidenced by his recent statement: "the Federal Communications Commission will not focus on denying Americans free data. Instead, we will concentrate on expanding broadband deployment and encouraging innovate service offerings."[121] While the FCC has yet to issue a formal policy regarding zero-rating, Chairman Pai's statement in conjunction with the Trump Administration's appointment of Jeffrey Eisenach – an economist in favor of deregulation and zero-rating

113. *See id.*
114. *See id.* at 13.
115. *Id.*
116. *Id.* at 9.
117. *See id.* at 16.
118. *See id.*
119. *See* Gustin, *supra* note 1.
120. *See* Repko, *supra* note 17.
121. *Id.*

practices – to advise on telecom issues makes it likely that zero-rating will not be banned but rather encouraged.[122]

III. THE *MOBILE-SIERRA* DOCTRINE

The rather obscure *Mobile-Sierra* Doctrine authorizes regulatory commissions to adjust private contract rates so that they are "just and reasonable."[123] Under the Doctrine, there is an initial presumption that a rate set in a freely negotiated contract passes the statutory "just and reasonable" standard.[124] However, this presumption is overcome by purchasers or sellers showing extraordinary circumstances or public interest necessity.[125]

A. Background on the Mobile-Sierra Doctrine

The *Mobile-Sierra* Doctrine arises from two Supreme Court cases, *United Gas Pipe Line Co. v. Mobile Gas Service Corp*. and *Federal Power Commission v. Sierra Pacific Power* that addressed whether the Federal Energy Regulatory Commission could modify bilateral contract rates.[126] Under both the Natural Gas Act and Federal Power Act, rates have to be filed with the Commission and any changes to those rates have to go through the Commission: the same bureaucratic process holds true for bilateral contracts.[127] Under both acts, the rates of the utilities need to be "just and reasonable" – what is "just and reasonable" is under the discretion of the Commission.[128]

While the Supreme Court decided both *Mobile* and *Sierra* on the same day, the analytical framework from *Mobile* was used to guide the decision for *Sierra*.[129] In *Mobile*, United Gas Pipe Line Company (United) sought to change the agreed upon rate specified in a long-term contract by filing a new schedule with the Federal Power Commission without the consent of Mobile Gas Service Corporation (Mobile), with whom it had contracted.[130] Mobile contended that United could not unilaterally change a contract rate.[131] The Court held that parties could not unilaterally change contract rates by filing new tariffs because the filing requirement articulated in the Natural Gas Act was a precondition to changing a rate, not an authorization to change rates.[132] The Court applied that rationale to *Sierra* and proceeded to delineate how the

122. *See* Jeff Dunn, It looks like we're going to have a less open internet under Donald Trump, BUS. INSIDER (Nov. 11, 2016), http://www.businessinsider.com/donald-trump-fcc-net-neutrality-zero-rating-policy-future-2016-11 [https://perma.cc/4LY4-CXMF].

123. 62 A.L.R. Fed. 2d 427 (2012).

124. *Id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.*

129. *See* 62 A.L.R. Fed. 2d at 427.

130. *See* United Gas Pipe Line Co., v. Mobile Gas Serv. Corp., 350 U.S. 332, 336 (1956).

131. *See id.*

132. *Id.* at 332.

Commission could determine whether a contract rate was "just and reasonable" and therefore lawful:

> The sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest – as where it might impair the financial ability of the public to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.[133]

Since the *Mobile-Sierra* decisions, courts have further delineated the scope and applicability of the Doctrine. In *In re Permian Basin Area Rate Cases*, the Court stated that agreements should only be changed in circumstances of unequivocal public necessity.[134] Moreover, in *Morgan Stanley Capital Group Inc. v. Public Utility District Number 1*, the Court stated that commissions must presume a rate set in a freely negotiated contract is "just and reasonable," and that presumption is only overcome if the commission finds that the contract is seriously harmful to the public interest or in extraordinary circumstances.[135] When analyzing whether a contract was harmful to the public interest, the Supreme Court clarified that one should not look at whether the public was immediately harmed by the contract, but instead at whether the contract would pose an excessive burden on consumers "down the line."[136] For example: "the disparity between the contract rate and the rates consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional . . . could amount to an 'excessive burden.'"[137]

Lower courts have disagreed as to whether this heightened standard can be overcome.[138] For example, some courts have held allegations of price discrimination resulting from a contract as insufficient to overcome the "just and reasonable" test, but "at least one court has found the anticompetitive effect of a contract price sufficient to rebut the *Mobile-Sierra* presumption."[139]

In *Texaco Inc. and Texaco Gas Marketing Inc. v. Federal Energy Regulatory Commission*, the FERC exercised its authority and changed a contract rate between a pipeline and a shipper to accommodate the public interest requirement of the *Mobile-Sierra* Doctrine.[140] The FERC looked "down the line" and determined that the contractual pricing mechanism used in the first contract would distort gas marketing pricing and would prove anti-competitive to the company's main competitor.[141] The court ultimately

133. Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956).

