

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

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
_____)	

REPLY COMMENTS OF THE GSM ASSOCIATION

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SUMMARY

The GSM Association (“GSMA”) is an international organization that represents the interests of the worldwide mobile communications industry. Spanning 219 countries, the GSMA unites nearly 800 of the world’s mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organizations.

GSMA continues to support an open Internet that enables consumers and business customers to access the lawful content and services of their choice, in ways that provide them with the best possible experiences, in keeping with the unique network management demands of wireless networks. GSMA urges the Commission to take a broad view in considering the global effects of its proposed regulations. As explained below, the record in this proceeding, and developments that have occurred since the close of the initial comment period, reinforce the main points of GSMA’s initial comments: that the proposed rules are unnecessary and could be counterproductive to economic development and the goal of universal broadband access.

The record makes clear that there is no policy or factual justification for the proposed rules. No new evidence of anticompetitive harm or consumer detrimental conduct was revealed on the record. Indeed, the proposed rules, by virtue of only applying to a subset of the overall Internet ecosystem, would have the effect of distorting competition in the marketplace. Additionally, the proposed rules are contrary to the goals of the recently released National Broadband Plan, which seeks to promote broadband access and innovation through increased flexibility and decreased regulatory burdens. Furthermore, virtually all commenters agree that, due to differences in the technology and the marketplace, wireless broadband networks present different challenges and opportunities, and deserve to be considered separately from traditional

wired broadband networks. Ultimately, there is no basis for application of the proposed rules to wireless broadband networks.

The record, and subsequent events, also stress that the proposed rules would hinder economic development and job creation at a time when these issues should be at the forefront of the Commission's policy-making agenda. Indeed, the Commission's main task of late has been the creation of the National Broadband Plan, itself an extension of the U.S. Administration's economic recovery efforts. Against this backdrop, the Commission should give serious consideration to the vast number and variety of commenters who raise legitimate concerns about the effect of the proposed rules on economic development in their communities.

As GSMA and others made clear in the initial round of comments, the proposed rules would also constitute a significant divergence both from international regulatory norms and from previously expressed U.S. international policy. The rules would represent a dramatic shift in U.S. policy, which has traditionally disfavored government intervention in the Internet. At a time when many international regulators have positively assessed the state of Internet development and decided to let these competitive markets continue to operate unfettered by new regulatory burdens, the U.S.'s contrary decision could have serious international consequences and set an uncomfortable precedent.

Finally, the Commission should recognize that the proposed rules seem contradictory to other expressed Administration policy priorities. Recently the U.S. Administration has identified the promotion of Internet freedom as a prominent aspect of its international diplomatic agenda. Mobile broadband networks already promote openness, transparency, and economic development around the world. However, the Commission's proposed rules could place new limits on free speech and may provide cover for countries that seek to restrict Internet freedom.

Furthermore, the FCC and other prominent Administration representatives have recognized the important role cybersecurity must play in the 21st century. As more of our economic, social, and governmental activities find expression online, the stakes and complexity of keeping the Internet and its users safe continue to increase. Unfortunately, the proposed rules potentially make the Internet less secure by both providing new information and intelligence to Internet malfeasants and reducing the ability of network operators to proactively protect their networks and dynamically responds to threats.

At bottom, although the GSM Association shares the Federal Communications Commission's enthusiasm about the potential of broadband technology to be an engine for continued social and economic development in the U.S. and around the world, the proposed rules would be counterproductive to making this vision a reality. Particularly in light of the complete absence of factual or policy justification for new interventionist Internet regulation, and the negative impact these regulations would have on other U.S. international and domestic policy goals, the Commission should reconsider the wisdom of the positions set forth in the NPRM. Ultimately, the proposed rules should be rejected.

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REPLY COMMENTS OF THE GSM ASSOCIATION

I. INTRODUCTION

The GSM Association (“GSMA”) hereby submits these Reply Comments in response to the record and the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.¹ GSMA represents the interests of the worldwide mobile communications industry. Spanning 219 countries, GSMA unites nearly 800 of the world’s mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organizations. GSMA’s members represent more than four billion mobile wireless connections using virtually all types of wireless technologies. GSMA is focused on innovating, incubating, and creating new opportunities for people around the world to benefit from mobile communications.

