

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF T-MOBILE USA, INC.

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EXECUTIVE SUMMARY

T-Mobile has long supported and continues to support an “Open Internet” and the core principles of net neutrality. Indeed, customers demand and deserve assurances that broadband providers will not block or impair lawful traffic without customer consent, and will fully disclose relevant facts and information regarding the services they offer. But these principles should be assured via a light regulatory touch framework or legislation, rather than via heavy handed, utility-style regulation that inhibits the pro-consumer, innovative role that T-Mobile is playing in the marketplace.

While T-Mobile supports an Open Internet, the 2015 *Title II Order* transformed what had been a reasonable Open Internet framework into a set of rules that are – as applied by the Commission – overly prescriptive and vague. These rules harm consumers, unnecessarily burden business operations, and chill and slow innovation.

Accordingly, T-Mobile urges the Commission to reaffirm its commitment to basic net neutrality principles akin to those articulated by Chairman Powell and set out in the 2005 Internet Policy Statement, and also urges the Commission to support Congressional action codifying such a non-Title II Open Internet framework.

The Commission should revise its regulatory regime recognizing that one-size-fits-all solutions are likely to restrict the options available to consumers and thus undermine consumer welfare. Mobile broadband customers have, and make, many choices regarding the nature of the services to which they subscribe. These choices allow them to configure their services in ways that best suit their own lives and needs. For example, customers can choose from a variety of rate plans with differing features, such as picking Standard Definition rather than High Definition video to conserve data or save money.

The competitive mobile marketplace in fact requires providers to meet customers’ needs. A company that acts contrary to consumers’ preferences will lose business to one that responds to customers’ demands. T-Mobile’s customer growth and success in the competitive mobile wireless broadband marketplace confirms this. There is no need for – and instead affirmative harm in – regulators unnecessarily substituting their judgment for that of consumers.

While T-Mobile supports customer-driven Open Internet principles, the *Title II Order* overreached in classifying mobile broadband as a utility-style telecommunications service/commercial mobile service (“CMRS”) and in imposing the vague “general conduct standard” (“GCS”), which subjects business decisions to uncertainty and regulatory overhang. T-Mobile’s experience with Binge On – which enabled T-Mobile to better compete against larger behemoths – demonstrates the GCS’s problems: The program was introduced into a competitive marketplace, was well disclosed, quickly became very popular with consumers, and allowed open participation by content providers. Nevertheless, Commission staff launched a year-long inquiry into its lawfulness, consuming resources and potentially chilling future offerings. And by the time the inquiry had concluded – finding that Binge On did not violate the Commission’s rules – T-Mobile had already moved on to new offerings. While the staff was well-meaning, this experience demonstrated to T-Mobile the flaws in the current rules.

The Commission should restore its prior conclusion that mobile broadband Internet access is an integrated information service. The Commission likewise should reinstate its prior holding that mobile broadband is a private mobile service.

The Commission also should eliminate or modify various other requirements. It should eliminate the GCS, and should conform the transparency rule to the intent of the 2010 Order, rescinding or clarifying various other statements made in the years since then that expanded that rule's scope.

For any rules the agency maintains, it should modify the reasonable network management exception to allow for flexible provider network management efforts, particularly for mobile networks, which rely on radio access and spectrum for service. It likewise should modify the enforcement regime and role of the Enforcement Bureau for any rules it maintains.

The agency also should confirm that mobile broadband Internet access is a wholly interstate service and best evaluated within a national framework. Therefore, it should preempt states and localities from enacting or enforcing net neutrality requirements.

Ultimately, however, Congress must act to eliminate regulatory uncertainty. Absent such action, ambiguities regarding the Commission's legal authority in this arena will lead to repeated disputes and shifting regulatory seesaws. The Commission should support an appropriate legislative solution to finally resolve this matter with a non-Title II Open Internet framework.

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COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”)¹ has long supported an Open Internet and core net neutrality principles. As the “Un-carrier,” T-Mobile works constantly to develop innovative plans and services at compelling prices that anticipate and satisfy consumers’ needs, eliminating customer pain points along the way. In the intensely competitive mobile wireless marketplace, this entails providing the openness that consumers demand – including assurances that providers will disclose relevant facts and information regarding the services they offer, and will not block, impair, or degrade lawful traffic without customer consent.

The 2015 *Title II Order*, however, went too far and transformed what had been a reasonable “Open Internet” framework into an overly prescriptive set of rules that are unnecessarily cumbersome and chill innovation. By deeming mobile broadband Internet access a “telecommunications service” and a “commercial mobile radio service” for the first time and applying to it a vague and far-reaching “general conduct” standard, the Commission subjected innovative consumer offerings to ongoing legal uncertainty. The chilling effect of this regulatory overhang is not a theoretical concern, and, in fact, became a troubling reality for T-Mobile when its highly popular new service offerings prompted undue FCC staff scrutiny. The general conduct standard, in particular, has curbed innovation in the mobile broadband space. In

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

addition, other aspects of the *Title II Order* have also harmed consumers, providers, and the broader Internet ecosystem.

The Commission should revise its regulatory regime by correcting these missteps. But Commission action alone is no longer sufficient. More than a decade after Chairman Powell articulated his four “Internet freedoms”² and the Commission issued the 2005 *Internet Policy Statement*, there still exist fundamental disputes regarding the source of the Commission’s authority over broadband Internet access. And the questions at stake in this proceeding are likely to endure so long as shifting Commission majorities continue to determine the nature and scope of any broadband regulation based on legislation enacted at the dawn of the Internet era.³ To set any regulatory framework on a strong and enduring statutory footing, and to facilitate continued mobile broadband competition and innovation, T-Mobile urges the Commission to support Congressional action to establish a stable Commission framework in this area. Any framework must avoid heavy handed utility-style regulation and not inhibit pro-consumer competition and innovation in the vibrant Internet ecosystem.

In the meanwhile, T-Mobile urges the Commission to provide much-needed certainty for all parties by applying the appropriate Open Internet framework. To this end, the Commission should:

- (1) reaffirm its commitment to basic network neutrality principles akin to those articulated by Chairman Powell and set out in the 2005 *Internet Policy Statement*, subject to common-sense exceptions in cases of customer-selected practices, reasonable network management, and the like;
- (2) make clear that mobile broadband Internet access is an information service, not a Title II common carrier “telecommunications service,” and also is a

² Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. on Telecomm. & High Tech.L. 5 (2004).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

private mobile service (“PMRS”), not a commercial mobile radio service (“CMRS”); and

- (3) confirm that mobile broadband Internet access is a wholly interstate service and thus requires a national framework, and rule that states may not adopt or enforce net neutrality requirements (*i.e.*, mandates affecting ISPs’ obligations with regard to transparency or the blocking, impairing, or prioritization of Internet traffic).

