

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
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REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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SUMMARY

The Commission can only meet the worthy objectives set forth in the National Broadband Plan if it adopts enlightened regulatory policies that create incentives for carriers to make the substantial investments that are needed for the U.S. broadband market to develop. This being the case, the Commission should give great weight to the comments of the broadband service providers upon which the National Broadband Plan depends. Significantly, this segment of the broadband market is speaking with one voice against the Commission's proposed net neutrality regulations. Diverse service providers who often disagree on regulatory policy issues are united in their view that intrusive net neutrality regulations will have substantial, unintended adverse consequences. Rural carriers and mid-tier wireless providers – such as Leap and MetroPCS – have joined forces with all of the Big-4 carriers – AT&T, Verizon Wireless, T-Mobile and Sprint Nextel – to oppose net neutrality regulation. The wireless industry providers have been joined by their wireline competitors, such as Qwest and SureWest, as well as by cable companies like Time Warner, Cox and Comcast, in pointing out the insidious effects of the proposed rules. This chorus is joined by equipment providers (including Nokia Siemens Networks, Ericsson and Qualcomm), content providers (including Amazon) and distinguished economists. All of these parties, urge the Commission to exercise discretion and not disrupt the present regulatory scheme that has made the Internet such an unparalleled success.

The proponents of net neutrality generally consist of so-called “free riders” – companies that do not build facilities-based networks, but rather seek unpaid access to the networks of others. Notably absent from the comments of this group is any indication that forcing network operators to accommodate all comers on a non-discriminatory basis – even those use utilize inordinate bandwidth – will foster Broadband investment and development.

The voluntary adoption of net neutrality principles by services providers like Clearwire provides compelling evidence that additional regulation is not needed. Marketplace forces are working. By continuing to employ a light regulatory touch, the Commission will allow the market, and most importantly consumers, to select among the varied business models that best fit their needs.

Significantly, the recent D.C. Circuit decision in *Comcast v. FCC* casts serious doubt on whether the Commission even has the authority to impose net neutrality regulations. The well-written opinion echoes many of the jurisdictional concerns that MetroPCS raised regarding net neutrality in prior filings. Proceeding with net neutrality regulations at the present time would no doubt generate a new wave of litigation that would distract broadband service providers from achieving the important goals outlined in the National Broadband Plan – the continued build-out of broadband networks. In the wake of *Comcast*, the Commission would be wise to abandon the net neutrality regulations that it is considering.

If the Commission nonetheless imposes net neutrality regulations, it must recognize the important differences between wireless and wireline networks. Many wireless networks are severely capacity constrained by a scarce resource: spectrum. A failure to recognize this distinguishing factor and imposing burdensome open network requirements will force certain innovative, consumer-friendly business models (such as low-cost, fixed price, all-you-can eat wireless plans) out of the market, to the detriment of consumers and the industry as a whole.

The Commission also must recognize that there are many gatekeepers to the Internet. Content providers like ESPN360 and Google are often in a powerful position and better able than most service providers to dictate what a consumer does or does not have access to on the Internet. Consequently, any net neutrality regulations that the Commission imposes must be

applied to all content, application and equipment providers that serve a gatekeeping function – lest such regulations merely push the theoretical problems to other points in the network.

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REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its reply to comments submitted on the *Notice of Proposed Rulemaking* (“NPRM”) released by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² The following is respectfully shown:

I. INTRODUCTION

In many respects, the positions taken by various commenters in this proceeding come as no surprise. On the one hand, several public interest groups and certain Internet companies support net neutrality regulations. On the other hand, almost without exception the actual providers of broadband services – upon whom the success of the Commission’s recently

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (rel. Oct. 22, 2009) (“NPRM”).

completed National Broadband Plan (the “Broadband Plan”) relies – strenuously oppose net neutrality regulations. The reasoned way to resolve this debate is for the Commission to listen to those commenters who are actually investing today in the facilities needed to provide the broadband services of tomorrow, and not to those content providers that are hitching a “free ride” on providers’ networks.³ Without this important investment in facilities, content and application providers will have no way of reaching their customers (a privilege for which they pay little or nothing), and the market as a whole will suffer. This group of commenters states unequivocally with nearly one voice that the imposition of net neutrality regulations will deter the development of innovative telecommunications devices, applications and business models and stifle the investment that drives product development and competition.⁴ In short, the proposed rules

³ Andrew Parker and Richard Waters, “Google accused of YouTube ‘free ride,’” *Financial Times*, Apr. 9, 2010, *available at* <http://www.ft.com/cms/s/2/8f5d6128-4400-11df-9235-00144feab49a.html> (“Free Rider Article”).

⁴ *See, e.g.*, Comments of AT&T, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“AT&T Comments”); Comments of Comcast Corporation, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Comcast Comments”); Comments of Cox Communications, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Cox Comments”); Comments of Ericsson, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Ericsson Comments”); Comments of CTIA – The Wireless Association, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“CTIA Comments”); Comments of Leap Wireless International, Inc. and Cricket Communications, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Leap Comments”); Comments of National Cable & Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“NCTA Comments”); Comments of Nokia Siemens Networks US, LLC, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“NSN Comments”); Comments of National Telecommunications Cooperative Association, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“NTCA Comments”); Comments of Qualcomm Incorporated, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Qualcomm Comments”); Comments of Qwest Communications International, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Qwest Comments”); Comments of Sprint Nextel Corporation, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Sprint Nextel Comments”); Comments of SureWest Communications, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“SureWest Comments”); Comments of Time Warner Cable, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Time Warner Comments”); Comments of T-Mobile

(continued...)

would have the exact opposite of their intended effects, do violence to important Commission, Congressional and Obama Administration goals, and completely undermine the Commission’s Broadband Plan.

The Broadband Plan strives for the U.S. to “lead the world in broadband innovation and investment.”⁵ Realizing that the explosive growth of the Internet has been “[f]ueled primarily by private sector investment and innovation,”⁶ the Broadband Plan seeks to promote investment by the private sector. Importantly, the Broadband Plan also recognizes that the Commission and other agencies “must be candid about where current government policies hinder innovation and investment in broadband.”⁷ Now is the time for candor. The very companies that the Commission is relying upon to make these investments are clearly indicating that the imposition of unnecessary net neutrality regulations will contradict the well-considered goals of the Broadband Plan. Many noteworthy commenters have provided concrete data and specific examples of how net neutrality will harm the growth and development of the Internet.⁸

(...continued)

USA, Inc., GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“T-Mobile Comments”); Comments of United States Telecommunications Association, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“US Telecom Comments”); Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (“Verizon Comments”).

⁵ CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, 29 (2010) (“National Broadband Plan”).

⁶ *Id.* at xi.

⁷ *Id.* at 4.

⁸ *See, e.g.*, Comcast Comments at 40-41 (stating that net neutrality regulations will jeopardize “paid-peering arrangements, which allow...application and service providers to more efficiently route their traffic to end users,” the ability of “consumers to decide which content, applications, or services they want to give priority status,” and “edge-caching or other collocation services”) (emphasis in original); AT&T Comments at 182 (noting that setting the rules for how providers, equipment manufacturers and content providers will “interfere with the emergence of niche and
(continued...)

