

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Restoring Internet Freedom |) | WC Docket No. 17-108 |
| _____ |) | |

COMMENTS OF SPRINT CORPORATION

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Sprint Corporation (“Sprint”) submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) latest Notice of Proposed Rulemaking seeking to preserve the future of Internet Freedom.¹

I. INTRODUCTION & SUMMARY

Sprint has a long history of supporting an open Internet. Over the course of many FCC proceedings, Sprint has stated repeatedly that the best way for the FCC to achieve its open Internet goals is through increasing competition and striking a balance that provides clear protections for consumers while also allowing mobile carriers to manage their networks and differentiate their services.² Sprint believes that the appropriate balance can be achieved through simplification and clarification of the rules including

¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (“*2017 NPRM*”).

² *See, e.g.* Reply Comments of Sprint Corporation at 3-4, GN Docket No. 14-20, GN Docket No. 10-127, (filed Sept. 15, 2014); Comments of Sprint Nextel Corp. at 1, GN Docket No. 09-191, WC Docket No. 07-54 (filed Jan. 14, 2010).

eliminating the vague and overbroad Internet conduct standard, adopting a more flexible view of what constitutes reasonable network management, and simplifying the FCC's transparency requirements.

Although well meaning, Sprint believes that the FCC's 2015 open Internet rules created restrictions and uncertainties that negatively affect innovation and competition among mobile broadband Internet access providers. For example, the Internet conduct standard, or "catch-all" rule the FCC adopted in 2015 is vague and overbroad.³ The resulting uncertainty has undermined mobile broadband providers' confidence in introducing innovative price plans, consumer promotions, and other pro-consumer offers for fear of retroactive enforcement of yet unarticulated standards. The FCC, understanding that the potential uncertainty created by the rule might negatively affect innovation, attempted to address that uncertainty by creating a process for obtaining advisory opinions. Unfortunately, the advisory opinion process has also proved to be unworkable from a real-world perspective.⁴ The FCC should eliminate this uncertainty by overturning and eliminating the "catch-all" rule and the accompanying case-by-case enforcement and advisory opinion framework.

The FCC can also increase competition and consumer choice by broadening the definition of reasonable network management so mobile providers can better manage their networks and develop more innovative products. The Commission should eliminate

³ *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 at ¶ 136 (2015) ("2015 Order").

⁴ *Id* at ¶¶ 229-39.

the requirement – added in 2015 – that to qualify as reasonable network management a network management decision cannot include business reasoning.⁵ As a practical matter, virtually *all* network management decision making must take into account financial and business considerations in addition to technical issues. Put differently, every network management decision involves balancing a host of competing factors, each of which potentially can affect a carrier’s bottom line. All mobile carriers share the goal of providing excellent, competitive mobile services over their networks at prices that are attractive to consumers. To achieve this goal, network managers need the flexibility to consider all inputs in deciding how to best manage their networks.

The FCC should also make clear that a mobile broadband provider’s properly disclosed management of classes of applications in a way that is source and content agnostic is both reasonable network management and can enhance consumer choice. There are today applications that, left unmanaged, will occupy more bandwidth than can reasonably be consumed by users of mobile devices. This challenge will likely only deepen in the future. Delivering these applications solely at the maximum available bandwidth, without room for network management or flexibility, has the potential to occupy network resources to the detriment of other users without a corresponding benefit to the subscriber consuming the content. Making clear that mobile carriers are free to offer and consumers are free to choose services that include transparently disclosed

⁵ *Id* at ¶ 216.

management of these applications would spur carrier innovation and increase consumer choice.

Similarly, the FCC should make it clear that mobile broadband Internet access plans that include an unlimited allowance of data are consistent with reasonable network management practices that control the manner in which that data is delivered. Just as customers at an all-you-can-eat buffet understand the food will be served on trays and plates and that no single customer can take all of the food so that no others are able to eat, mobile broadband consumers who choose plans that offer unlimited quantities of data understand they may still be subject to reasonable protocols, customs, and courtesies that ensure other customers have fair access to the services they, too, have purchased.