I. THE COMMISSION SHOULD PROTECT CORE NETWORK NEUTRALITY PRINCIPLES IN A MANNER THAT ACCOUNTS FOR FIERCE AND EVOLVING MOBILE BROADBAND COMPETITION

The last time the Commission took up the issue of Internet openness, the result was criticized by one of its own former chief economists as being premised on economic analysis that was “wrong, unsupported, or irrelevant.”⁴ Mobile broadband consumers cannot afford for this mistake to be repeated. We are at the dawn of 5G and if the U.S. is to retain its leadership in wireless innovation, the Commission must take into account the data that the *Title II Order* ignored. The data points to a single conclusion: There can be no doubt that the mobile broadband marketplace is fiercely competitive, and becoming increasingly competitive as fixed broadband providers, such as Comcast and Charter, are now offering mobile broadband services. Competition of this sort is the best mechanism for ensuring customer-driven openness.

A. As the “Un-Carrier,” T-Mobile Supports Internet Openness and is Committed to Customer Choice.

For years, T-Mobile’s brand has been predicated on customer choice. Through a series of “Un-carrier” moves, T-Mobile has demonstrated its commitment to the proposition that the customer – not the provider, and not any third party – is best situated to determine which services

⁴ Tim Brennan, *Is the Open Internet Order an “Economics-Free Zone”?*, Vol. 11 No. 2 The Free State Foundation at 2 (June 28, 2016), http://www.freestatefoundation.org/images/Is_the_Open_Internet_-_Order_an_Economics_Free_Zone_062816.pdf; see also L. Gordon Crovitz, ‘Economics-Free’ Obamanet, *Wall St. J.* (Jan, 31, 2016), <https://www.wsj.com/articles/economics-free-obamanet-1454282427> (discussing quote in which Mr. Brennan called the *Title II Order* an “economics-free zone”).

and features will best address his or her specific needs. As T-Mobile has shown, customers are happiest when they choose whether and when to change providers, how much data they wish to have available, what speeds they wish to enjoy, and whether to save their data or dollars by viewing videos in standard definition rather than high definition. Mobile broadband service providers must be ever-focused on ensuring that their customers receive the services and features they desire at competitive prices or those customers will leave them. T-Mobile has succeeded in the marketplace by responding to these needs.⁵

By contrast, a regulatory regime that unnecessarily constrains customer choices or hampers service providers in fulfilling customer preferences risks diminishing customer welfare across-the-board. Still worse, while market mechanisms quickly signal service providers when consumers are dissatisfied, there is no equivalent mechanism to inform regulators quickly and reliably that their efforts to substitute their own preferences or prophecies for those of the marketplace have led to dissatisfaction. In short, then, a competitive marketplace can self-correct, whereas undue regulatory mandates effectively cannot.

B. In the Competitive Mobile Broadband Marketplace, Providers Must Meet Customers' Demands, Including Demands for Internet Openness.

There can be no doubt that the mobile wireless broadband marketplace is fiercely competitive. This competition requires providers to satisfy consumers' demands for openness to remain viable and to continue to attract and retain customers. In this environment, heavy-handed regulations are unnecessary at best, and outright harmful at worst.

⁵ In 2016, T-Mobile added over eight million net customers for the third year in a row, bringing its customer total to 71.5 million. See T-Mobile, *T-Mobile Delivers Strong Customer Growth – ONCE AGAIN: Q4* (Jan. 5, 2017), <https://newsroom.t-mobile.com/news-and-blogs/q416-prelim-results.htm>.

Over 120 facilities-based service providers offer mobile wireless service within the United States,⁶ and new services continue to enter. Mobile virtual network operators (“MVNOs”) and newer entrants such as Comcast continue to develop an ever-increasing role in connectivity;⁷ Tracfone, for example, ranks fifth among all providers of mobile service, facilities-based or otherwise.⁸ And alternative connectivity methods are poised to alter the mobile broadband marketplace even more; analysts estimate that there will be more than 75 million Wi-Fi hotspots in the U.S. by 2018, a 6,000 percent increase in four years alone.⁹ New entrants such as Google,¹⁰ Microsoft,¹¹ Comcast,¹² and Charter¹³ are providing or will provide wireless broadband service. Usage is skyrocketing: amidst global mobile data traffic growth of 63 percent in 2016 alone,¹⁴ the U.S. leads the globe in monthly data traffic per smartphone.¹⁵

⁶ Industry Analysis and Technology Div., Voice Telephone Services: Status as of June 30, 2016, at 10 Table 2 (Apr. 2017).

⁷ Rick Karpinski, *US mobile virtual network operators at a crossroads*, 451 Research (Feb. 27, 2017), <https://451research.com/report-short?entityId=91715&referrer=marketing>.

⁸ Tracfone Wireless, Inc.’s Petition for Designation as a Lifeline Broadband Provider, WC Docket No. 09-197, at 2 (Oct. 31, 2016).

⁹ iPass, *Wi-Fi Growth Map*, <http://www.ipass.com/wifi-growth-map/> (last visited July 15, 2017) (citing Maravedis Wireless Infrastructure analysts).

¹⁰ See, e.g., Google, *Meet Project Fi, a wireless service from Google*, <https://fi.google.com/about/> (last visited July 15, 2017).

¹¹ Microsoft, *A Rural Broadband Strategy: Connecting Rural America to New Opportunities*, https://msblob.blob.core.windows.net/ncmedia/2017/07/WEW4382_Microsoft-Broadband-TV-Sheet_LV8.pdf.

¹² See, e.g., Brian Fung, *Comcast wants to be your new cellphone carrier. Here’s everything you need to know*, Wash. Post (Apr. 6, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/04/06/-comcast-wants-be-your-new-cellphone-carrier-heres-everything-you-need-to-know/?utm_term=.5-dde6160808f; Xfinity, <https://www.xfinity.com/mobile/> (last visited July 15, 2017).

¹³ See, e.g., Chad Bray, *Comcast and Charter Communications Form Wireless Alliance*, N.Y. Times (May 8, 2017), <https://www.nytimes.com/2017/05/08/.../comcast-charter-communications-deal.html> (“Charter has said it plans to offer wireless service in 2018.”)

¹⁴ Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016-2021 White Paper* (updated Mar. 28, 2017), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/mobile-white-paper-c11-520862.html>

From 2015-2016, mobile data traffic in the United States increased by over 4 trillion megabytes (a 35x increase over 2010 data traffic volume).¹⁶

The variety of choices means that customers can – and do – easily shift from one mobile wireless provider to another if their demands are not being fulfilled. This is especially true in the wake of T-Mobile’s industry-leading move away from long-term service contracts¹⁷ and its other Un-carrier moves,¹⁸ which have freed consumers to respond quickly to valuable new offerings. T-Mobile’s success in innovating¹⁹ has caused other mobile providers to make significant changes to long-standing practices and offers, again to meet customer needs – a recent example

¹⁵ Ericsson, *Ericsson Mobility Report: On the Pulse of the Networked Society*, at 2 (June 2016), <https://www.ericsson.com/res/docs/2016/ericsson-mobility-report-2016.pdf>.