MetroPCS recommends that the Commission heed the warnings of these commenters, lest the Commission impose rules that will deter these very companies from making the very investments that the Commission is seeking to promote and that the country desperately needs.

MetroPCS pointed out in its comments that “net neutrality regulations will deter investment by creating uncertainty for companies as to whether or not they can earn a reasonable return on their network.”⁹ Specifically, “[p]rohibiting service providers from charging premium rates for the delivery of certain content also may make it more difficult for those providers to recoup the costs of their infrastructure investments, thereby reducing their incentive for network expansion.”¹⁰ Any reduction in the incentive for a service provider to expand its network runs directly counter to the Broadband Plan’s goal of creating “a more productive, creative, efficient America in which affordable broadband is available everywhere and everyone has the means and skills to use valuable broadband applications.”¹¹ Consequently, MetroPCS opposes the imposition of unnecessary and potentially harmful net neutrality regulations, which will create private sector uncertainty and stifle investment and innovation:

(...continued)

value-added service markets [such as] mobile healthcare, mobile e-Commerce, and location-aware services”) (internal quotations omitted).

⁹ Comments of MetroPCS Communications, Inc., GN Docket No. 09-191, WC Docket No. 07-52, 31, filed Jan. 14, 2010 (“MetroPCS Comments”).

¹⁰ *Id.* at 31.

¹¹ National Broadband Plan at 9.

Intrusive net neutrality requirements will have the effect of discouraging network expansion, thus hindering broadband deployment in rural areas and among underserved urban populations and harming consumers of broadband services across the board. Such regulation will also create uncertainty, reducing the amount of capital available for investment in wireless – in direct contract to the Commission’s stated goal of encouraging facilities-based competition.¹²

The comments submitted by other stakeholders in the market for broadband Internet services reflect broad agreement with the MetroPCS position. MetroPCS is joined by a diverse cross-section of participants in the broadband marketplace in advising the Commission to retain the light regulatory touch that has proven thus far to be such a spectacular success. Nearly all broadband service providers, many equipment and content providers, and many distinguished economists agree that any regulation of the Internet, including imposing net neutrality requirements, is premature, invasive and potentially devastating to a nascent Internet marketplace. With the remarkable success of all aspects of business relating to the Internet, the clear consensus is that any net neutrality regulation at this point would be a solution in search of a problem and most likely will “kill the goose that lays the golden eggs.”

Properly viewed, the fact that certain service providers currently operate a neutral network business model serves as proof that the marketplace already is developing varied business models and practices on an organic, as-needed basis in response to consumer demand. Government intrusion is not required and would in fact harm these nascent efforts. Competition, rather than additional government regulation, is the key to an open Internet. The success of the Internet has largely flowed from all layers in the ecosystem being able to innovate without government intervention. Could the government have foreseen, much less fostered, businesses

¹² MetroPCS Comments at 71.

like Yahoo, Google, Amazon and eBay? The success of these companies and their services stands in stark contrast to the failure of France's once-promising "Minitel" technology. Minitel was an innovative online services system launched by France Telecom in the early 1980s. Minitel's advanced technology allowed it to become one of the largest online services in the world. However, state regulatory intervention fostered a centralized, bureaucratic organization that would eventually cause it to cede its dominant position to the more open and flexible Internet service companies.¹³ The lesson to be learned from Minitel is that the Commission needs to be focused on how to create more competition, rather than abandoning its light regulatory touch in favor of government mandates and adopting regulations that hamstring existing providers. The principles proposed in the NPRM lead directly and unequivocally to less competition and less investment.

Furthermore, the Commission is without the authority to impose its proposed net neutrality rules. The U.S. Court of Appeals for the District of Columbia (the "D.C. Circuit") now has confirmed what MetroPCS and many other commenters argued to the Commission – that the Commission does not have authority to impose its proposed net neutrality regulations.¹⁴ Rather than adopting regulations atop a shaky-at-best jurisdictional foundation, the Commission should follow the guidance of its own Broadband Plan and adopt policies that serve to promote, rather than restrict, investment, competition and innovation.

¹³ See Simeon Mitropolitski, "Why Minitel Lost the War With Internet," IRED.Com, Inc., Jan. 6, 2006, available at <http://www.ired.com/news/mkt/minitel.htm>.

¹⁴ *Comcast Corporation v. FCC*, Opinion, No. 08-1291 (D.C. Cir. Apr. 6, 2010) ("*Comcast*"). Although the Commission cannot ignore net neutrality via Title I ancillary authority, MetroPCS believes that such a result is not the same for its ability to mandate data roaming.

II. THE RECENT D.C. CIRCUIT DECISION INDICATES THAT THE COMMISSION LACKS THE AUTHORITY TO IMPOSE NET NEUTRALITY REGULATIONS

The recent decision of the D.C. Circuit in *Comcast Corporation v. FCC* confirms the jurisdictional concerns that MetroPCS and others expressed regarding the Commission's authority to enact net neutrality regulations. MetroPCS previously warned that "[s]imply put, the Commission does not have the legal authority to adopt the proposed net neutrality regulations."¹⁵ The D.C. Circuit now has agreed, holding that the Commission is unable to "support its exercise of ancillary authority over [] network management practices."¹⁶ As discussed in detail below, the D.C. Circuit held that "[b]ecause the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any statutorily mandated responsibility, we grant the petition for review and vacate the *Order*."¹⁷

MetroPCS took particular issue with the Commission's proposed use of its so-called "ancillary jurisdiction" to regulate broadband service providers. MetroPCS indicated that, where the exercise of ancillary jurisdiction has been permitted, such jurisdiction "was exercised in an area (or to protect an area) over which the Commission already had explicit statutory authority."¹⁸ To this end, MetroPCS noted that "[n]o court has ever found that the Commission properly exercised ancillary jurisdiction based solely on other provisions contained in Title I of the Act."¹⁹ The D.C. Circuit in *Comcast* echoed this conclusion:

¹⁵ MetroPCS Comments at 4.

¹⁶ *Comcast* at 3.

¹⁷ *Id.* at 36.

¹⁸ MetroPCS Comments at 5 (emphasis in original).

¹⁹ *Id.* at 5 (citing Barbara Esbin & Adam Marcus, "The Law is Whatever the Nobles Do": Undue Process at the FCC, 17 COMMLAW CONSPECTUS *1, 62-72 (2009); James B. Speta, FCC (continued...)

The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.

MetroPCS also expressed concern that, if the Commission’s authority were upheld solely on the broad language of Title I, “[t]he Commission’s authority would be virtually limitless.”²⁰ The *Comcast* decision contains nearly identical reasoning. The Court writes, “Were we to accept [such a] theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations that . . . the Commission . . . would be unable to impose in Internet service providers.”²¹ As such, the D.C. Circuit confirms MetroPCS’ belief that “Congress did not intend the Commission to have such limitless power.”²² Such limitless Commission power, the Court reasoned, “would circumvent the important principle that the Commission acts only pursuant to authority Congress specifically delegates to it.”²³ In addition to finding the Commission’s jurisdictional arguments “flatly inconsistent” with judicial precedent, the Court held that such a rationale, “if accepted . . . would virtually free the

(...continued)

Authority to Regulate the Internet: Creating It and Limiting It, 35 LOY. U. CHI. L.J. 15, 25-27 (2003)).