Improving competition and innovation among mobile broadband providers requires that consumers can make informed decisions. Mobile carriers should make available to all customers the commercial terms of service including charges, fees, and limits, the performance the customer can expect, and information on how the services will be managed. But information overload does not make for better decision-making. Sprint believes the FCC's 2015 transparency enhancements and the subsequently issued staff public notice crossed the line between clear, concise information that is readily available and useful and information overload.⁶ Accordingly, the Commission should return to a simplified transparency rule, including making it clear that carriers can meet

⁶ 2015 Order at ¶ 171 n. 424; *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 30 FCC Rcd 5330, 5338 (rel. May 19, 2016) (“*Guidance PN*”).

the requirements with respect to general network management techniques by referencing a readily available website devoted to such disclosures as it did in 2010.⁷ Certainly consumers who are attracted to a wireless data plan that includes an unlimited amount of data are savvy enough to navigate to a website for further details.

II. THE INTERNET CONDUCT STANDARD HAS IMPEDED COMPETITION AND INNOVATION

A. The Current Internet Conduct Standard Creates Uncertainty That Results in Reduced Innovation and Consumer Choice

In its *2017 NPRM*, the Commission proposes to eliminate the Internet conduct or “catch-all” standard.⁸ This standard gives the FCC an opportunity to review carrier offerings or practices that are in full compliance with the FCC’s bright line rules, but nevertheless somehow “trouble” the Commission.⁹ In other words, the Commission has reserved virtually unrestrained authority to review and declare unlawful – after the fact and on a case-by-case basis – offers or practices that comply with the net neutrality rules, but which the FCC decides unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing, or of edge providers to access consumers.¹⁰ The only guidance the Commission provided on how it might decide whether a given practice was in violation of this rule were five general and non-exclusive “factors” the Commission says it might

⁷ *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, ¶ 57 (2010) (“*2010 Order*”).

⁸ *2017 NPRM* at ¶

⁹ *2015 Order* at ¶135.

¹⁰ *Id* at ¶¶ 136-7.

consider.¹¹ More troubling is that the FCC has delegated the decision-making process to its Enforcement Bureau. This delegation drives even more uncertainty – not only might a carrier practice be found to be unlawful after the fact, but any such decision is also likely to be accompanied by a hefty fine.

Neither the future conduct standard nor its implementing factors provide carriers with reasonable notice of what they are, and are not, allowed to do. The rule forces carriers to follow a decision tree analysis – handicapping unknown factors and reading tea leaves found in Commission statements, speeches, public notices, and press releases – just to hazard an educated guess at the lawfulness of a proposed course of action. Unquestionably, eliminating this Internet conduct standard will promote service-related innovation by eliminating the uncertainty caused by vague and undefined regulation.

B. The Process for Seeking FCC Guidance Is Unworkable

Although one court held that the rule’s voluntary guidance process saved it from being unconstitutionally vague,¹² the advisory opinion process does not mitigate the chilling effect the “catch all” rule places on carrier innovation. Some of the fault lies in process itself.

For example, as with interpretation of the Internet conduct standard in general, the FCC did not delegate responsibility for addressing requests for advisory opinions to one of the FCC policy Bureaus with responsibility over broadband. Rather the Commission

¹¹ *Id.* at ¶¶ 139-45.

¹² See *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 736-740 (D.C. Cir 2016), *reh’g en banc denied*, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017)

has delegated responsibility directly to the Enforcement Bureau.¹³ Moreover, the FCC has not placed any bounds on the Enforcement Bureau’s discretion in handling requests for advisory opinions. The Enforcement Bureau has discretion in choosing whether to respond to a request,¹⁴ will only respond to a request relating to prospective or proposed conduct,¹⁵ and has the discretion to initiate an enforcement investigation if it believes the conduct might violate the open Internet rules.¹⁶

The Commission did not establish any deadline for providing an advisory opinion nor did the Commission establish any certainty for parties that might attempt to rely on such an opinion. Even where a party has “fully, completely, and accurately presented to the Bureau all relevant facts,” any advisory opinion is issued by the Bureau on the express condition that it is without prejudice to the Enforcement Bureau’s ability to reconsider, rescind, or revoke the opinion—or the Commission’s right to later rescind an advisory opinion.¹⁷ In a competitive industry where plans of action are discussed, modified, refined up to the last minute before being introduced into the market, it is simply not possible to rely on a process without timelines, certainty, confidentiality, or guarantee of any kind.