¹⁶ See CTIA, *Americans’ Wireless Data Usage Continues to Skyrocket*, (May 9, 2017), <https://www.ctia.org/industry-data/press-releases-details/press-releases/americans-wireless-data-usage-continues-to-skyrocket>; CTIA, *Wireless Quick Facts*, (Nov. 2016), <https://www.ctia.org/industry-data/wireless-quick-facts> (last visited July 15, 2017).

¹⁷ See T-Mobile, *T-Mobile’s Un-carrier 4.0 Event: T-Mobile Delivers Contract Freedom for Families By Paying Off Early Termination Fees* (Jan. 8, 2014), <https://newsroom.t-mobile.com/media-kits/t-mobiles-un-carrier-40-event.htm> (announcing T-Mobile’s industry-first offer to pay early termination fees for consumers switching from other providers); Trevor Thomas, *No regrets: Switch to the better network and receive up to \$650*, Verizon (Dec. 28, 2015), <https://www.verizonwireless.com/news/article/2015-12/no-regrets-switch-to-the-better-network-and-receive-up-to-650.html/> (Verizon announcing a switch-subsidizing promotion).

¹⁸ See, e.g., T-Mobile, *T-Mobile Cranks Up the Volume on Music Freedom*, (Aug. 27, 2014), <https://newsroom.t-mobile.com/news-and-blogs/music-streaming-momentum-update.htm> (announcing an expansion of participating streaming music services in T-Mobile’s “Music Freedom” free data program); T-Mobile, *T-Mobile Unleashes Mobile Video with Binge On* (Nov. 10, 2015), <https://newsroom.t-mobile.com/media-kits/un-carrier-x.htm> (announcing the beginning of T-Mobile’s innovative and popular free data streaming program, “Binge On”); T-Mobile, *T-Mobile Announces 6th Expansion of Binge On in Just 7 Months – Now Has Nearly 90 Providers Streaming Free* (June 14, 2016), <https://newsroom.t-mobile.com/news-and-blogs/binge-on-new-providers-june-2016.htm>;

¹⁹ T-Mobile, *T-Mobile’s Binge On Brings More Cowbell: Now Over 80 Video Services Stream Free Without Using Your Data* (May 17, 2016), <https://newsroom.t-mobile.com/news-and-blogs/binge-on-adds-more-cowbell.htm> (explaining that not only did 92% of T-Mobile customers say they would be watching more videos as a result of the program, 89% of U.S. wireless consumers said the program would be appealing if offered by their provider – and 94% said they would try a new online service if it was part of a free data offering like Binge On).

being T-Mobile's move towards ubiquitous unlimited service plans, prompting the industry to follow its lead.²⁰

The competitiveness of the mobile wireless marketplace, coupled with the move away from long-term service contracts, leave T-Mobile and its rivals acutely aware of customer demands with respect to Internet openness. Consumers want (1) straightforward disclosures that inform them regarding the nature of the services they are buying, but that do not burden them with information that is not relevant or is confusing (e.g. overly technical), and (2) the freedom to access websites, services, applications, and content of their choice without unreasonable interference. Mobile broadband providers ignore these demands at their own peril. There is no need for – and instead affirmative harm in – Commission action unnecessarily substituting its own judgment for that of consumers.

II. THE *TITLE II ORDER* ESTABLISHED A FLAWED LEGAL FRAMEWORK THAT HARMS INNOVATION AND UNDERMINES CONSUMER INTERESTS

While T-Mobile supports customer-driven Internet openness, the regulatory regime in place today undercuts consumer interests and should be revised. The *Title II Order* overreached on several fronts, but the most harmful aspects of the framework it erected were (1) the classification of mobile broadband Internet access as a telecommunications service/commercial mobile radio service and (2) the related imposition of the vague “general conduct standard,” subject to case-by-case review of any broadband provider's plans, pricing, or practices, and

²⁰ T-Mobile, *Hello Un-carrier 12 ... R.I.P. Data Plans: T-Mobile Goes All In on Unlimited* (Aug. 18, 2016), <https://newsroom.t-mobile.com/news-and-blogs/rip-data-plans.htm>; Verizon, *Get unlimited data on the network you deserve: Verizon* (Feb. 12, 2017), <http://www.verizon.com/about/news/get-unlimited-data-network-you-deserve-verizon>; AT&T, *AT&T Brings New Unlimited Wireless and Entertainment Deals to Market*, (Feb. 27, 2017), http://about.att.com/story/att_brings_new_unlimited_wireless_and_entertainment_deals_to_market.html.

subject to a set of highly subjective factors.²¹ Application of the GCS’s broad and ambiguous requirements subjects any decision made by a provider regarding a new service offering or practice to uncertainty and regulatory overhang, undercutting the business case for any innovative product that might stray from the offerings of the past even when judged highly desirable by consumers.

This concern is not simply theoretical, as T-Mobile knows from its own experience. In late 2015, the company began offering Binge On – which provided zero-rated video content, optimized for a smaller mobile device screen. T-Mobile offered comprehensive notifications and disclosures regarding the terms of the new feature. And it was based on choices made available to both the customer (*i.e.*, whether to toggle the Binge On feature off or on) and the edge provider (*i.e.*, whether to participate in zero rating). Binge On was free to customers and edge providers alike, and was open to all edge providers on competitively neutral terms. Like T-Mobile’s other “Un-carrier” decisions, Binge On allowed T-Mobile to set itself apart from its competitors by offering a creative solution to the skyrocketing demand for mobile video that other carriers had answered with overage charges and higher-priced plans. Binge On allowed customers to extend their high speed data use on their plans at no additional cost, while still giving them control over their video viewing experience. It also improved overall network performance and capacity, again benefitting customers.

²¹ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5660 ¶ 137 (2015) (“*Title II Order*”) (“We note that the [GCS] represents our interpretation of sections 201 and 202 in the broadband Internet access context....”).

In short, Binge On was a “poster child” for the type of innovative, pro-competitive, pro-consumer policies that the Commission should have encouraged. It quickly became apparent that customers and content providers alike were enjoying Binge On’s benefits. For example:

- A poll conducted in January 2016 found that about 90 percent of consumers found Binge On to be “extremely, very, or somewhat appealing.” Of T-Mobile customers surveyed, 92 percent said that they would watch more video with Binge On, and 69 percent of other carriers’ customers said that they would expect to pay extra for Binge On.²²
- As of April 2016, of the video delivered on T-Mobile’s network, 70 percent was streamed without a data charge.²³
- A July 2016 survey of Binge On video service providers showed that 80 percent of providers surveyed were seeing customers watch longer, watch more frequently, or watch more on mobile phones.²⁴
- Although content providers were offered the chance to opt out of Binge On without any consequence, no provider exercised this option.
- Although Binge On was introduced with 24 video providers, it quickly grew to offer zero-rated video from more than 100 video services, at no additional charge and subject to completely neutral eligibility criteria.
- Smaller video providers sent a letter to the Commissioners in July 2016 stating that “[p]articipation in the Binge On platform has greatly increased the visibility and exposure for our services, increasing both the overall number of viewers and the number of hours viewed by consumers.”²⁵

²² See T-Mobile, *Video Viewing Skyrockets – More Than Doubling – with T-Mobile’s Binge On* (Jan. 28, 2016), <http://t-mo.co/258L5HH>.