²⁰ *Id.* at 7.

²¹ *Comcast* at 24. Counsel for the FCC admitted in oral argument to the audacious breadth of the FCC’s claim of authority, arguing that, under the auspices of Section 151, “just as the *Order* seeks to make Comcast’s Internet service more ‘rapid’ and ‘efficient,’ the Commission could someday subject Comcast’s Internet service to pervasive rate regulation to ensure that the company provides the service at ‘reasonable charges.’”²¹ Under such an interpretation, the D.C. Circuit found, “the Commission’s [ancillary] jurisdiction . . . would be unbounded.” *Comcast* at 23 (internal quotations omitted).

²² MetroPCS Comments at 7.

²³ *Id.* at 7.

Commission from its congressional tether.”²⁴ Recognizing the limits of the Commission’s ancillary jurisdiction, the D.C. Circuit held that “the Commission has failed to tie its assertion of ancillary authority over Comcast’s Internet service to any statutorily mandated responsibility.”²⁵

In the wake of *Comcast*, the Commission would be wise to abandon the proposed net neutrality regulations. The D.C. Circuit’s decision undermines any claim that the Commission, absent a specific congressional mandate, possesses the authority to impose net neutrality restrictions. MetroPCS cautioned the Commission that the courts had “repeatedly rebuffed...[the Commission’s] earlier attempts to expand its Title I ancillary jurisdiction,” and counseled that the Commission “should not take that well-trodden but unsuccessful path again.”²⁶ Adopting net neutrality regulations in the absence of express statutory authority will breed uncertainty, foster litigation and distract carriers from the more important task of fulfilling the objectives of the Broadband Plan. Rather than expend its energy pursuing net neutrality regulations founded on suspect jurisdictional authority, the Commission should concentrate on finding ways to promote competition and investment and continue the profound innovation that competition and the current deregulatory scheme has realized.

The Commission also should reject the calls of those commenters who argue that the Commission should either establish a functional separation model,²⁷ or regulate Internet access

²⁴ *Comcast* at 23.

²⁵ *Id.* at 36 (internal quotations and citations omitted). The D.C. Circuit cast aside each of the Commission’s proposed bases for jurisdiction in holding that the Commission’s authority is limited to the power granted to it by statute.

²⁶ MetroPCS Comments at 10.

²⁷ Comments of the National Association of State Utility Consumer Advocates, GN Docket No. 09-191, WC Docket No. 07-52, 16, filed Jan. 14, 2010 (“NASUCA Comments”).

under Title II authority.²⁸ Both of these ideas are throwbacks to a more regulatory “command and control” era that wisely has been rejected by the Commission. The Commission originally established functional separation in the context of monopoly providers and maintained the regime for certain services only when one provider had a dominant market share. Here, the Internet access business has significant competition – with consumers having the choice of one or two wireline providers, four to five wireless providers, at least one cable company and additional competition is on the way.²⁹ Further, functional separation imposes costs on the regulated business which ultimately are borne by the consumer. Functional separation in a robust competitive environment makes no sense, and is unnecessary and unwarranted.

In addition, as MetroPCS pointed out in a recent *ex parte* submission, regulating broadband under Title II would be inappropriate, and could result in considerable unintended consequences.³⁰ There is no record evidence to demonstrate that reclassification is justified to ensure competition in broadband Internet services or in order to accomplish the Commission’s mission. Again, the first goal of the Commission should be *primum non nocere* – to do no harm.

²⁸ Reply Comments of Public Knowledge, NBP Public Notice # 30, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 26, 2010); Comments of Public Knowledge, et al, GN Docket No. 09-51 at pp. 24-25 (filed June 8, 2009); Comments of the Consumer Federation of American and Consumers Union, GN Docket No. 09-51 at pp. 17-20 (filed June 6, 2009); *see also* “Genachowski Still Deciding Whether to Ask FCC to Classify Broadband,” Communications Daily, 2-3, Apr. 15, 2010 (noting that “Commissioner Michael Copps made clear last week that he will support reclassification.” and that “Commissioner Mignon Clyburn hasn’t staked out her position, but some of her comments have indicated that she would have no problem voting for reclassification”).

²⁹ MetroPCS Comments at 20-21.

³⁰ *See* Letter dated February 3, 2010 from Carl W. Northrop and Michael Lazarus, counsel to MetroPCS, to Marlene H. Dortch, Secretary, Federal Communications Commission (“A reclassification [of broadband as a Title II service] would completely turn on their heads all existing relationships in the broadband Internet services market and bog it down with economic regulation, tariffs, and a host of federal and state regulation that would not only hinder the build-out of broadband networks but also stunt the growth of services and applications.”).

Reclassifying broadband Internet service as a Title II service certainly would do substantial harm to both broadband service providers and the consumers who access such services, as well as the goals articulated in the National Broadband Plan.

III. A VIRTUAL INDUSTRY CONSENSUS EXISTS THAT THE PROPOSED REGULATIONS ARE UNNECESSARY AND POTENTIALLY HARMFUL

Many words are used to describe the present marketplace for Internet services in the United States – competitive, robust, consumer-friendly and innovative – but rarely, if ever, does the word “consensus” come up when discussing Internet policy. That changed when the Commission proposed to impose draconian net neutrality regulations that are generally perceived to have significant, harmful and unintended consequences across the entire industry. A wide-ranging collection of broadband service providers and service provider interest groups spoke with one voice in opposing the Commission’s net neutrality *NPRM*. Many echo MetroPCS’ conclusion that “the heavy handed net neutrality proposals of the Commission are unnecessary and ill advised.”³¹ All types of service providers, and important groups of equipment providers, content and application providers and economists, all spoke out against the unnecessary net neutrality that the Commission proposed. Such near-unanimity in a highly-competitive industry should be accorded great weight by the Commission.

A. Service Providers

By MetroPCS’ count, the vast majority of broadband service providers and service provider interest groups openly oppose net neutrality regulation either entirely or in large part. This opposition came from all corners of the industry, including large, small, urban and rural providers. Big-4 wireless leader AT&T states unequivocally that “Commission identifies no

³¹ MetroPCS Comments at 4.

present market failure or other problem that these rules could rationally address, and the Commission can resort only to theoretical speculation about ‘problems’ that might someday arise in the future,” concluding that “preemptive intervention now would be arbitrary and capricious for that reason alone.”³² Rounding out the Big-4, Verizon,³³ Sprint Nextel³⁴ and T-Mobile³⁵ joined AT&T in its opposition to net neutrality regulations, as well. Perhaps the positions taken by the largest wireless service providers are not surprising. But what is notable is the extent to which they were joined by much smaller wireless competitors. For example, mid-tier providers Leap Wireless and MetroPCS, who often find themselves at odds with the largest carriers on regulatory policy issues, came to the same conclusion as did the Big-4. The Internet currently is a vibrant place, Leap argues, and any FCC rules must be applied “in a flexible manner consistent with the relatively unregulated environment in which Internet technology has flourished to date.”³⁶ The Commission must take note of the fact that both larger and smaller wireless carriers, whose interests are not always aligned, are in such agreement. This should be a signal to the Commission to tread cautiously with any net neutrality regulation.