¹³ 2015 Order at ¶ 231.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 232.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 235.

III. CLARIFYING THE DEFINITION OF REASONABLE NETWORK MANAGEMENT WILL ALLOW MOBILE PROVIDERS TO BETTER MANAGE THEIR NETWORKS AND DEVELOP MORE INNOVATIVE PRODUCTS

To account for changing patterns of consumption and growing consumer desire for mobile access to high bandwidth services, the FCC should modify its reasonable network management standard to provide mobile carriers more flexibility in managing their networks. For example, in 2016, mobile video traffic accounted for 60 percent of total mobile data traffic globally.¹⁸ Cisco projects that global mobile data traffic will increase seven-fold between 2016 and 2021, growing at a compound annual growth rate of 47 percent and reaching 49.0 exabytes per month by 2021.¹⁹ Of the 49 exabytes per month crossing the mobile network by 2021, 38 exabytes will be mobile video.²⁰

Similarly, Virtual Reality (VR) and Augmented Reality (AR) applications and service are poised to be massive drivers of mobile Internet traffic in the next five years. VR immerses users in a simulated environment, while AR is typically an overlay of technology on the real world. While gaming tends to drive the development of VR applications, AR is driven by applications that enhance retail, medicine, education, tourism and other external interactions. According to Cisco, the accelerated acquisition of smartphones, tablets, and wearable devices is significantly contributing to the

¹⁸ Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021 White Paper* at 2 (February 7, 2017) (*Cisco VNI*) available at: <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.html>.

¹⁹ *Id* at 3.

²⁰ *Id* at 22.

development of AR and VR markets, as globally smartphones will be 53.1% of device connections by 2021 and VR headsets are expected to grow from an installed base of 18 million in 2016 to nearly a 100 million by 2021.²¹ Cisco projects that global VR traffic will grow eleven-fold from 13.3 Petabytes per month in 2016, to 140 Petabytes per month in 2021 and that global AR traffic will increase seven-fold between 2016 and 2021, from 3 Petabytes per month in 2016 to 21 Petabytes per month in 2021.²²

To manage the growth in contemporary streaming applications and changing trends in application consumption, mobile broadband Internet access providers will require significantly more flexibility than the 2015 Open Internet Rules provide. Network managers will be required to balance technical and business considerations in managing tonnage and allocating network resources, find ways to deliver quality, high-bandwidth application experiences to consumers without negatively impacting consumers of other applications, and deliver compelling service offerings to consumers with ever changing patterns of consumption.

A. Reasonable Network Management Includes Financial and Other Business Considerations

The FCC should revise its current definition of reasonable network management to make it clear that financial and other business considerations can be a legitimate basis on which to build reasonable network management strategies. In the *2015 Order*, the Commission narrowed its definition of reasonable network management to exclude from

²¹ *Id* at 23.

²² *Id* at 24.

the definition of reasonable network management actions taken for reasons other than purely technical management purposes. In particular, the Commission stated that “[f]or a practice to even be considered under [the network management] exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network management justification rather than other business justifications.”²³

This requirement ignores the simple reality that virtually all network management decisions involve balancing of limited resources, including financial resources, and other considerations that are not purely technical. These considerations include managing limited spectrum and network resources in a dynamic environment, addressing network issues associated with mobility, and integrating costly and constantly advancing technological and network upgrades to address ever evolving consumer demands.

By returning to a broader definition of what constitutes reasonable network management, the FCC would reduce uncertainty and stimulate creative efforts among carriers to better provide advanced services to their customers. The FCC would also stimulate investment and competition by permitting network managers to more appropriately balance capital expenditures on network and other business decisions with the technical realities associated with delivering higher bandwidth applications.

²³ 2015 Order at ¶ 216.