²³ See T-Mobile, *To Celebrate the Amping Up of Binge On and Music Freedom, T-Mobile Serves Up Half-Off Tablet Offer* (Apr. 5, 2016), <https://newsroom.t-mobile.com/news-and-blogs/tablet-bundle-offer.htm>.

²⁴ T-Mobile, *T-Mobile Quadruples Binge On Services, Now Over 100 Video Providers Stream Data-Free* (July 26, 2016), <https://newsroom.t-mobile.com/news-and-blogs/binge-on-100-providers.htm>.

²⁵ See Letter from Baebble Music et al., to Tom Wheeler, Federal Communications Commission, Chairman et al., GN Docket No. 14-28, at 1 (July 26, 2016).

Despite this clear and convincing evidence of Binge On’s ecosystem-wide benefits – and notwithstanding Chairman Wheeler’s initial praise for the offering²⁶ – FCC staff soon raised questions about the program’s lawfulness. The fact that Binge On was a highly transparent program, launched in a highly competitive mobile wireless marketplace (where it was free to rise and fall on its own merits), should have been dispositive, but it was not. Some net neutrality purists argued that Binge On was a rule violation regardless of its pro-competitive, pro-consumer impact.²⁷ For nearly a full year, the company was asked to respond to multiple FCC staff inquiries, all apparently designed to determine whether the wildly popular Binge On program somehow violated the net neutrality rules and harmed consumers. While the staff was well-meaning and professional, the fact remains that, during that time, Binge On – which had become a centerpiece of T-Mobile’s portfolio of offerings – remained in legal jeopardy.

Ultimately, under Chairman Wheeler, the staff issued a Report addressing Binge On and other mobile carriers’ “zero-rating” plans.²⁸ That Report concluded, in relevant part, that “it is

²⁶ Speaking to the press following the Commission’s November 2015 open meeting, then-Chairman Wheeler praised Binge On as “pro-competition and pro-innovation,” saying the product was “[c]learly ... highly innovative and highly competitive.” See, e.g., Todd Shields, *T-Mobile Offering Is ‘Highly Innovative,’ FCC Chief Wheeler Says*, Bloomberg Tech. (Nov. 19, 2015), <http://www.bloomberg.com/news/articles/2015-11-19/t-mobile-offering-is-highly-innovative-fcc-chief-wheeler-says>.

²⁷ See, e.g., Barbara van Schewick, *T-Mobile’s Binge On Violates Key Net Neutrality Principles* (Jan. 29, 2016), <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>; Timothy Karr, *T-Mobile’s Arbitrary Data Caps Make No Sense*, Free Press (Nov. 10, 2015), <https://www.freepress.net/press-release/107199/t-mobile-arbitrary-data-caps-make-no-sense> (criticizing T-Mobile’s Binge On product); Jason Koebler, *So This Is How Net Neutrality Dies: Not with court battles, but with “free” data*, Motherboard (Nov. 19, 2015), https://motherboard.vice.com/en_us/article/so-this-is-how-net-neutrality-dies. See also Susan Crawford, *Zero for Conduct*, Backchannel (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868> (“Zero-rating is pernicious; it’s dangerous; it’s malignant. Regulators around the world are watching how the US deals with zero-rating, and we should outlaw it. Immediately.”).

²⁸ Federal Communications Commission, Wireless Telecommunications Bureau Report, *Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero-Rated Content and Services*, (rel. Jan. 11, 2017) https://apps.fcc.gov/edocs_public/attachmatch/DOC-342987A1.pdf (subsequently rescinded).

unlikely that the [Binge On] offering violates the [GCS].”²⁹ And Chairman Pai subsequently rescinded the letter *in toto*, sparing at least for now, other providers’ zero-rating plans from further jeopardy.³⁰

T-Mobile was able to navigate the Binge On inquiry to a favorable conclusion. Nevertheless, so long as the vague general conduct standard remains on the books, plans like Binge On – and other offerings – remain at risk. They may be questioned or even potentially found unlawful, irrespective of their competitive impact, the fact that they are premised on customer choice, or other factors that show them to advance the public interest. Ultimately, this uncertainty will continue to blunt innovation and impede market-based efforts to provide additional value to consumers. It will also force companies like T-Mobile to allocate limited resources to regulatory filings and possible litigation – resources that would better be spent developing and building better networks and services for consumers.

T-Mobile’s experience with Binge On also shows that regulatory review can never be a match for the speed, force, and benefits of market competition. Even before the FCC staff’s review was complete, T-Mobile had moved on from Binge On to a popular new unlimited plan (T-Mobile ONE) that directly resulted from the Binge On offering – and T-Mobile’s Un-carrier offers and services continue to evolve. In a marketplace where regulators are still pondering yesterday’s news as new innovative offerings are introduced, undue regulatory intervention is chilling and harmful.

²⁹ *Id.* at 11 (emphasis added).

³⁰ *Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services*, Order, 32 FCC Rcd 1093 (WTB 2017).

III. THE COMMISSION SHOULD RESTORE MOBILE BROADBAND INTERNET ACCESS'S HISTORICAL CLASSIFICATION AS AN INTEGRATED INFORMATION SERVICE

The *Notice* proposes to return to the long-standing treatment of broadband Internet access as an integrated information service and to its 2007 determination that mobile broadband Internet access is a private mobile service (and hence not subject to common carrier treatment).³¹

T-Mobile supports these results.

A. Mobile Broadband Internet Access is Properly Deemed an Integrated Information Service.

In a series of decisions between 2002 and 2007, the Commission repeatedly and correctly found that broadband Internet access is an integrated information service, no matter what technological platform the provider relied upon.³² The Supreme Court upheld the core interpretive decisions underlying this approach (as laid out in the *2002 Cable Modem Order*) in 2005's *Brand X* decision.³³

The *Title II Order* reversed these decisions. The majority's conclusions were based on its claims that broadband providers "primarily" offered "Internet connectivity and transmission capability,"³⁴ which customers often use to access third-party content,³⁵ and that providers'

³¹*Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434, 4441 ¶ 24 (2017) ("*Notice*").

³² See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Order*"); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*"), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*").

³³ *Brand X*, 545 U.S. 967.

³⁴ *Title II Order*, 30 FCC Rcd at 5755 ¶ 351.

marketing materials “emphasize transmission speed as the predominant feature that characterize” their offerings.³⁶ The majority further believed that functionalities inherent to the transmission – including caching and DNS³⁷ – fell into the “network management” exception to the “information service” definition.³⁸

The *Title II Order* was wrong on this issue. If anything, the transmission and processing utilized by mobile broadband offerings are becoming more, not less, integrated. Moreover, customers have always *viewed* mobile broadband Internet access as offering the capability to access websites, email, and other functionalities, not as pure transmission distinct from those offerings.³⁹ T-Mobile’s mobile data customers are purchasing “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁴⁰ Put differently, in the words of the *Wireless Broadband Order*, they are seeking a service that “combines computer processing, information provision, and computer interactivity with data transport, enabling [them] to run a variety of

³⁵ *See id.* at 5753-55 ¶¶ 347-50.