The Federal Communications Commission (“FCC” or “Commission”) has long been a global leader in sound, well-reasoned, deregulatory telecommunications policy. It is important for the Commission both to take the long view regarding the impact of its regulatory decisions domestically and around globe, as well as to make sure that its actions are firmly rooted in the

¹ Preserving the Open Internet; Broadband Industry Practices; *Notice of Proposed Rulemaking*; GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd 13064 (rel. Oct. 22, 2009) (“Open Internet NPRM”).

actual, real-world conditions of contemporary telecommunications markets. GSMA offers these reply comments on the record that has developed in the instant proceeding to provide the input of its international (including those in the United States) and diverse members on the proposed rules, and the impact they may have on economic, social, and security goals, which may extend far beyond the U.S. broadband market.

The Commission should recognize that the record that has developed in the Open Internet proceeding and the events that have occurred since initial comments were filed clearly support the core points of GSMA's initial comments. Specifically, the record demonstrates that there is no policy or factual basis for the proposed rules. Indeed, their adoption would distort a highly competitive marketplace by favoring some participants over others, would be contrary to the goals of the recently released National Broadband Plan, and would be inconsistent with the technical and economic realities of mobile broadband network operations. Furthermore, the record makes clear that Commission's proposed rules will hinder job creation and investment at a time when the top priority should be economic recovery. Additionally, the proposed rules and some proposals offered by commenters would be highly divergent from international norms. Not only would these proposals stand as outliers, but they may have the effect of rapidly expanding the scope and intrusiveness of global Internet regulation. Finally, the proposed rules directly contradict and potentially undermine other U.S. policy goals that have been recently and prominently expressed by the Administration, including the promotion of Internet freedom and the advancement of cyber security.²

² Although GSMA does not take a position on the FCC's assertion of jurisdiction in the instant NPRM, it recognizes that the recently released decision in *Comcast v. FCC*, No. 08-1291, slip op. (D.C. Cir. 2010), is directly relevant to the issue of the FCC's authority to act in this area. *See also, infra* Part IV.B.

II. THERE IS NO POLICY OR FACTUAL JUSTIFICATION FOR THE PROPOSED RULES

The record in this proceeding clearly demonstrates that the Commission's proposed rules are unnecessary and inappropriate, especially with respect to mobile broadband networks. First, there is simply no justification for government intervention in the highly competitive wireless marketplace. Indeed, the rules in their current form would have the effect of distorting competition in the broadband market by favoring certain participants over others. Furthermore, the proposed network neutrality regulations would be contrary to the goal of promoting ubiquitous broadband access, which underlies the Commission's recently issued National Broadband Plan. Finally, commenters on all sides of the debate have recognized that mobile broadband networks have unique technical constraints and considerations that argue for different treatment.

A. The Proposed Rules Would Distort Competition In the Broadband Marketplace

Despite the tens of thousands of comments filed in response to the Commission's Open Internet NPRM, no evidence was presented of market failure and no new examples of anticompetitive blocking, discrimination or prioritization were identified. As explained by GSMA and others, the U.S. wireless industry is highly competitive and innovative and it provides consumers with a wide array of choices in technology and services.³ In fact, recent market reports indicate that simultaneously with there being strong growth in the U.S. wireless

³ See Comments of the GSM Association at 2, GN Docket No. 09-191 (filed Jan. 14, 2010) ("GSMA Comments"); Comments of AT&T at 83-85, GN Docket No. 09-191 (filed Jan. 14, 2010) ("AT&T Comments"); Comments of CTIA at 24, GN Docket No. 09-191 (filed Jan. 14, 2010) ("CTIA Comments"); Comments of MetroPCS at 13-16, GN Docket No. 09-191 (filed Jan. 14, 2010) ("MetroPCS Comments"); Comments of Qualcomm Inc. at 5-15, GN Docket No. 09-191 (filed Jan. 14, 2010) ("Qualcomm Comments"); Comments of Sprint Nextel Corp. at 10-12, GN Docket No. 09-191 (filed Jan. 14, 2010) ("Sprint Nextel Comments"); Comments of the United States Telecom Association at 10-11, GN Docket No. 09-191 (filed Jan. 14, 2010) ("US Telecom Comments"); Comments of Verizon and Verizon Wireless at 21-28, GN Docket No. 09-191 (filed Jan. 14, 2010) ("Verizon and Verizon Wireless Comments").

market—5.9 million net connection additions in the fourth quarter of 2009 alone—fierce competition persists amongst the largest and the regional wireless providers.⁴ In the absence of any evidence of competitive harm in the wireless market, the Commission’s proposed open Internet rules are simply not appropriate.