Wireless providers also found themselves tightly aligned with wireline providers – groups that often struggle to see eye-to-eye. T-Mobile, for example, vigorously argued that the

³² AT&T Comments at 96.

³³ Verizon Comments at 12 (“Precisely because broadband Internet access services – and the Internet ecosystem more generally – remain early in their development, it is particularly important that the Commission not impose regulations that would impede or even halt their continued growth and evolution by discouraging investment and innovation or distorting competition.”).

³⁴ Sprint Nextel Comments at 12 (“Given this environment and history, the Commission should continue to follow its precedent by imposing new regulation on the competitive mobile sector only upon demonstration of a clear cut need.”).

³⁵ T-Mobile Comments at 6.

³⁶ Leap Comments at 2.

wireless broadband marketplace “embodies the ‘virtuous cycle’ of innovation and growth that has been expressly cited by the Obama Administration, and the public interest will be best served by further encouraging market forces to develop it without regulation.”³⁷ SureWest, a holding company consisting of multiple wireline broadband providers, echoed T-Mobile’s comments about the innovation and competition that the current market for Internet services brings. SureWest writes that “the Internet has been and is currently a tremendously successful facilitator of economic, cultural, social and political discourse, which has led to unprecedented increases in the nation’s productivity.”³⁸ According to SureWest, “this tremendous success has been the result of deregulation or non-regulation of the Internet and its service providers.”³⁹ Qwest also mirrors these sentiments, noting that “[i]n the absence of intrusive regulatory intervention, competition is thriving in the broadband market and robust growth is evident.”⁴⁰

Providers of cable broadband services joined this chorus. Time Warner posited that there is a complete “absence of a record demonstrating that [net neutrality] rules are remotely necessary.”⁴¹ Indeed, Time Warner argues, “the NPRM actually sets forth a more compelling case *against* regulation in this context than for it, failing to identify any concrete problems to be solved while noting the significant downside of proceeding in the absence of demonstrated harm.”⁴² The comments of Comcast and Cox support Time Warner’s conclusion, along with the conclusions drawn by those in the wireless and wireline industries, that the Internet currently is

³⁷ T-Mobile Comments at 6.

³⁸ SureWest Comments at 3.

³⁹ *Id.* at 3.

⁴⁰ Qwest Comments at 8.

⁴¹ Time Warner Comments at 24.

⁴² *Id.* at 24 (emphasis in original).

flourishing because of, not in spite of, the Commission’s light regulatory touch. Specifically, Cox writes, the Commission’s “regulatory approach to date has provided a stable environment for investment and innovation in the broadband marketplace – even though the marketplace, and broadband networks themselves, continue to change rapidly.”⁴³ Comcast agreed, citing the fact that “[t]he deregulatory policies begun under the Clinton Administration and advanced by successor Administrations and Commissions led to over \$500 billion dollars of investment in the last decade by all broadband providers.”⁴⁴ In light of the extraordinary success of the Internet and the widespread availability of affordable, reliable and high-speed broadband access, “it is short-sighted for the Commission to now adopt a view that seems to assume a marketplace of potential ‘bad actors.’”⁴⁵

B. Equipment Providers

Broadband service providers have been joined by an important group of equipment suppliers which is speaking out against unnecessary and potentially harmful net neutrality regulations. These equipment providers recognize that their prospects are inextricably linked to the investments (or lack of investments if the proposed net neutrality rules are adopted) that will be made by the broadband providers, and recognize the powerful force of the “virtuous cycle” of investment, innovation and consumer demand that has thus far made the Internet a smashing success. They wisely caution against disrupting a system that is functioning smoothly.

For example, Nokia Siemens Networks (“NSN”) employs over 20,000 telecommunications professionals as one of the largest communications infrastructure companies

⁴³ Cox Comments at 4.

⁴⁴ Comcast Comments at 5-6.

⁴⁵ Cox Comments at 6-7.

in the world.⁴⁶ As an infrastructure provider, NSN has a unique perspective on what is required for the Internet to continue its profound global success story. It is noteworthy, writes NSN, that the “Internet’s rise to prominence has occurred under a relatively stable regulatory and political framework, one that balances many competing interests and stakeholders.”⁴⁷ Net neutrality regulations put this “stable regulatory and political framework” at considerable risk.

Accordingly, NSN questions “whether altering an approach that seems to have been a success is advisable based on speculative or theoretical harms that might or might not occur.”⁴⁸ Indeed, regulating when, or even whether, a network operator can distinguish among types of traffic is likely to have deleterious effects on the consumer broadband experience. With regard to wireless broadband services specifically, NSN states that the capability to manage traffic flows is “absolutely paramount to providing not just good service but sometimes any service at all when the number of users in a geographic area rises rapidly.”⁴⁹ Importantly, NSN points out:

The Commission cannot be in a position to adequately outline all potential exceptions to a discrimination prohibition, and the resulting vacuum in terms of understanding what is permissible conduct in this area could paralyze broadband network providers from innovating with legitimate methods of managing their networks.⁵⁰

As the manufacturer of the backbone of broadband networks, NSN’s comments should carry particular weight with the Commission. In its comments, NSN highlighted the strain on network infrastructure as just one of the many potential unintended consequences that net neutrality may foist upon an already competitive and thriving broadband marketplace.

⁴⁶ NSN Comments at 1.

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 11.

Ericsson also agrees with MetroPCS that “there should be an exception to any net neutrality regulation for [managed] services.”⁵¹ Echoing MetroPCS’ observation that “to a large extent, broadband services delivered to a handset are all managed services,”⁵² Ericsson recognizes that “as wireless carriers the world over adopt 4G wireless broadband technologies, voice becomes another application delivered wirelessly using IP, rather than the *raison d’être* of the network itself.”⁵³ Ericsson provides the Commission with an important understanding of how services will be delivered over tomorrow’s wireless network, and the Commission should pay careful attention, lest the development of such next-generation services be stifled.

Another major participant in the equipment-manufacturing business, Qualcomm, is one of the leading providers of mobile broadband handsets and consumer equipment technology.⁵⁴ As a result, Qualcomm has had a front-row seat to what it calls the “fierce competition in the US among the wireless carriers in the provision of mobile broadband services.”⁵⁵ Such competition “has brought substantial benefits to consumers and has spurred the rapid deployment and expansion of these mobile broadband networks across the country.”⁵⁶ In light of the substantial consumer benefits that the broadband Internet has brought to so many Americans, Qualcomm’s conclusion nearly mirrors that of MetroPCS – that net neutrality regulations “present[] a solution

⁵¹ MetroPCS Comments at 69.

⁵² *Id.* at 69.

⁵³ Comments of Ericsson, Inc., GN Docket No. 09-191, WC Docket No. 07-52, 26, filed Jan. 14, 2010 (“Ericsson Comments”).