³⁶ *Id.* at 5755 ¶ 351.

³⁷ The Commission has defined caching as “the storing of copies of content at locations in a network closer to subscribers than the original source of the content,” enabling “more rapid retrieval of information from websites that subscribers wish to see most often.” Caching may be undertaken by the ISP or a third party, such as a content delivery network. *See id.* at 5758 n.973. As the Commission has explained, the domain name system (“DNS”) “enables the translation of domain names into IP addresses. When queried about a domain name, a DNS server provides the querier with the IP address of the domain name or the IP address of another DNS server that may provide the IP address of the domain name if the original DNS server does not know how to translate a particular domain name.” *See Cable Modem Order*, 17 FCC Rcd at 4810 n.74.

³⁸ *Title II Order*, 30 FCC Rcd at 5765-75 ¶¶ 365-81.

³⁹ *See id.* at 5750 ¶ 342 (explaining that the *Brand X* majority and dissent both relied on customers’ perceptions regarding the nature of broadband Internet access).

⁴⁰ 47 U.S.C. § 153(24) (defining “information service”).

applications,”⁴¹ including not only the email and websites of 2007 but also streaming video, real-time gaming, and other advanced offerings of 2017.

The *Title II Order*’s “network management exception” argument also was flawed. That exception applies only to functionalities that merely facilitate *transmission* and do not provide enhanced capabilities to the user.⁴² In contrast, caching and DNS are themselves valuable to consumers, and facilitate the provision of an information service.

Finally, the Commission has ample discretion to change its position here and revert to its previous (and correct) interpretation of the Act’s terms. *Brand X* and *USTelecom v. FCC* both were premised on the ambiguity of the governing statutory terms, and thus contemplated that the FCC enjoyed discretion to adopt any reasonable interpretation.⁴³ And in *Brand X*, a majority of the Supreme Court expressly deemed the “information service” approach reasonable.⁴⁴ New evidence regarding the effect of the *Title II Order* on innovation also warrants that decision’s review and reversal.

B. Mobile Broadband Internet Access is Properly Deemed a Private Mobile Service.

The Commission should also reverse the *Title II Order*’s erroneous holding that mobile broadband was not PMRS but rather CMRS.

⁴¹ *Wireless Broadband Order*, 22 FCC Rcd 5904 ¶ 7.

⁴² As the *Title II Order* acknowledged, the network management exception codified the preexisting “adjunct to basic” category. See *Title II Order* 30 FCC Rcd at 5736 ¶ 312 & n.804. That category, however, was limited to services that “facilitate use of the basic network without changing the nature of basic telephone service.” *No. Am. Telecomms. Ass’n*, Memorandum Opinion and Order, 101 F.C.C.2d 349, 361 ¶ 28 (1985). Functionalities such as DNS and caching do not simply facilitate telecommunications (much less a basic *telephone service*). Rather, they form a core component of the features users seek from broadband Internet access – the ability to enter a website address and access, manipulate, and otherwise interact with stored data. These are the hallmarks of an information service.

⁴³ *Brand X*, 545 U.S. at 981-82; *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 384-85 (D.C. Cir. 2017).

⁴⁴ See *Brand X*, 545 U.S. at 998-1000.

Under the terms of Section 332, a commercial mobile service is an mobile offering “that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.”⁴⁵ The term “interconnected service,” in turn, means in relevant part “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission). . . .”⁴⁶ In contrast, a “private mobile service” is a mobile service “that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”⁴⁷ Under the Act, an entity providing a private mobile service “shall not . . . be treated as a common carrier for any purpose. . . .”⁴⁸

In 2007, the Commission rightly found that mobile broadband was a “private mobile service,” because it was not interconnected with the “public switched network.” Section 332, it recognized, requires interconnection with “the traditional local exchange or interexchange switched network” and “use of the North American Numbering Plan.”⁴⁹

The *Title II Order* strained hard to reverse these conclusions. First, it found that mobile broadband was interconnected with the “public switched network,” amending its rules to provide for the first time that the “public switched network” meant networks defined by telephone

⁴⁵ 47 U.S.C. § 332(d)(1).

⁴⁶ *Id.* § 332(d)(2).

⁴⁷ *Id.* § 332(d)(3).

⁴⁸ *Id.* § 332(c)(2).

⁴⁹ *Wireless Broadband Order*, 22 FCC Rcd at 5917 ¶ 44, quoting *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1436-37, ¶¶ 59-60 (1994).

number endpoints and IP addresses.⁵⁰ The Commission also found that mobile broadband “interconnected” with the public switched telephone network because broadband customers using voice over Internet protocol (“VoIP”) could call telephone numbers.⁵¹ Finally, the majority held that mobile broadband was functionally equivalent to mobile telephony.⁵²

These 2015 decisions should be reversed. Legislative history and extensive precedent make clear that Congress intended only services using the public switched *telephone* network to be deemed CMRS. Before Congress enacted the CMRS definition in 1993, the Commission and the courts had routinely used the term “public switched network” to mean the “telephone network.”⁵³ The 1993 Conference Report, moreover, showed that Congress used “public switched network” to mean “the [p]ublic switched telephone network.”⁵⁴

Even if one ignored Congress’s intent and years of precedent, the suggestion that the telephone network and the Internet comprise a single, unified network – “*the* public switched network” – makes no sense. Congress had in mind a single network, not two distinct and different networks with extremely limited interaction. Nor does the existence of VoIP offerings render the telephone network and the Internet interconnected: Only a tiny percentage of Internet endpoints can interconnect with the telephone network through VoIP applications. One cannot

⁵⁰ *Title II Order*, 30 FCC Rcd at 5779-80 ¶ 391.

⁵¹ *Id.* at 5786-87 ¶ 400.

⁵² *Id.* at 5788-89 ¶ 404.

⁵³ The Commission in 1981 had observed that “the public switched network interconnects all telephones in the country.” *Applications of Winter Park Tel. Co.*, 84 F.C.C.2d 689, 690 n.3 (1981). The next year, the D.C. Circuit defined the public switched network as “the same network over which regular long distance calls travel.” *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982). To be sure, technology evolved between 1981 and 1993. But in the face of existing precedent defining the term “public switched network,” Congress is expected to have endorsed that precedent unless it stated an intention to depart from it, which it did not.

⁵⁴ H.R. Rep. No. 103-213, at 495 (1993).

call a website, a video stream, or an IP-enabled refrigerator. Finally, the *Title II Order*'s test for "functional equivalence" is not valid. The mere facts that mobile voice and mobile broadband are both widely available and both offer the capability of communication does not render them equivalent in the eyes of consumers, and should not subject them to the same regulatory frameworks.