Nevertheless, some commenters have argued that network neutrality rules are required regardless of the presence of vigorous competition in the broadband marketplace.⁵ Such a rationale is inconsistent with the FCC’s basis for potential action. And, since it lacks factual support, such a rationale would be unlawful. To illustrate, FCC Chairman Julius Genachowski has indicated that a lack of competition is a core justification for government involvement in the broadband market.⁶ Additionally, President Barack Obama recently described himself and his administration as “fierce advocates for a dynamic free market,”⁷ adding further questions as to why the Commission would intervene in a free market for wireless services that is characterized by vigorous competition.

⁴ See “US Market Reports Strong Q4 2009 Growth But Competition Remains Fierce,” *Wireless Intelligence Snapshot*, Issue # 77 (March 4, 2009) available at <https://www.wirelessintelligence.com/analysis/2010/03/us-market-reports-strong-q4-2009-growth-but-competition-remains-fierce/>.

⁵ See, e.g., Comments of the Open Internet Coalition at 39, GN Docket No. 09-191 (filed Jan. 14, 2010) (“openness rules are needed to protect innovation regardless of the specific level of competition in the network”) (“Open Internet Coalition Comments”); Comments of Public Interest Commenters at 22-24, GN Docket No. 09-191 (filed Jan. 14, 2010) (arguing that effective competition combined with general antitrust laws are insufficient to protect the open Internet) (“Public Interest Comments”).

⁶ See Chairman Julius Genachowski, Federal Communications Commission, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*, Remarks at the Brookings Institution, Washington, DC (Sept. 21, 2009) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf (listing “limited competition among service providers” as the first of the reasons to be concerned about Internet openness).

⁷ Mike Dorning and Julianna Goldman, *Obama Says He’s ‘Fierce’ Free-Market Advocate, Rejects Critics*, Bloomberg, <http://www.bloomberg.com/apps/news?pid=20601070&sid=aDLk0IPYaSa0#> (Feb. 11, 2010).

If curing failures of competition is not the point of the new regulations, then there is no policy or factual reason to exclude other important parts of the Internet ecosystem such as content and search providers, who have at least as much ability and incentive to engage in discrimination and who often already openly engage in paid prioritization. As has been argued by others, the Commission must focus its competitive analysis on all segments of the Internet market in order to appropriately protect consumers and to avoid empowering some players at the expense of others.⁸ Although GSMA takes no stance on the validity of the underlying allegations, in the context of understanding the roles of *all* Internet businesses it is worth noting that the European Commission has launched a preliminary informal antitrust investigation into Google's search engine and advertising program.⁹ The examination is reportedly in response to complaints made to the European Commission by three parties: two of the complaints allege that Google's search results unfairly demote their competitive services in relation to Google's own, while the third complaint alleges unfair conduct with respect to Google's "AdSense" advertising program.¹⁰ These allegations illustrate that rules that only apply to some participants in the Internet ecosystem might have the effect of improperly distorting the marketplace without effectively preventing the possibility of arguably anticompetitive conduct.

⁸ See Notice of *Ex Parte* Presentation from Ari Q. Fitzgerald, Counsel to Vodafone to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 09-47, 09-51, 09-191 (filed Feb. 26, 2010).

⁹ See Richard Waters and Nikki Tait, "Google Faces Brussels Antitrust Scrutiny," *Financial Times* (Feb. 24, 2010) available at <http://www.ft.com/cms/s/2/46018520-20da-11df-b920-00144feab49a.html>; see also Reply Comments of Foundem, GN Docket No. 09-191, WC Docket No. 07-52 (filed Feb. 23, 2010) (alleging that Google's Universal Search Mechanism poses a threat to competition and innovation).