⁵⁴ In fact, Qualcomm licenses its technology to over 175 companies that manufacture infrastructure and subscriber devices, including phones, smartphones, smartbooks, and consumer electronic devices. Qualcomm Comments at 6.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 7.

in search of a problem.”⁵⁷ The wireless industry in particular is ill-suited to the type of net neutrality regulations that the Commission has proposed. In fact, Qualcomm states, “[t]he very goals that the Commission seeks to further with respect to wireless would be thwarted if it adopts rules to regulate wireless network management.”⁵⁸

The Commission should pay close attention to both NSN, Ericsson and Qualcomm who have been important architects and creators of the networks and devices that have created today’s broadband Internet. Regulators need to listen closely when innovators in an industry, such as NSN, Ericsson and Qualcomm, speak out strongly against a particular set of additional regulations.

C. Economists

The Commission should take special note of the significant group of distinguished economists and academics that have come out against unnecessary net neutrality regulation. Twenty-one economists, both from private and from university backgrounds, have informed the Commission of their conclusion that “the economic evidence doesn’t justify the net neutrality rules the commission is considering.”⁵⁹ At a news conference regarding the filing, economist Jeffret Eisnach of Navigant Economics and George Mason University stated that “[t]here is simply no basis for believing that there is any kind of generalized or systematic market power one would expect would require as a precondition of the prohibitive ex ante regulations the

⁵⁷ *Id.* at 14. *See also* MetroPCS Comments at 11 (titling Section III “The proposed net neutrality rules are a ‘solution in search of a problem’”).

⁵⁸ *Id.* at 19.

⁵⁹ Howard Buskirk, “Economic Arguments for Net Neutrality Rules Fall Short, Economists Say,” *Communications Daily*, 3, Apr. 13, 2010.

commission has proposed.”⁶⁰ Eisenach concluded that there are “multiple broadband providers for the vast majority of markets,” further noting that the market for broadband services “is certainly not a monopoly, the kind of situation that would justify Carterfone.”⁶¹

Economist and former Clinton Administration official Robert Litan heralded the significance of the sheer number of economists involved in the filing, saying, “Having over 20 economists come together in a statement as detailed and strongly worded as this one should send a message to the commission that it’s barking up the wrong economic tree.”⁶² Eisenach agreed, saying that the filing is unusual, in that most filings made by groups of economists “have tended to be less specific and they have tended not to be filed in formal rulemaking proceeding and tended not to make as substantive or detailed of recommendations.”⁶³ The Commission should take the comments made by these economists very seriously, as they provide a scholarly view from outside the broadband services industry. The independent conclusion by these economists that there is “no evidence of a natural monopoly” in the broadband market and that there is “vigorous competition between the incumbent telco in any region and the cable provider”⁶⁴ should be an important signal to the Commission that net neutrality regulation is unwarranted and unnecessary.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

D. Content Providers

Perhaps the most notable commenters are the content providers who are voicing concern over the Commission's foray into net neutrality. Content providers have been identified by the Commission as major potential beneficiaries of net neutrality policies intended to foster an "open" Internet. Yet, they are not all convinced. For example, Amazon.com ("Amazon"), a well-known content provider, understands that draconian net neutrality may not be a "win" for content providers. Rather, in its view, any new rules that remove the deregulatory environment in which the Internet has thus far thrived should be counted as a loss for all players in the broadband Internet marketplace. Amazon recognizes the interdependency of three segments of the broadband market – equipment manufacturers and content providers, service providers, and consumers – and believes with a different approach a "win-win-win outcome is possible."⁶⁵ Rather than draconian regulations resulting in forced neutrality, Amazon favors rules that would "allow broadband Internet access service providers to favor some content so long as no harm is done to other content."⁶⁶ Such an outcome would give service providers "the regulatory certainty to pursue new business models with users and content providers."⁶⁷ Simultaneously, "content providers would have opportunities to better serve their customers by using the network operators' new services."⁶⁸ By allowing service providers to favor certain providers' content,

⁶⁵ Comments of Amazon.com, GN Docket No. 09-191, WC Docket No. 07-52, 1, filed Jan. 14, 2010 ("Amazon Comments").

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 1-2.

“consumers and other users would realize the benefits of service improvements from broadband Internet access service providers.”⁶⁹

The Commission should pay special attention to content providers, such as Amazon, who understand the potentially negative macro effects of regulations that would prevent content providers from acquiring the priority access that they may need to serve their customers. For example, the Kindle has the price of the wireless access included with the download of content. This fixed price model may not be possible in a one-size-fits-all regulatory scheme.⁷⁰

The simple reality is that government regulation is ill-suited to the fast moving Internet marketplace. The better approach is to foster robust competition and to let competitive market forces shape the network management policies and service models that broadband service providers will adopt. The competitive marketplace can and will reward those companies that fulfill consumers’ needs and punish those who do not. The real issue is what the consumer wants, not the particular players. The only way to meet consumer demands is to have a fully-functioning, vibrant and competitive Internet marketplace. Rather than focus on the speculative harms raised by certain proponents of net neutrality, MetroPCS urges the Commission to listen to the largely unified voices of stakeholders across the broadband ecosystem speaking out

⁶⁹ *Id.* at 1.

⁷⁰ Caroline Gabriel, “AT&T will use new device formats to introduce usage-based pricing,” Rethink Wireless, March 3, 2010, available at <http://www.rethink-wireless.com/2010/03/03/att-new-device-formats-introduce-usage-based-pricing.htm> (noting AT&T’s CEO’s outline to investors of usage-based plans focusing on new data devices such as the iPad and citing the “death of all-you-can-eat deals”); Caroline Gabriel, “4G: Clearwire wants new partners, Verizon looks to usage pricing,” Rethink Wireless, Jan. 10, 2010, available at http://www.rethink-wireless.com/article.asp?article_id=2414&pg=1 (noting that that Verizon’s LTE pricing would probably involve a basic flat fee plus usage-based charges for any bandwidth consumed on any LTE-enable device); Jenna Wortham, “AT&T to Urge Customers to Use Less Wireless Data,” N.Y. TIMES, Dec. 9, 2009, at B6 (noting that “[t]he amount of growth and data that we are seeing in wireless data is unprecedented” and may require AT&T to rethink its data pricing strategy).

against unnecessary and potentially harmful net neutrality regulation – which will deter the very goals the Commission seeks – investment, innovation and competition.

IV. THE VOLUNTARY ADOPTION OF NET NEUTRALITY POLICIES BY CERTAIN SERVICE PROVIDERS PROVES THAT REGULATION IS NOT NECESSARY

Proponents of the proposed rules are certain to claim that support for net neutrality by service providers, such as Clearwire, strongly justify such regulation. Properly viewed, however, Clearwire’s comments provide compelling evidence that additional regulation is completely unwarranted and unnecessary.

Clearwire states unequivocally that it made a voluntary business decision to self-adopt certain net neutrality principles to gain competitive advantage. “For Clearwire, adopting open network standards and permitting customers to choose the devices and applications they want to use on the network are policies that set Clearwire apart from its competition.”⁷¹ Thus, in the absence of net neutrality regulation, providers such as Clearwire have voluntarily chosen to pursue a neutral network business model that they expect will differentiate their services and resonate with the American consumer. Clearwire is not shy about its views on this either, noting its opinion that “[o]penness is not merely an important policy issue, it is good business practice.”⁷² Clearwire’s ability to adopt such a business model demonstrates precisely the simplicity and beauty of the present regulatory regime. Ironically, a growing competitor such as Clearwire could find itself to be competitively disadvantaged if its distinguishing open network approach is undermined by FCC regulations that force all competitors to the same model.