IV. THE COMMISSION SHOULD ELIMINATE OR MODIFY VARIOUS RULES

A. The Commission Should Eliminate the General Conduct Standard.

As discussed above, the GCS is not workable and leads to uncertainty, undermining innovation and harming consumer interests. Further, the *Title II Order* acknowledges that the GCS is a manifestation of Title II's core provisions (Sections 201 and 202) in the broadband context.⁵⁵ As such, the GCS cannot survive re-reclassification even if its survival were otherwise appropriate (which again it is not).

The day the *Title II Order* was adopted, then-Chairman Wheeler responded to a question regarding what behavior the GCS permitted and prohibited by acknowledging "we don't really know." Rather, "the FCC will sit there as a referee able to throw the flag."⁵⁶ A rule whose bounds cannot be delineated by its principal champion is problematic and too vague to be applied by broadband providers in the marketplace. The Commission should eliminate the GCS, as the *Notice* proposes.⁵⁷

⁵⁵ *Title II Order*, 30 FCC Rcd at 5660 ¶ 137.

⁵⁶ Federal Communications Commission, February 2015 Open Commission Meeting, Chairman Tom Wheeler, Press Conference, at 166:39–166:52 (Feb. 26, 2015), <https://www.fcc.gov/news-events/events/2015/02/february-2015-open-commission-meeting>.

⁵⁷ *See Notice*, 32 FCC Rcd at 4458-59 ¶¶ 72-75.

B. The Commission Should Conform the Transparency Rule to the Intent of the 2010 Order.

As explained above, T-Mobile supports transparency requirements, and has worked to ensure that its customers (and all consumers) have the information necessary to make informed market choices. Transparency has been important for T-Mobile and its success in the competitive marketplace.

The *Title II Order*, without amending the text of the transparency rule, broadened it well beyond its original intent. The Commission should now rescind and/or amend those changes, and conform the rule to the Commission’s intent in 2010. The 2015 “enhancements” and interpretations are burdensome and confusing, and do not provide helpful consumer information. At a minimum, the Commission should take the following steps:

First, consistent with its original intent, the Commission should make clear that the rule “requires[s] *only* that providers post disclosures on their websites and provide disclosure at the point of sale.”⁵⁸ In that regard, it should repudiate the novel interpretation, first expressed by the Enforcement Bureau in an “Enforcement Advisory,” that the rule applies to “all advertisements and other public statements that broadband Internet access providers make about their services....”⁵⁹ This interpretation effectively modified the transparency rule without notice and

⁵⁸ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17939-40 ¶ 59 (2010) (“*2010 Order*”) (emphasis added), 18037 ¶ 54 (Final Regulatory Flexibility Analysis) (emphasis added). *Accord Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices*, FCC Supporting Statement at 3, OMB No. 3060-1158 (July 2011) (the transparency rule “*requires only* that providers post disclosures on their websites, and direct consumers to such websites at the point of sale.”) (emphasis added).

⁵⁹ *Open Internet Transparency Rules, Broadband Providers Must Disclose Accurate Information to Protect Consumers*, FCC Enforcement Advisory, 29 FCC Rcd 8606 (EB 2014). While the Commission assumed the validity of the Enforcement Bureau’s interpretation in its discussion of the 2010 Transparency Rule in the *Title II Order*, 30 FCC Rcd at 5671-72 ¶¶ 160-161, it appears not to have focused on the radical departure of that interpretation from the Commission’s original interpretation. In that regard, the serious overreach represented by this enforcement advisory is a good example of why the

comment and had no basis in the original rule. Advertising mandates raise a host of issues not within the scope of the FCC’s core expertise, and are better addressed through mechanisms other than the Commission’s open Internet rules.

Second, the Commission should make clear the disclosure required at the point of sale. As articulated by the Commission in adopting the transparency rule, ISPs can comply with the point-of-sale requirement by “provid[ing] links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users.”⁶⁰ The Commission muddled this requirement in the *Title II Order* by stating that, for compliance with the point-of-sale requirement, “[i]t is not sufficient for broadband providers simply to provide a link to their disclosures.”⁶¹ Matters were confused still further by the staff’s *2015 Guidance*, which said that this statement “was intended to explain that, while disclosures may be made via a link to a website, for those disclosures to be meaningful, [broadband] providers must ensure that consumers actually receive any Open Internet-related information that is relevant to their purchasing decision at all potential points of sale....”⁶² In this connection, the Commission should grant the pending applications for review of the *2015 Guidance* filed by CTIA and the Competitive Carriers Association (“CCA”) with respect to the point-of-sale requirement.⁶³

Commission should prohibit the Enforcement Bureau from issuing new interpretations of the Open Internet rules as opposed to enforcing them where appropriate.

⁶⁰ *2010 Order*, 25 FCC Rcd at 17939-40 ¶ 57.

⁶¹ *Title II Order*, 30 FCC Rcd at 5677 n.424.

⁶² *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330, 5338-39 (Chief Technologist/OGC/EB 2016) (“*2015 Guidance*”), *applications for review pending*.

⁶³ Application for Review of CTIA, GN Docket No. 14-28 (filed June 20, 2016) (“CTIA Application for Review”); Application for Review of Competitive Carriers Ass’n, GN Docket No. 14-28 (filed June 20, 2016) (“CCA Application for Review”).

Third, the Commission should more generally grant the CTIA and CCA applications for review of the *2015 Guidance*. In that regard, it should rescind that document’s language regarding performance reporting at the Cellular Market Area (“CMA”) level.⁶⁴ CMAs provide an unrealistic level of geographic granularity that is not helpful to consumers. Moreover, many customers have no idea what a CMA is, do not purchase service by CMA, do not know what CMA they are in, and will use service across multiple CMAs.⁶⁵ In any event, it often is not technically feasible for a mobile provide to collect or report information at the CMA level. The Commission should recognize this by formally eliminating this guidance.

The Commission should also confirm that, notwithstanding the *2015 Guidance*,⁶⁶ mobile broadband providers need not provide the Measuring Broadband America (“MBA”) data to satisfy their disclosure obligations with regard to speed and latency. The Office of Management and Budget (“OMB”) declined to approve mobile MBA as a safe harbor under the Paperwork Reduction Act (“PRA”)⁶⁷ and any requirement to use such data would be flawed in numerous respects.⁶⁸ Ultimately, the Commission’s failure to seek public feedback on its attempted use of the mobile MBA program as a safe harbor resulted in an unrealistic and undesirable policy outcome, which the Commission should reverse.

⁶⁴ See *2015 Guidance*, 31 FCC Rcd at 5335.

⁶⁵ See CTIA Application for Review at 10-12, CCA Application for Review at 13-14.

⁶⁶ See *2015 Guidance*, 31 FCC Rcd at 5335.

⁶⁷ Transparency Rule Disclosures, Notice of Office of Management and Budget Action, OMB Control No. 3060-1220 (approved Dec. 15, 2016) (“Transparency Rule Disclosures”), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-3060-012#section0_anchor.

⁶⁸ See CTIA Application for Review at 12-15; CCA Application for Review at 14-16.