134. *See* In re Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968).

135. *See* Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1, 554 U.S. 527, 545–46, 550 (2008).

136. *See id.* at 552.

137. *See id.* at 553.

138. *See* 62 A.L.R. Fed. 2d at 427.

139. *Id.*

140. *See* Texaco Inc. and Texaco Gas Marketing Inc. v. Federal Energy Regulatory Com'n, 148 F.3d 1091 (D.C. Cir. 1998).

141. *See id.*

deferred to the Commission's decision, finding that it satisfied its burden of articulating a supportable and reasonable explanation of how the public interest required a modification of a private contract rate.[142] Furthermore, although the court found that the *Mobile-Sierra* Doctrine was not overcome by an amendment of a telecommunications interconnection agreement, the Doctrine has been considered in contracts pertaining to telecommunications, as seen in *Quick Communications, Inc. v. Michigan Bell Telephone Company*.[143]

B. Parties That Have Standing Under the Mobile-Sierra Doctrine

Although courts and interested parties originally assumed that only sellers could challenge rates using the *Mobile-Sierra* Doctrine, the Supreme Court has gone on to clarify that sellers, purchasers, and even non-contracting parties can challenge rates.[144] *In Morgan Stanley Capital Group Inc. v. Public Utility District Number 1*, the Court noted that even though it was sellers in *Mobile* and *Sierra* that challenged the contract rates, purchasers can also challenge contracts.[145] The Court went on to clarify that purchasers have the same burden as sellers in overcoming the presumption that a contract rate is "just and reasonable."[146] The Court cited *Potomac Electric Power Co. v. F.E.R.C.* and *Boston Edison Co. v. F.E.R.C.* in its decision.[147]

1. Standing for Purchasers under the *Mobile-Sierra* Doctrine

In the former case, Potomac Electric Power Co. (PEPCO) requested under the Federal Power Act (FPA) to unilaterally modify its contract rate with Allegheny Power System (APS).[148] PEPCO and FPA entered an agreement stipulating that "PEPCO would purchase contract entitlements to a share of the Ohio Edison System's installed generating capacity and associated energy" and then "APS would purchase from the Ohio Edison System the power intended for PEPCO."[149] APS would then "resell the power purchased from the Ohio Edison System to PEPCO."[150] PEPCO filed a complaint against APS to FERC requesting that FERC order APS to reduce its rate because it was arbitrarily higher than APS' rates for comparable

142. *See id.* at 1097.
143. *See* Quick Communications, Inc. v. Michigan Bell Telephone Co., 515 F.3d 581 (6th Cir. 2008).
144. 62 A.L.R. Fed. 2d at 427.
145. *See* 554 U.S. 527, 534 (2008).
146. *Id.* at 534-35
147. 62 A.L.R. Fed. 2d at 427.
148. *See* Potomac Elec. Power Co. v. F.E.R.C., 210 F.3d 403, 404 (D.C. Cir. 2000).
149. *Id.* at 404.
150. *Id.*

services.[151] PEPCO argued that "the public interest was adversely affected by the contractual rate" because the excessive rates were set entirely by APS and accordingly, PEPCO had little bargaining power at the time because of APS' market power.[152] Ultimately, the court did not question the purchaser's standing but found against PEPCO because it did not produce evidence supporting its claims that the rates were unduly discriminatory or excessively burdensome.[153]

In *Boston Edison Co. v. F.E.R.C.*, municipal customers challenged the rate formula of electricity supply contracts.[154] Boston Edison Co. (BECO) had entered into an energy contract with municipal agencies for the sale of electricity produced at a nuclear power plant in Massachusetts.[155] Customers contended that BECO's inclusion of nuclear plant addition interest in its rate formula subjected them to impermissibly high charges.[156] Unlike in PEPCO, the court found for the purchasers but held that the Commission could not order BECO to refund the overcharges because of the relevant statute of limitations.[157]