⁷¹ Comments of Clearwire Corporation, GN Docket No. 09-191, WC Docket No. 07-52, 1, filed Jan. 14, 2010 (“Clearwire Comments”).

⁷² *Id.* at 7.

Further, Clearwire's position may be motivated by its unique spectrum position. Clearwire boasts that it has over 120 MHz of spectrum in virtually every major market.⁷³ MetroPCS and every other wireless carrier (other than AT&T and Verizon Wireless) have considerably less spectrum to utilize to provide broadband services. This raises the concern that Clearwire's position may be less about doing good for consumers and more about trying to impose burdensome rules on competing carriers who may be less capable of complying while maintaining a commercially viable service due to their spectrum constraints. Until the Commission has made available to all carriers at least 120 MHz of spectrum for each carrier, Clearwire's position should be viewed with great skepticism.

Irrespective of Clearwire's motives, as MetroPCS stated in its Comments, "the last thing the Commission should want is to dictate pricing and business models. The Commission is not in the best position to know what works and what does not."⁷⁴ Indeed, it is the American consumer that is in the best position to know what works for him or her, and these consumers vote with their feet early and often. Clearwire's early success is due not only to its advantageous spectrum position, but also in part to consumer's "vote with your feet" approach when they are presented with diverse competitive alternatives in the market for broadband services. If Clearwire is correct that an open network will enable it to compete more effectively for customers, then other service providers will adopt similar policies and net neutrality will become widespread *without a government mandate*. Clearwire's voluntarily adopted business model shows that the Commission's current light regulatory touch is working. The Commission should

⁷³ Clearwire Corporation 8-K, Exhibit 99.1, "Clearwire Investor Presentation; June 2008," 14, filed Jun. 12 2008 (indicating that Clearwire's average nationwide spectrum position is greater than 120 MHz).

⁷⁴ MetroPCS Comments at 52.

not replace this healthy market driven process with a “one-size-fits all” regime, but rather find ways to deliver additional spectrum to all in the wireless arena so that robust competition can continue to flourish. Neutral networks, such as Clearwire’s, are appearing spontaneously in response to consumer demand. But, consumers desire a variety of different network structures and pricing plans. The neutral network practices that Clearwire has voluntarily adopted may not fit the requirements of all consumers.

V. THE COMMISSION SHOULD NOT HEED THOSE WHO CLAIM THAT WIRELESS SHOULD BE TREATED THE SAME AS WIRELINE OR CABLE

Several commenters argue that treating wireless similarly to wireline or cable would be either justified or appropriate.⁷⁵ Such commenters demonstrate their lack of understanding of the wireless industry, the scarcity of available spectrum, and the difference in technology which must dictate different outcomes. Although MetroPCS does not advocate net neutrality regulation for any segment of the Internet access business, any suggestion that the wireless industry is the same as the wireline industry is just plain incorrect.

First, as repeatedly demonstrated, the retail wireless industry is competitive. An end user will in most instances be able to select among four to five facilities-based wireless providers in each metropolitan area – with the additional competition of Clearwire looming for most markets.⁷⁶ By most accounts, the wireless industry is vibrant and has experienced, and is expected to continue to experience, price declines and greater bandwidth and speeds for consumers. This is significantly different from the situation in the wireline industry, where there may be only one or two choices for consumers in the near term.

⁷⁵ See, e.g., NCTA Comments at 46; Comcast Comments at 32; Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52, 125, filed Jan. 14, 2010; Comments of Vonage Holdings Corp., GN Docket No. 09-191, WC Docket No. 07-52, 29, filed Jan. 14, 2010.

⁷⁶ MetroPCS Comments at 20-21.

Second, as the Commission chronicled in its Broadband Plan, the wireless industry faces a severe spectrum shortage.⁷⁷ Unlike wired systems, which can add capacity at their discretion by building additional facilities, wireless expansion requires a scarce commodity – spectrum. This aspect of the wireless business distinguishes it from any other player in the Internet access ecosystem. This scarcity of spectrum means carriers must exert control over the uses of the spectrum – or else face shortages or the complaints of consumers having dropped calls or connections. As the Commission knows, AT&T recently has experienced capacity shortages due to usage characteristics of the iPhone. If the current growth of data usage continues and additional spectrum is not made available, others will experience shortages as well – which will only hurt consumers. Also, unlike wired Internet connections, a considerable amount of Internet connectivity in wireless is through specialized devices – handsets and smartphones. These devices are different as they have different capabilities and features and are thus considerably different than the devices attached to the wired Internet.

Ericsson, in its comments, pointed out the important differences between the capacity constraints facing wired and wireless networks. Recognizing that network management holds even greater importance for capacity-limited wireless providers, Ericsson stated that wireless “networks rely on finite spectrum resources, access to which is controlled by the government through spectrum allocations and auctions, and those spectrum resources have inherent RF engineering limitations.”⁷⁸ Accordingly, wireless providers in particular will “need to continue

⁷⁷ National Broadband Plan at 77-78.

⁷⁸ Ericsson Comments at 9.

to manage the allocation of network resources to ensure consumers have a quality communications experience.”⁷⁹

Third, wireless technology in general dictates a different approach. Unlike some wired systems, wireless systems are shared among all users – so a heavy user will more likely affect the services provided to other users of the same service than would such a user in the wired ecosystem, where the last mile in many instances is not a shared resource. Further, since wireless combines voice and data on the same system, wireless providers must be able to prioritize traffic or else they will not be able to provide robust voice services.⁸⁰

Fourth, wireless relies on a scarce resource – spectrum – which is unevenly distributed throughout the wireless industry. Unlike wireline and cable providers which can add capacity merely by adding facilities, wireless carriers not only must add facilities, but they also must get access to spectrum. As the Commission has already observed, wireless is in need of at least 500 MHz of spectrum in the next decade and without this spectrum wireless will be hamstrung in its ability to provide the services consumers have and will come to demand from wireless.⁸¹ Further, spectrum is not evenly distributed among the wireless carriers. For example, Clearwire holds over 120 MHz of spectrum in virtually all major metropolitan areas, and AT&T and Verizon are not far behind. However, mid-tier carriers such as MetroPCS and Leap hold considerably less spectrum – on average between 20 and 30 MHz in their licensed areas. This disparity leads to not all carriers being able to offer the same services. In such an instance, net neutrality would have a particularly deleterious effect on those carriers with less spectrum than

⁷⁹ *Id.* at 10.

⁸⁰ MetroPCS Comments at 45-46.

⁸¹ National Broadband Plan at 84.

their competitors. Indeed, some of the larger carriers may have decided to use the lack of access to robust spectrum as a competitive weapon. For example, Verizon CEO Ivan Seidenberg recently commented that “I don’t think we’ll have a spectrum shortage the way this document suggests we will.”⁸² This is a complete turn-about from their earlier position that the industry needs at least 500 MHz of spectrum. This disparity in a scarce resource – spectrum – is unique to the wireless industry and militates against requiring net neutrality for wireless carriers.