Fourth, the Commission should formally revoke the requirement in the *Title II Order* that mobile providers make specific disclosures regarding packet loss.⁶⁹ OMB declined to approve the “packet loss” requirement under the PRA, and the Commission should accordingly eliminate it.⁷⁰ The use of packet loss as a “one-size-fits-all” labeling metric ignores the fundamental realities faced by many providers – particularly rural providers, whose services may experience highly variable packet loss rates based on topography or physical obstructions.⁷¹ More important, packet loss figures are largely useless to consumers, who often have no way to evaluate this type of information. And perhaps most important of all, reporting on packet loss is in many cases technically infeasible. The Commission should rescind this unduly burdensome and largely useless metric from any transparency obligation.

C. The Commission Should Modify the Reasonable Network Management Exception for Any Applicable Rules it Maintains or Adopts.

Beginning with the 2005 *Internet Policy Statement* and through the 2010 *Open Internet Order*, the Commission appropriately recognized the importance of a reasonable network management exception to its Open Internet principles and rules. The *Title II Order*, however, departed in several ways from the common-sense approach of the past. That decision held that “[f]or a practice to even be considered under this exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network

⁶⁹ *Title II Order*, 30 FCC Rcd at 5673-74 ¶ 166.

⁷⁰ Transparency Rule Disclosures, *supra* note 67.

⁷¹ CCA Application for Review at 19 n.50 (“Rural networks can include geographic areas with a variety of topography or physical features that impede or enhance transmissions, as well as equipment supplied by multiple vendors, frequencies in several bands, and sites using different types of transmitters. Therefore, providing a single number merely to make use of the disclosure label would mislead the public – an outcome that no one desires.”).

management justification rather than other business justifications.”⁷² It further provided that the Commission’s analysis might turn on “whether the practice is triggered only during times of congestion and whether it is based on a user’s demand during the period of congestion.”⁷³

These two breaks from the prior approach introduced new difficulties and uncertainties for effective network management efforts and reduce rather than enhance consumer welfare. They should be reversed. Mobile broadband providers seeking to provide the best experience for their users must constantly and aggressively manage their networks to accommodate skyrocketing demand and always-limited spectrum resources. This challenge will only grow with increasing mobile demand and the deployment of 5G offerings. The 2015 limitations on systemic efforts to mitigate congestion and on any mechanisms that could potentially be challenged as being premised on “business justifications” undermine providers’ ability to promote rational, user-friendly allocation of limited network resources. While some network management strategies will likely be focused on particular times and locations in which congestion occurs, providers must also be free to adopt preventative measures to curb congestion *before* it occurs, and to pursue strategies that will conserve capacity network-wide. Such strategies might also affect the providers’ costs and/or revenues, raising the prospect that critics will falsely assert an impermissible business motivation, effectively gutting the reasonable network management exception. The Commission should make clear that providers retain latitude to manage their networks for the benefit of customers free from such second-guessing.

⁷² *Title II Order*, 30 FCC Rcd 5700 ¶ 216.

⁷³ *Id.* at 5702 ¶ 220.

D. In the Event the Commission Adopts or Maintains Open Internet Rules, it Should Modify the Enforcement Regime and Role of the Enforcement Bureau.

In recent years, the Commission’s enforcement program lost sight of its core goal – to take enforcement action as appropriate “when there is a clear violation of [FCC] regulations,” not to make new policy.⁷⁴ Several aspects of the *2015 Open Internet Order* empowered the Enforcement Bureau’s recent misguided policymaking agenda and should be reversed. Specifically, T-Mobile proposes the following changes to the Open Internet enforcement regime in the event the Commission chooses to adopt or retain Open Internet rules.

First, the Commission should revoke the authority of the Enforcement Bureau to provide “guidance” regarding ambiguities and uncertainties in the Open Internet rules through either “advisory opinions” or “enforcement advisories.”⁷⁵ Any such guidance regarding the Open Internet rules (and FCC rules generally) should be provided through the relevant policy-making bureau(s), *not* the Enforcement Bureau.⁷⁶

Second, and in a similar vein, the Commission should eliminate its Open Internet formal complaint rules, which it described as “comparable to the section 208 formal complaint rules....”⁷⁷ With reclassification, ISPs will no longer be common carriers.⁷⁸ Where there are

⁷⁴ Ajit Pai, Commissioner, Federal Communications Commission, Remarks at the PLI/FCBA 33rd Annual Institute on Telecommunications Policy & Regulation, at 3 (Dec. 3, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-336693A1.pdf. See also Michael O’Rielly, Commissioner, Federal Communications Commission, Remarks on FCC Enforcement: Questionable Priorities & Wrong Directions (Jun. 11, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333879A1.pdf.

⁷⁵ *Title II Order*, 30 FCC Rcd at 5706 ¶ 229, 5710 ¶ 241.

⁷⁶ The policy-making bureaus may issue declaratory ruling orders (or draft such items for the Commission’s consideration) to provide guidance as appropriate. See 47 C.F.R. § 1.2 (stating that the Commission “may, . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty”).

⁷⁷ *Title II Order*, 30 FCC Rcd at 5713 ¶ 252.

clear rule violations, the Enforcement Bureau can investigate and take or recommend enforcement action based on informal requests for investigation or informal complaints. Where there is uncertainty about the rules, ISPs should not be put through an expensive and burdensome process of defending themselves in a formal adjudicatory proceeding for the law to be clarified. Here, too, declaratory rulings are sufficient to resolve uncertainty. If, however, the formal complaint rules are maintained, the Commission should eliminate any suggestion that, in the absence of a *prima facie* showing by the complainant, the defendant still “must show they are in compliance with the rules.”⁷⁹ This is manifestly unfair.

Third, consistent with these changes focused on delineating the proper role of the Enforcement Bureau as handling enforcement matters and not making policy, the Commission should also instruct the Enforcement Bureau to focus its Open Internet investigations and related enforcement actions on situations involving clear violations of the rules, keeping in mind the admonishment of the D.C. Circuit that the relevant standard for imposing a penalty is not that the agency’s interpretation of its regulations is “reasonable” but rather whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with *ascertainable certainty*, the standards with which the agency expects parties to confirm”⁸⁰ The Commission should make clear to the Enforcement

⁷⁸ 47 U.S.C. §§ 206-209. Outside the context of such statutory rights, there is no need for a formal complaint process to decide, “us[ing] a case-by-case approach, taking into account the totality of the circumstances, . . . alleged violations of the open Internet rules.” *Title II Order*, 30 FCC Rcd at 5711 ¶ 246.

⁷⁹ *Title II Order*, 30 FCC Rcd at 5713 ¶ 252.

⁸⁰ *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (emphasis added) (citations omitted). *See also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

Bureau that its responsibility is manifestly *not* to take enforcement areas involving “gray areas” of the law⁸¹ or where there is no demonstration of consumer harm.