B. Placing Disclosed, Source, Content, and Destination Agnostic Throughput or Service Restrictions on High Bandwidth Applications Is Reasonable Network Management

Changing patterns of consumption and growing consumer desire for mobile access to high-bandwidth services also place unique technical resource management challenges on providers of mobile broadband. For example, as demand for mobile video services has ballooned, mobile network operators have had to respond by experimenting with network management techniques designed to optimize the video viewing experience for video consumers while preserving network resources to ensure other types of applications have fair access to the resources needed to enjoy those applications.

Some of these techniques involve placing disclosed, source, content, and destination agnostic rate limits on high bandwidth applications. For example on some of Sprint's service plans, Sprint applies a throughput limit of 2 Mbps on streaming mobile video services. At this throughput level, consumers of video services on a smartphone or tablet can enjoy a high-quality, standard definition video experience while at the same time assisting Sprint in managing tonnage on the network.

While Sprint does not believe that the FCC in 2015 intended to prohibit this type of network management (the 2015 rules certainly contemplate that carriers could engage in this type of practice),²⁴ the 2015 formulation of "reasonable network management" is so narrow that the exception might not be available for this clearly benign form of

²⁴ See, e.g. 2015 Order at ¶169 (discussing how carriers should disclose application-based network management practices).

network management. By broadening the formulation of the reasonable network management exception to make it clear that source, content, and destination agnostic management of classes of applications is permissible, the FCC could stimulate experimentation, innovation, and consumer choice in mobile data plans and services.

C. Unlimited Data Plans Can Be Subject to Disclosed Network Management

The FCC could significantly increase innovation and consumer choice in mobile broadband by revising the way that the FCC views reasonable network management and the accompanying disclosures associated with mobile data plans that offer unlimited quantities of data. In a series of recent enforcement actions, the FCC appears to be championing the view that mobile carriers cannot apply network management to data plans that are advertised as providing unlimited quantities of data because, even when disclosed, those techniques are inconsistent with the concept of “unlimited.”²⁵

The error in this view is that consumers do not understand offers of unlimited data – or even offers of unlimited high-speed data – to mean that the data will always be delivered to them at the maximum possible rate without regard to other customer demands, other network priorities, or any other network management concern. This strict reading of the term “unlimited” is not consistent with consumers’ everyday understanding of the concept of “unlimited” in other common commercial settings.

²⁵ *AT&T Mobility LLC*, Notice of Apparent Liability for Forfeiture and Order, FCC 15-63, 30 FCC Rcd. 6613 (2015); *T-Mobile USA, Inc.*, Order and Consent Decree, DA 12-1125, (rel. Oct. 19, 2016).

Customers at an all-you-can-eat buffet, understand the food will be served on trays and plates and others will continue to be permitted to eat. Purchasers of unlimited car wash plans understand they must still wait in line behind other customers for a wash. A motorist who purchases an unlimited towing plan does not expect the towing service to tow the vehicle to and from the office as a substitute for commuting. And consumers of mobile broadband plans that offer unlimited quantities of data understand they may still be subject to reasonable protocols, customs, and courtesies to ensure other customers have fair access to the services they too have purchased.

The broad and all-encompassing reading the FCC has attributed to commercial offerings of unlimited data plans has a chilling effect on competition and plan innovation and is inconsistent with consumers' everyday understanding of the commercial use of the term "unlimited." Overly burdensome regulation of carriers' ability to manage their networks threatens their ability to continue offering unlimited data plans, which would rob consumers of the benefits they enjoy under such plans, including the elimination of overage charges and the end of consumers being forced to carefully monitor their data consumption. By relaxing its definition of the term and clarifying that mobile broadband Internet access plans that include unlimited amounts of data are consistent with disclosed, reasonable network management techniques, the FCC will increase competition and innovation in mobile broadband plans.

IV. SIMPLE AND CLEAR TRANSPARENCY WILL IMPROVE CONSUMER CHOICE AND CARRIER INNOVATION

Providing customers with accurate, clear, and concise information promotes competition, innovation, and high-quality services that drive consumer demand and

broadband investment and deployment. Sprint provides consumers and edge providers with a wealth of information regarding its network management practices, performance characteristics, and commercial terms through a webpage devoted to open Internet disclosures and with other web pages and plan materials providing greater detail for those requiring it.²⁶ And Sprint is committed to continuing to provide the transparency both customers and edge providers expect.