In light of the foregoing considerations, even if the Commission determines that certain net neutrality regulations are necessary for wireline carriers, it should acknowledge the significant differences between wireless and wireline networks and not impose net neutrality on wireless carriers.

VI. THE COMMISSION SHOULD ENSURE THAT IT DOES NOT PRECLUDE COMPANIES FROM PURSUING CERTAIN BUSINESS MODELS

It would be short-sighted and potentially harmful for the Commission to adopt net neutrality regulations that limit the type and number of business models from which a consumer may choose. As MetroPCS warned in its Comments, the application of “one-size-fits-all” net neutrality regulation may “serve to destroy [business model] innovation, as it has the practical effect of dictating business models to service providers.”⁸³ This is not an idle concern. Stringent net neutrality regulations threaten to challenge or eliminate many of the business models that consumers have come to expect and enjoy. With the proposed regulations, “the Commission

⁸² Niraj Sheth, “FCC Takes a Jab at Verizon CEO Over Spectrum,” WSJ Blogs, Apr. 8, 2010, available at <http://blogs.wsj.com/digits/2010/04/08/fcc-takes-a-jab-at-verizon-ceo-over-spectrum/>.

⁸³ MetroPCS Comments at 61.

runs the risk of driving innovative business models from the marketplace – and possibly eliminating competitors”⁸⁴ to the detriment of all consumers.

Specifically, the disruptive and innovative “all-you-can-eat” wireless business model that was pioneered by MetroPCS and is loved by consumers, may become extinct if the inflexible net neutrality rules proposed by the Commission are adopted.⁸⁵ The all-you-can-eat business model has taken hold throughout the wireless industry, as flat-rate unlimited use plans now are offered in some form by nearly every wireless provider. MetroPCS is responding to these competitive developments by offering new packages (e.g. tax and regulatory fee inclusive plans for a fixed price) at even lower prices. Net neutrality regulations will hamstring innovative carriers like MetroPCS, denying them the freedom to test new pricing models in order to allow consumers to determine for themselves what plan best meets their needs. As MetroPCS previously has stated, “[f]orcing wireless carriers to carry all traffic indiscriminately ties their hands and prevents them from trying the types of innovative new arrangements that the Commission has stated that it wants to preserve.”⁸⁶ This is a particular concern now that the broadband industry is experiencing what has been referred to as a “data tsunami.”⁸⁷ More than ever, carriers will be forced to control network access in order to avoid having their systems swamped and rendered scuttled.

⁸⁴ *Id.* at 24.

⁸⁵ *Id.* at 27.

⁸⁶ *Id.* at 27.

⁸⁷ Daren Fonda, “Repaving the Information Highway,” *SmartMoney*, May 2010, *available at* http://online.wsj.com/article/SB10001424052702303491304575188443334155342.html?mod=dist_smartbrief (noting that “[m]obile video is growing so fast that it's expected to account for two-thirds of wireless data traffic by 2014 (with YouTube alone already taking up 10 percent)”).

Further, MetroPCS is on the cusp of offering even more innovative services to the public when it launches its 4G Long Term Evolution (“LTE”) services in the second half of 2010 in selected MetroPCS metropolitan areas. As the Commission knows, MetroPCS historically has served a mass market which has been largely unserved by the larger national carriers. With MetroPCS’ launch of 4G LTE services, enhanced services will now become available to consumers who cannot or will not purchase service from the larger national carriers. Further, since many MetroPCS customers use their mobile units as their primary telecommunications device, many of them use their handsets as their primary access to the Internet. If the Commission imposes net neutrality on carriers such as MetroPCS which do not have the spectrum to support net neutrality, the users who may only have access to the Internet via their handset may lose their ability to connect.

Interestingly AT&T – a frequent foe of MetroPCS on regulatory issues – embraces MetroPCS’ view of the potential harm to innovative and consumer-friendly business models. At the present time, consumers “may choose among offerings suited to all their many diverse tastes and needs, and the marketplace continues to evolve in response to their demands.”⁸⁸ With this competitive, pro-consumer market structure already in place, it is both counterproductive and simply illogical for the Commission “to deny consumers this range of choices by dictating that all carriers must instead offer one homogenized model for the delivery of wireless broadband services.”⁸⁹ CTIA echoes this sentiment, arguing that the “[i]mposition of the proposed net neutrality rules will freeze the current business model for wireless services, stifling innovative

⁸⁸ AT&T Comments at 140.

⁸⁹ *Id.* at 141.

technologies, service offerings and interactions among ecosystem players that benefit consumers.”⁹⁰

The very ability to create groundbreaking devices like the Amazon Kindle – devices that depend on innovative content delivery business models – will be put at risk if the Commission adopts invasive net neutrality regulations. For example, the Kindle is only permitted to access the Internet for Amazon-related or -approved purposes. In return for this restriction, Amazon subsidizes the cost of the Kindle owner’s wireless connectivity, allowing customers to download Amazon content at a discounted price, or even for free.⁹¹ Under the Commission’s proposed net neutrality regime, the legality of such an innovative business model would be uncertain. With these counterproductive rules in place, MetroPCS has predicted, “new products like the Kindle will disappear amid investor concerns that Amazon and its wireless providers will be forced to freely accommodate all competitors on their proprietary networks and devices.”⁹²

Diverse business models are possible when differentiation is promoted. For example, customers may be willing to pay for increased download speeds at times when they are downloading video, but not when merely checking email. Such a model would allow the Internet to truly reach its potential for robustly competing against brick and mortar businesses – like video rental businesses. Further, content providers may be willing to include the cost of such faster bandwidth in the price for their content. Equipment manufacturers may be willing to pay for limited Internet connectivity for devices which use the Internet infrequently, such as when equipment needs to be serviced or usage checked or monitored. The smart grid may

⁹⁰ CTIA Comments at 46.

⁹¹ *Id.* at 46.

⁹² MetroPCS Comments at 29.

develop where power companies pay a fee for limited Internet access for meter reading. The main point here is that a one-size-fits-all approach could preclude all of the above from occurring – and prevent additional innovative models that are yet to even be thought of.

One of the important aspects of the debate over net neutrality is to consider who is being served by requiring all to pay for the high bandwidth consumption of some. As the Commission knows, a very small percentage of users generate the lion's share of the traffic over the Internet. These users, for the most part, are not content providers or application providers. The Commission should not allow the Internet experience of most users to suffer due to the extraordinary uses of the few. One of the ways to avoid this issue is to throttle the bandwidth used – in other cases it may be to deter users which disrupt the experience of others. Either way, net neutrality would limit a carrier's flexibility which will deter investment and innovations.

If the Commission does impose net neutrality regulations, which it should not, it must ensure that such regulations allow varied business models to thrive. Any such regulations must allow providers of unlimited data services the freedom to manage their networks in a manner that ensures their continued ability to offer unlimited services to consumers, and to charge for their services in a way that supports their business model. If companies offering certain plans – from unlimited wireless data to niche video services – are forced to comply with draconian net neutrality regulations, the Commission will force these players entirely out of the marketplace. Such an outcome will harm consumers, competition and the market for broadband services as a whole.