Fourth, if it maintains a transparency rule (or any other Open Internet rule), the Commission should also clarify that a violation of any such rule with respect to customers as a whole or to a class of customers is a single violation for penalty purposes, and that there is not a separate violation for each customer.⁸² For example, treating every instance in which a customer read or might have read the disclosure as a distinct violation eviscerates the statutory maximum.⁸³ As then-Commissioner Pai stated in an analogous context in which the Commission treated an allegedly unlawful data security practice as a separate violation for all affected customers such that the statutory maximum was \$9 billion, “[i]t strains credulity to think that Congress intended such massive potential liability....”⁸⁴

V. THE COMMISSION SHOULD CONFIRM THAT MOBILE BROADBAND INTERNET ACCESS IS A WHOLLY INTERSTATE SERVICE

A national framework is needed for mobile broadband Internet access service. In this regard, for decades, the Commission has recognized on a bipartisan basis that broadband Internet access is an inherently interstate service.⁸⁵ The *Title II Order* “reaffirm[ed] the Commission’s

⁸¹ See Brendan Sasso, *The FCC’s \$365 Million Man*, Nat’l J. (Apr. 26, 2015), <http://goo.gl/8QuT6h> (quoting then-Enforcement Bureau Chief Travis LeBlanc) (“when it’s clear that something is impermissible, [regulated companies] generally don’t do it So when you’re in enforcement, you’re almost always working in a gray area.”).

⁸² 47 C.F.R. § 1.80(b)(9)(D)(ii).

⁸³ See *AT&T Mobility, LLC*, Notice of Apparent Liability for Forfeiture and Order, 30 FCC Rcd 6613, 6625 ¶ 38 (2015) (noting “astronomical” result obtained using per-customer approach).

⁸⁴ *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, 13350 (2014) (Dissenting Statement of Commissioner Ajit Pai).

⁸⁵ See, e.g., *Cable Modem Order*, 17 FCC Rcd at 4832 ¶ 59 (observing that the “points among which” broadband communications travel “are often in different states and different countries”); *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 28 (“Having concluded that wireless broadband Internet access service is an information service, we also find that the service is jurisdictionally interstate.”); *GTE*

longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.”⁸⁶ This conclusion is clearly correct. Indeed, the inherently interstate and international character of Internet communications is even *more* obvious in the context of mobile broadband than with regard to fixed broadband, because nomadic services are, by their nature, more conducive to boundary-crossing use. During the course of a fixed broadband communication, a user in one state will almost surely interact many times with information stored in other states and other nations. A mobile broadband communication involves that as well, but adds the possibility that the user herself will transit between or among states during the course of a single session.

Given the inherently interstate (and international) nature of the communications at issue, all participants in the mobile ecosystem – customers, providers, and others – benefit from a uniform federal regulatory framework. A patchwork quilt of state-by-state regulation would impair providers’ ability to offer nationwide service plans and to engage in uniform practices, undermining consumer welfare. It adds operational and financial burdens without corresponding benefit.

Yet without further action, the benefits of national uniformity are at risk. While the *Title II Order* recognized the “Internet’s inherently global and open architecture,” it left open the prospect that states could continue to regulate, except when such regulation “conflict[s] with federal law.”⁸⁷ Since that decision issued, T-Mobile and other providers have seen state regulators take an increasingly active role with respect to broadband Internet access service.

Telephone Operating Cos., Memorandum Opinion and Order, 13 FCC Rcd 22466, 22474-75 ¶ 16 (1998).

⁸⁶ *Title II Order*, 30 FCC Rcd at 5803 ¶ 431.

⁸⁷ *Id.*

Having shown their propensity to regulate broadband, it is virtually certain that they will try to do so again absent a definitive bar. Such actions will impose significant costs and undermine consumer interests. Even if providers could be sure that the FCC would step in quickly to preempt regulations that directly undercut federal law, the result would still be months of uncertainty and the expenditure of significant resources while the agency considered and ruled on the conflict. And even when the state law poses no direct conflict with federal law or policy (or other *states'* laws or policies), it still will result in patchwork regulation, either balkanizing a service provider's offerings or forcing the provider to conform all its offerings to the requirements of the most stringent state. Moreover, such regulations inevitably encumber intrastate traffic, likely including traffic that never even transits the state whose mandates are at issue.

In light of the above, the Commission should clarify that there is no separate state jurisdiction to enact or enforce net neutrality requirements – including requirements addressing an ISP's broadband-related disclosures or practices with regard to blocking, degrading, or prioritizing traffic. These areas are appropriately left to the federal government's exclusive jurisdiction.⁸⁸

VI. THE COMMISSION SHOULD SUPPORT CONGRESSIONAL REFORM TO ELIMINATE REGULATORY UNCERTAINTY

If decades of debate over Internet openness and broadband classification have taught anything, it is that uncertainty regarding the Commission's legal authority in this arena will lead to repeated disputes, and regulatory whiplash in the absence of Congressional direction. Cable

⁸⁸ Nothing herein would preclude states from exercising their traditional jurisdiction over consumer protection matters, so long as such exercise did not touch on net neutrality-related obligations involving transparency or the treatment of broadband traffic as it transits the ISP's network.

modem service,⁸⁹ wireline broadband,⁹⁰ and wireless broadband⁹¹ were determined to be information services – until they weren't. The *Internet Policy Statement* was simply part of “ongoing policymaking activities” and did “not adopt[] rules”⁹² – until a prior Commission sought to enlist it to impose *de facto* mandates.⁹³ Democrats and Republicans alike agreed that Title II reclassification would be disastrous⁹⁴ – until that consensus crumbled. The reversals and counter-reversals that characterize this debate would become wearisome in the context of a daytime soap opera, much less in the governance of one of the most important sectors of the American economy.

Thus, T-Mobile believes that Congress must step in to provide clarity and a firm foundation for any Open Internet mandates. To stave off another decade of unnecessarily rancorous conflict before the Commission, to give customers and companies the much-needed stability on which optimal growth relies, and to ensure continued American leadership in the mobile wireless future, T-Mobile therefore asks the Commission to support Congressional action to legislate regulatory uncertainty out of the Open Internet dialogue. Specifically, the Commission should support a Congressional non-Title II framework that prohibits anti-

⁸⁹ *Cable Modem Order*, 17 FCC Rcd 4798.

⁹⁰ *Wireline Broadband Order*, 20 FCC Rcd 14853.

⁹¹ *Wireless Broadband Order*, 22 FCC Rcd 5901.

⁹² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986, 14988 ¶ 5 & n.15 (2005).

⁹³ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008), vacated by *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁹⁴ *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7915-16 (2010) (Statement of Chairman Genachowski) (explaining the then-Chairman had “suggested the Third Way approach as ... a preferable alternative to the approach of applying full Title II to broadband, an approach that is unacceptable,” and praising the *non*-Title II approach as “a response that rejects ... the extreme of applying extensive legacy phone regulation to broadband”).

competitive blocking or impairment of lawful traffic without customer consent (subject to longstanding and accepted exceptions).

VII. CONCLUSION

For the reasons stated herein, the Commission should reverse several misjudgments at the heart of the 2015 *Title II Order*, and should support Congressional action to provide a lawful, stable, long-term, pro-innovation, and pro-consumer framework for broadband regulation going forward.

Respectfully submitted,

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