2. Standing for Non-Contracting Parties under the *Mobile-Sierra* Doctrine

The Supreme Court states in *NRG Power Marketing, L.L.C. v. Maine Public Utilities Commission* that non-contracting parties can also challenge contract rates under the *Mobile-Sierra* Doctrine because such claims are not dependent on the identity of the complainants who seek them, as seen above.[158] This case involved concerned parties who opposed a comprehensive settlement agreement that involved New England's energy grid.[159] There were issues with the reliability of the grid, so the FERC approved an agreement that established a rate-setting mechanism for energy sales and stated that the *Mobile-Sierra* public interest standard would govern rate challenges.[160] Proponents of the settlement contended that the opponents did not have standing under the *Mobile-Sierra* Doctrine because they were a non-contracting party.[161] The Court of Appeals also found this argument compelling.[162] But, the Supreme Court found differently and reasoned that if commissions must presume that contract rates are "just and reasonable" without being a party to the contract, then it would be counterintuitive for

151. *See id.* at 405.
152. *Id.* at 406.
153. *See id. at 409.*
154. *See* Boston Edison Co. v. F.E.R.C, 856 F.2d 361, 361 (1st Cir. 1988).
155. *See id.* at 362.
156. *See id.* at 363.
157. *See id.* at 374.
158. *See* NRG Power Marketing, LLC v. Maine Public Utilities Com'n., 558 U.S. 165, 176 (2010).
159. *See id.* at 167-68.
160. *See id.* at 168.
161. *See id.*
162. *See id.*

non-contracting parties to not be afforded the same presumption.[163] The Court went on to state that "the *Mobile-Sierra* Doctrine does not overlook third-party interests; it is framed with a view to their protection."[164]

IV. A LAWSUIT IS THE BEST MECHANISM FOR CURBING DISCRIMINATORY ZERO-RATING PRACTICES IN THE CURRENT POLITICAL LANDSCAPE

The FCC's recent dismissal of the WTB's Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services and broader changes in zero-rating regulations demonstrate that any regulation of discriminatory practices will likely not be done on the Commission's own accord. This means that the discriminatory practices alluded to in the 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services will persist and likely expand.[165] Therefore, the best mechanism for regulating discriminatory zero-rating practices and preserving net neutrality under the new Republican leadership is a lawsuit brought by customers, edge providers or non-contracting third parties against AT&T and Verizon via the *Mobile-Sierra* Doctrine. In all of these lawsuits, the challenges would need to overcome the presumption that the contract is "just and reasonable" and prove that the contract is seriously harmful to the public interest or show extraordinary circumstances.[166] Specifically, these potential plaintiffs would need to prove that their respective contracts "impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[167] This argument need not be supported by immediate evidence because the Court has stated that courts should not look at whether the public was immediately harmed by the contract, but instead at whether the contract would pose an excessive burden on consumers "down the line."[168]

A. Lawsuit Brought by Customers Under the Mobile-Sierra Doctrine

Customers of AT&T and Verizon could bring a lawsuit like the customers of electricity in *Boston Edison Co. v. F.E.R.C.*[169] Except in this scenario, customers would not be challenging the formula used to determine their rates[170] but rather the rates themselves. Because AT&T and Verizon are likely favoring their downstream affiliates, DIRECTV and go90 by providing

163. *See id. at 174-75.*
164. *See id.* at 175.
165. *See* Repko, *supra* note 17.
166. *See Morgan Stanley Capital Group Inc.*, 554 U.S. at 550.
167. *Fed. Power Comm'n*, 350 U.S. at 355.
168. *Morgan Stanley Capital Group Inc.*, 554 U.S. at 552-53.
169. *See Boston Edison Co.*, 856 F.2d at 362.
170. *See id.*

them with better terms and conditions compared with unaffiliated content providers,[171] they are subsequently disrupting competition in the market, which impacts the prices offered to consumers. The customers in *BECO* argued similarly that BECO's inclusion of nuclear plant addition interest in its rate forum subjected them to impermissibly high charges, and the court found in the customers' favor.[172] Moreover, unlike the customers in BECO, the customers affected here might even be able to receive refunds for the overcharges, providing that they bring the suit within the statute of limitations.[173]