VII. ANY NET NEUTRALITY REGULATIONS SHOULD APPLY TO ALL PARTICIPANTS IN THE WIRELESS ECOSYSTEM, INCLUDING CONTENT AND APPLICATION PROVIDERS

The broadband fortunes of service providers, equipment suppliers, content providers and consumers are inextricably linked. This being the case, applying net neutrality regulations only to service providers would create an unfair advantage for content and application providers and ultimately harm consumers. If the Commission chooses to impose net neutrality regulations – which it should not do – it should foster competitive parity in all sectors of the Internet ecosystem, unless there are technical or other differences which mandate a different result.⁹³ In order to prevent the regulatory burden from unfairly falling on service providers alone, any net neutrality rules must apply to content and application providers as well.

Many stakeholders agree that content providers can create significant bottlenecks to accessing the best that the Internet has to offer. The American Cable Association (the “ACA”) correctly notes that “powerful content providers are now pushing closed Internet business models, denying millions of users access to content.”⁹⁴ Media conglomerates, like ESPN with its ESPN360 service, “block access to their online content, unless a customer’s broadband provider agrees to a wholesale arrangement,” which reportedly entails “a per subscriber fee for all broadband subscribers, regardless of whether a particular subscriber wants, or ever uses, the service.”⁹⁵ In all, “ESPN denies access to ESPN360 to over 30 million United States broadband

⁹³ One such technical difference is that wireless is understandably different than wireline and other Internet access technologies since it uses scarce spectrum and it builds shared systems.

⁹⁴ Comments of the American Cable Association, GN Docket No. 09-191, WC Docket No. 07-52, 5, filed Jan. 14, 2010 (“ACA Comments”).

⁹⁵ *Id.* at 5.

customers, based solely on the customer's selection of broadband provider."⁹⁶ This is precisely the type of gatekeeping behavior that the Commission seeks to limit for service providers by its proposed net neutrality regulations. However, these particular practices are coming not from service providers, but rather from the content providers themselves.

The Commission must take heed of this fact. Service providers have been cast as the villains for too long in the "good vs. evil" net neutrality mythology that is spun by the content providers. In fact, far from "good vs. evil," content providers currently enjoy a "free ride" to their customers over service providers' networks.⁹⁷ Because of sites like Google's YouTube, broadband networks are struggling to keep pace with exploding customer data use, while Google and others continue to pay little to nothing to reach their customers. Rene Obermann, CEO of Deutsche Telekom, recently noted that "[t]here is not a single Google service that is not reliant on network service."⁹⁸ In order to prevent reducing the role of network providers to that of "dumb pipes," the Commission must also take note of the role that content gatekeepers play in "fuelling an explosion of data traffic on [providers'] networks."⁹⁹ If the Commission hopes to navigate the coming "data tsunami," it must realize that an open Internet cannot be fostered by regulating only one portion of the ecosystem. If the Commission insists upon regulating gatekeepers, it can only defend a uniform approach which addresses all participants similarly.

Notably, the ACA was not the only commenter to express concern with ESPN360 and its ilk. USTelecom also recognizes the potential harm of an overly-narrow application of any net neutrality regulations. Preserving the current highly-successful competitive balance will require

⁹⁶ *Id.* at 5.

⁹⁷ *See* Free Rider Article.

⁹⁸ *Id.*

⁹⁹ *Id.*

“broad application of any Commission rules to all stakeholders and participants so as not to tip the balance among them.”¹⁰⁰

Google is also a powerful content provider that has the ability to exercise market power over the Internet. The National Cable and Telecommunications Association (“NCTA”) cites the experience of some technology firms who found that it is not service providers, but rather “search engines like Google, Yahoo and Microsoft’s new Bing [that] have become the Internet’s gatekeepers.”¹⁰¹ Google in particular fits this gatekeeper mold – “with 71 percent of the United States search market...Google’s dominance of both search and search advertising gives it overwhelming control.”¹⁰² NCTA believes that “Google’s ability to affect the Internet marketplace is apparent and certainly warrants at least as much attention as any potential threat posed by cable operators and other ISPs.”¹⁰³ Numerous other commenters adopted similar positions regarding the need to apply any net neutrality regulations industry-wide.¹⁰⁴ These cautionary statements both arose from specific examples,¹⁰⁵ and from more general analyses of the broadband marketplace.¹⁰⁶

¹⁰⁰ Comments of the United States Telecom Association, GN Docket No. 09-191, WC Docket No. 07-52, 40, filed Jan. 14, 2010 (“USTelecom Comments”).

¹⁰¹ NCTA Comments at 47.

¹⁰² *Id.* at 48.

¹⁰³ *Id.* at 48.

¹⁰⁴ *See, e.g.*, SureWest Comments at 24; Time Warner Comments at 74; Cox Comments at 11; Comcast Comments at 30.

¹⁰⁵ Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-191, WC Docket No. 07-52, 9, filed Jan. 14, 2010 (“OPASTCO Comments”) (“[ESPN360’s] behavior is no different than the potential market power abuse by broadband Internet access service providers which the NPRM seeks to prevent via the proposed nondiscrimination rule.”).

¹⁰⁶ AT&T Comments at 199 (“[S]earch engines can and do affect the free flow of information on the Internet more than any broadband Internet access provider.”).

MetroPCS agrees that, if the Commission decides to impose net neutrality on wireless, the Commission must impose net neutrality restrictions on a competitively neutral basis across the entire broadband ecosystem. Without such across-the-board application, such regulations would merely serve to “preserve whatever market structure exists just beyond the ISP’s headend.”¹⁰⁷ If the Commission is determined to impose net neutrality rules, which it should not do, it must make certain that the rules it adopts do not unintentionally create an imbalance of power between service providers and content and application providers. Such an imbalance would undermine the very goals that the Commission seeks to achieve through its open Internet policies. In order to avoid handing content and application providers the keys to the Internet kingdom, the Commission must apply any and all net neutrality regulations applied to service providers equally across all segments of the Internet ecosystem.

VIII. CONCLUSION

The Commission stands on the precipice of great change. With basic Internet services now available to a significant part of the population, and wireless Internet now available across most of the United States, the pace of development for new services and applications that were previously unheard of, are just around the corner. The question to ask is whether any proposed regulation will foster or hinder the next innovations in the evolution of the Internet. The stakes are high, and U.S. competitiveness in the next several decades is on the line. The Commission can choose to tread down the path of additional regulations – a path that seldom has resulted in innovation – or choose to remove obstacles. The latter approach will lead to innovation, competition, lower prices and enhance consumer welfare.

¹⁰⁷ NCTA Comments at 49.

The Commission should heed the cries from all corners of the broadband ecosystem not to impose intrusive and potentially harmful net neutrality regulations. From the service provider sector, wireless, wireline and cable operators joined together against the imposition of net neutrality regulations in a rare display of near-unanimity. Joining the service providers is a significant group of equipment manufacturers and content providers, the very entities that proponents of net neutrality claim will “benefit” from additional regulations. This remarkable display of cohesion should speak volumes to the Commission about the industry-wide concern regarding net neutrality. MetroPCS, along with so many other stakeholders in the broadband industry, urges the Commission to listen to the many varied voices and decline to impose additional net neutrality regulations.

Respectfully submitted,

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