¹⁰ See Waters and Tait, *supra* note 8; see also Julia Holtz, Senior Competition Counsel, Google, "Committed to Competing Fairly," *Google European Public Policy Blog*, <http://googlepolicyeurope.blogspot.com/2010/02/committed-to-competing-fairly.html> (Feb. 24, 2010).

Indeed, a better solution is to ensure that there is flexibility at every level of the broadband market that allows service providers and content providers to negotiate commercial arrangements regarding network operation and content distribution. Provided there is sufficient transparency to consumers regarding their ability to access or use Internet services, applications and content, allowing this commercial flexibility is the best way to develop innovative new business models and expand consumer choice. Importantly, even Google's CEO recently expressed support for the notion that network operators should be able to form revenue sharing agreements with content providers in return for guaranteed service levels, so long as they are not done anticompetitively.¹¹

B. Network Neutrality Regulations Are Contrary To the Goals of The National Broadband Plan

Application of the FCC's proposed open Internet rules to mobile broadband would be contrary to the goals of the National Broadband Plan.¹² The stated mission of the National Broadband Plan "is to create a high-performance America—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."¹³ One key to achieving this goal of ubiquitous broadband access will be continued competition amongst mobile broadband providers and increased deployment of mobile broadband networks. The FCC explicitly recognized the central role mobile network deployment will have in its ongoing broadband strategy when the

¹¹ See Richard Wray, "Google Chief Extends Olive Branch To Mobile Phone Groups," *The Guardian* (Feb. 17, 2010) available at <http://www.guardian.co.uk/business/2010/feb/17/google-chief-olive-branch-mobile-groups>.

¹² See Federal Communications Commission, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (March 16, 2010) available at <http://www.broadband.gov/plan/> ("NBP").

¹³ *Id.* at 9.

National Broadband Plan set the aggressive goal of making 500 MHz of spectrum available for wireless broadband uses in the next ten years.¹⁴

LTE and other next generation networks will be deployed soon and will, if appropriately encouraged by the Commission, provide additional competitive, facilities-based broadband access. According to the National Broadband Plan, Verizon Wireless and Clearwire will be well into commercial deployment of their 4G services by the end of 2010, and at least three other significant 4G deployments will begin in 2011.¹⁵ Verizon Wireless has indicated that is on track to cover 25 to 30 U.S. markets with LTE service by year-end.¹⁶ The company has also reported peak download speeds of 40-50 Mbps and peak upload speeds of 20-25 Mbps in field trials of its LTE networks in Boston and Seattle demonstrating the game-changing potential of next generation mobile broadband networks.¹⁷ As Eric Schmidt, CEO of Google recently quipped at the GSM Association's annual Mobile World Congress, "[t]he story is LTE."¹⁸ "We understand," Schmidt continued, "that the new rule is mobile first in everything."¹⁹

The main limiting factors on mobile broadband deployment in the United States will be access to spectrum and financing. The Commission's actions should be geared towards alleviating these concerns, not aggravating them with new operational constraints. The National Broadband Plan praised the success of the Commission's flexible use licensing policies for

¹⁴ *Id.* at 84.

¹⁵ *Id.* at 22.

¹⁶ Dan Meyer, @MWC: VZW joins GSMA, updates LTE plans, RCRWireless, <http://www.rcrwireless.com/article/20100215/CARRIERS/100219981/1098> (Feb. 15, 2010).

¹⁷ Verizon Wireless, Press Release, "Verizon Wireless' 4G LTE Network Testing Promises Significantly Faster Speeds Than Current 3G Networks" (March 8, 2010) *available at* <http://news.vzw.com/news/2010/03/pr2010-03-02b.html>.

¹⁸ Matt Kapko, @MWC: Google CEO outlines search giant's mobile efforts, RCRWireless, http://www.rcrwireless.com/article/20100216/WIRELESS_TECHNOLOGY/100219967 (Feb. 16, 2010).