B. Lawsuit Bought by Unaffiliated Edge Providers Under the Mobile-Sierra Doctrine

Unaffiliated edge providers who are discriminated against should bring a lawsuit against AT&T and Verizon like the purchasers in *Potomac Electric Power Co. v. F.E.R.C*. In *PEPCO*, PEPCO filed a complaint against APS to FERC requesting that FERC order APS to reduce its rate because it was arbitrarily higher than APS' rates for comparable services, which was unduly discriminatory.[174] PEPCO argued that the public interest was adversely affected by the contractual rate because the excessive rates were set entirely by APS and accordingly, PEPCO had little bargaining power at the time because of APS' market power.[175] Here, unaffiliated edge providers should make the same claim if they can show that affiliated providers are getting a better deal. However, in *PEPCO*, the court found in favor of FERC because PEPCO did not produce evidence supporting its claims that the rates were unduly discriminatory or excessively burdensome.[176] Here, unaffiliated edge providers *do* have some evidence that these rates are ultimately unduly discriminatory and burdensome. Digital Fuel Monitor extensively researched the impact of zero-rating in markets outside the United States and found that ISPs were able to raise prices after zero-rating had allowed them to monopolize the market.[177] Conversely, in the Netherlands, where zero-rating was banned, one ISP has already doubled its Internet volume caps.[178] These arguments would likely have merit as the Court explicitly stated that discriminatory effects do not have to be immediate under the *Mobile-Sierra* Doctrine but rather we can look down the line at whether the contract would pose an excessive burden on consumers.[179]

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171. *Policy Review*, *supra* note 8.
172. *See Boston Edison Co.*, 856 F.2d at 363.
173. *See id.* at 372.
174. *See Potomac Elec. Power Co.*, 210 F.3d at 406.
175. *Id.* at 409.
176. *See id*.
177. *See* Antonios Drossos, *The real threat to the open Internet is zero-rated content*, DIGITAL FUEL MONITOR (last visited Apr. 9, 2017), http://dfmonitor.eu/downloads/Webfoundation_guestblog_The_real_threat_open_internet_zerorating.pdf. [https://perma.cc/J324-HKEF].
178. *Id.*
179. *See Morgan Stanley Capital Group Inc.*, 554 U.S. at 527.

C. Lawsuit Brought by Non-Contracting Parties Under the Mobile-Sierra Doctrine

Another solution is for a non-contracting party like Public Knowledge or the ACLU to bring a lawsuit under the *Mobile-Sierra* Doctrine. Again, in *NRG Power Marketing, L.L.C. v. Maine Public Utilities Commission*, the Court held that non-contracting parties can also challenge contract rates under the *Mobile-Sierra* Doctrine because such claims are not dependent on the identity of the complainants who seek them.[180] Here, Public Knowledge would be an ideal party because they are a non-profit organization that advocates for an open Internet.[181] Moreover, the ACLU could be a possible party because they stand for the principle that net neutrality is the only way to preserve the open Internet.[182]

V. CONCLUSION: THE *MOBILE-SIERRA* DOCTRINE: AN UNLIKELY FRIEND FOR OPPONENTS OF ZERO-RATING

Under the FCC's new Republican leadership, the best solution for curbing discriminatory zero-rating practices is a lawsuit arguing that, pursuant to the *Mobile-Sierra* Doctrine, zero-rated contracts like those between AT&T, Verizon and their affiliated providers are harmful to the public interest. Zero-rating has become increasingly debated and controversial since the 2015 Open Internet Order.[183] Opponents contend that it violates the principles of net neutrality and is ultimately harmful to customers.[184] Proponents counter saying zero-rating promotes innovation and is a manifestation of free market principles.[185] Since the 2015 Order, the only formal recognition of the zero-rating conundrum by the FCC was the 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services by the WTB.[186] Unsurprisingly, the 2016 Policy Review found that some zero-rating models are probably unduly discriminatory.[187] However, Commissioner Ajit Pai has stated that he will not be regulating zero-rating, and his dismissal of the WTB's 2016 Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services reflects that sentiment.[188] While certainly an unlikely friend to proponents of zero-rating, the *Sierra-Mobile* Doctrine could serve as a mechanism for a lawsuit that would force the FCC to regulate discriminatory zero-rating practices. Not all zero-rating structures are discriminatory, but some

180. *See NRG Power Mktg., LLC*, 558 U.S. at 176.

181. *See About Us*, PUB. KNOWLEDGE, https://www.publicknowledge.org/about-us/ (last visited Apr. 11, 2017) [https://perma.cc/ZR4X-67Z5]

182. *See Net Neutrality*, ACLU, https://www.aclu.org/issues/free-speech/internet-speech/net-neutrality (last visited April 10, 2017) [https://perma.cc/ESZ2-QZWE].

183. *See* van Schewick, *supra* note 5.

184. *See* Carillo, *supra* note 88 at 377.

185. *See* Ard, *supra* note 79 at 988.

186. *See Policy Review*, *supra* note 8.

187. *See id.*

188. *See* Repko, *supra* note 17.

structures are.[189] Therefore, in order to protect a free and open Internet and the customers who use it, a lawsuit via the *Sierra-M*obile Doctrine is our only hope.

189. *Policy Review*, *supra* note 8.