However, as Sprint commented in response to the FCC's *2014 NPRM*, Sprint believes that a number of the transparency rule enhancements, adopted by the Commission in 2015, have the opposite of the intended effect. These so called "enhancements" provide little or no consumer or edge provider benefit. On the contrary, they have created consumer confusion and have resulted in significant and unnecessary burdens for mobile carriers.

A. The FCC Should Make It Clear That Carriers Can Disclose Their Network Management Practices on a Publicly Available Web Page

No one disagrees that for consumers to make informed choices in selecting their mobile broadband services, consumers must have access to accurate information about the commercial terms, performance, and network management associated with their broadband Internet access services. This does not, however, mean that every consumer must be forced to read every disclosure on every product to make what they consider to

²⁶ Open Internet Information, Sprint.com, *available at* http://www.sprint.com/legal/open_internet_information.html.

be an informed choice. Some consumers may purchase services based on price alone, while others may be concerned about coverage areas or the availability of particular smartphones.

Recognizing that making information easily available in a concise format would encourage informed decision making, the Commission in 2010 made it clear that carriers could satisfy the transparency requirements by prominently displaying or providing links to their network management disclosures “on a publicly available easily accessible website.”²⁷ Unfortunately both in the *2015 Order* and in a subsequent staff public notice issued in 2016, the Commission appears to have backtracked on this simple way to satisfy the transparency requirement.²⁸

It is Sprint’s view that information overload does not make for better decision-making. The FCC can strike the right balance between clear, concise, easily-available and useful information and detail overload by simplifying the rule. Carriers should be able to meet the disclosure requirements regarding general network management techniques by referencing a readily available website devoted to such disclosures.

B. The FCC Should Eliminate the 2015 Enhancements and Withdraw the Staff’s 2016 Guidance Public Notice

In the *2015 Order* and subsequent 2016 *Guidance PN*, the Commission and staff adopted a large number of detailed and confusing “enhancements” requiring extremely

²⁷ *2010 Order* at ¶ 57.

²⁸ *2015 Order* at ¶ 171 n. 424; *Guidance PN* at 5338.

granular disclosures of actual network performance on a geographic basis.²⁹ The staff also declared the FCC’s Measuring Mobile Broadband America program as a “safe harbor” for actual performance drawing objections from the highly-professional, independent, competitive benchmarking industry.³⁰

The enhancements and subsequent guidance were so confusing and questionable in their value to consumers that the Office of Management and Budget took over two years to complete their review of the enhancements. In the end, the OMB only approved certain of the enhancements subject to a long list of conditions the FCC must satisfy before any future OMB renewal, and disallowing the FCC declaration of the Measuring Mobile Broadband America program as a safe harbor for carrier disclosures of actual performance.³¹ Given the potential for information overload and the highly questionable value of the enhancements to consumer decision making, the FCC should take this opportunity to eliminate the 2015 enhancements and withdraw the FCC staff’s 2016 *Guidance PN*.

V. CONCLUSION

For the foregoing reasons, Sprint believes the Commission can best increase competition and protect an open Internet through a return to simpler and clearer open Internet rules. The Commission should eliminate the Internet conduct standard, which is

²⁹ 2015 Order at ¶¶ 162-170; *Guidance PN* at 5332-5338.

³⁰ See, e.g. Letter from Bryan Darr, President and CEO Mosaik, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (dated Jul. 15, 2016).

³¹ See *Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements*, Public Notice, GN Docket No. 14-28, DA 16-1400 (rel. Dec. 16, 2016).

vague, overbroad and significantly reduces carrier innovation in consumer offerings. The Commission should also return to a more encompassing view of what constitutes reasonable network management to provide mobile broadband Internet service providers with additional flexibility in managing their networks and developing service offerings. Finally, the FCC should adopt a simplified transparency requirement that provides consumers with access to simple, clear, and accurate information regarding the commercial terms, performance, and network management customers can expect from their services, including through links to easily accessible websites.

Respectfully submitted,

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