¹⁹ *Id.*

“allowing innovation and capital formation to occur with greater efficiency.”²⁰ In order to find innovative revenue streams that will support further network investment and lower prices for consumers, network operators must continue to enjoy the same flexibility to experiment with different service offerings and business models as all members of the Internet ecosystem.

Numerous representatives of small and minority owned business, as well as commenters from a wide range of American communities, have all recommended that the Commission focus on encouraging deployment of next generation networks, not retarding it through uncertainty and increased costs to carriers.²¹ Rarely does such a wide cross-section of society reach consensus on an issue, and here they urge the FCC to make stimulating broadband deployment and affordability of broadband access its number one priority. New regulations on network operator

²⁰ NBP at 79.

²¹ See, e.g., Comments of the Atlanta Business League at 1-2, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of California Black Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 4, 2010); Comments of Latin American Chamber of Commerce of Charlotte at 1-2, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of Latin American Youth Center at 1, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of Minority Business Alliance of Southwest Michigan at 1, GN Docket No. 09-191 (filed Jan. 14, 2010); Comments of Mississippi Black Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 14, 2010); Comments of Mississippi Minority Business Alliance, Inc. at 1, GN Docket No. 09-191 (filed Dec. 22, 2009); Comments of NAACP - Nashville Branch at 1, GN Docket No. 09-191 (filed Jan. 6, 2010); Comments of NAACP Arlington at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of NAACP-Grand Rapids at 1, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of National Gay & Lesbian Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 5, 2010); Comments of National Gay and Lesbian Task Force at 1, GN Docket No. 09-191 (filed Jan. 5, 2010); Comments of Orange County Hispanic Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 4, 2010); Comments of Parent Allies for Student Success at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of Pride Communications at 1-2, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of Rainbow PUSH at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of Rev. Raleigh Trammell (Southern Christian Leadership Conference) at 1-2, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of South Carolina Alliance of Black School Educators at 1-2, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of Shelby County (Ind.) Development Corporation at 1, GN Docket No. 09-191 (filed Jan. 13, 2010); Comments of State Representative John J. Deberry, Jr. (Tenn.) at 1-2, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of State Representative James L. Word (Ark.) at 1-2, GN Docket No. 09-191 (filed Jan. 6, 2010); Comments of State Representative Ronald Brisé (Fla.) at 1-2, GN Docket No. 09-191 (filed Jan. 6, 2010); Comments of State Senator Henry Wilkins (Ark.) at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of the Town of Pahrump, Nevada at 1-2, GN Docket No. 09-191 (filed Jan. 12, 2010); Urban League of Metropolitan Seattle at 1, GN Docket No. 09-191 (filed Jan. 13, 2010).

flexibility will likely raise prices for consumers, and increased regulatory uncertainty raises the cost of capital and makes it harder to find sufficient financing for network development, especially for smaller carriers and new entrants who may be likely to spread into areas that have traditionally been underserved by broadband providers.

C. Commenters Largely Agree that Wireless Broadband Networks Are Different

Notwithstanding the above, if the Commission does proceed to implement network neutrality rules, the record makes clear that the proposed rules are specifically inappropriate for mobile broadband networks from an operational perspective. Even many of the most vocal network neutrality advocates – including many who urge application of the Commission’s proposed rules to wireless networks – recognize that the rules would have to apply differently in the wireless context due to the unique technical and capacity considerations.²²

Although these commenters recognize that the different characteristics of wireless networks demand different treatment, they don’t fully understand that the operational distinctions between mobile and fixed networks are so substantial as to be dispositive. For example, Free Press compares an iPhone to a laptop and finds that “from the perspective of an Internet access service, there is and should be no distinction.”²³ Clearly this evidences a fundamentally incomplete understanding of the nature of operating mobile broadband networks. Although an iPhone connecting via a 3G mobile broadband network and a laptop connected to a home Wi-Fi

²² See, e.g., Comments of the Center for Democracy and Technology at 51-52, GN Docket No. 09-191 (filed Jan. 14, 2010) (open Internet rules should apply to wireless, but with special characteristics of mobile networks taken into consideration in determining what is reasonable network management) (“CDT Comments”); Comments of Free Press at 125-126, GN Docket No. 09-191 (filed Jan. 14, 2010) (same) (“Free Press Comments”); Comments of Clearwire at 9-10, GN Docket No. 09-191 (filed Jan. 14, 2010) (open Internet rules should apply to wireless, but discussing special problems in mobile networks and the need for dynamic network management).

²³ Free Press Comments at 125.

network that relies upon a wired fiber-optic connection for its broadband Internet access, are both “wireless devices,” the broadband Internet access infrastructure that the two devices rely upon are completely different and have dramatically divergent constraints and characteristics. In this example, only the iPhone relies on mobile wireless broadband access, and that makes all the difference.

Indeed, as GSMA and other commenters indicated in the initial round of comments, the special characteristics of mobile broadband networks make restrictions on network operators’ abilities to manage network traffic particularly inappropriate because of the capacity constraints of spectrum-based networks and the need for highly dynamic network management. Unlike fiber optic or DSL connections, mobile broadband networks operate on a shared system where one user’s traffic can have a significant effect on overall network performance. Furthermore, although cable broadband networks also employ a form of capacity-sharing between the user and the central office, total throughput and capacity on mobile wireless broadband networks are much more limited. That characteristic, combined with the fact that mobile users, by definition, move around, demand that mobile broadband network operators have great flexibility in choosing how to manage their networks to ensure the optimum consumer experience.

Furthermore, mobile broadband technology is constantly changing at an extraordinarily rapid rate. Such innovation within mobile broadband networks will be essential to provide the type and quality of services consumers demand. The Administration’s goal is to promote this type of pro-consumer technological innovation. The proposed rules, however, will harm it. As John Leibovitz, Deputy Chief of the FCC’s Wireless Telecommunications Bureau and Phil Bellaria of the Omnibus Broadband Initiative recently recognized, the proliferation of new

mobile devices will create unprecedented challenges for network operators.²⁴ Consequently, the FCC “must ensure that network congestion doesn’t choke off a service that consumers clearly find so appealing or frustrate mobile broadband’s ability to keep [the United States] competitive in the global broadband economy.”²⁵ As the National Broadband Plan explained, “[i]f the U.S. does not address this situation promptly, scarcity of mobile broadband could mean higher prices, poor service quality, an inability for the U.S to compete internationally, depressed demand and, ultimately, a drag on innovation.”²⁶

III. THE PROPOSED RULES WOULD HINDER ECONOMIC DEVELOPMENT, ECONOMIC RECOVERY, AND JOB CREATION

The Commission’s proposed rules threaten to slow investment in the broadband industry, which in turn could have a negative effect on the overall United States economy. Chairman Genachowski underscored the significance of the Information and Communications Technology (ICT) sector to the U.S. economy in a recent speech when he said that high-speed Internet access “is reshaping our economy and our lives more profoundly than any technology since electricity, and with at least as much potential for advancing prosperity and opportunity, creating jobs, and improving our lives.”²⁷ The Chairman went on to note that the ICT sector represents a trillion dollars in revenue, millions of jobs, and 13 percent of the U.S. GDP.²⁸ Indeed, as discussed above, the primary task of the current Commission has been to compose a National Broadband

²⁴ Phil Bellaria, Director, Scenario Planning and John Leibovitz, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission, *Message From the iPad: Heavy Traffic Ahead*, Blogband, <http://blog.broadband.gov/?entryId=138385> (Feb. 1, 2010).

²⁵ *Id.*

²⁶ NBP at 77.

²⁷ Chairman Julius Genachowski, Federal Communications Commission, *Broadband: Our Enduring Engine for Prosperity and Opportunity*, Prepared Remarks Before the NARUC Conference, Washington, D.C. at 2 (Feb. 16, 2010) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296262A1.pdf.

²⁸ *Id.*

Plan, itself a component of the largest economic stimulus bill ever adopted in the United States.²⁹

The Plan states that “[s]pectrum policy must be a key pillar of U.S. economic policy,” and that “mobile broadband . . . promises to continue to be a significant contributor to U.S. economic growth in the coming decade.”³⁰ Against this backdrop, the economic impact of the Commission’s actions should be a foremost consideration, and the proposed open Internet rules should give the Commission pause.

Among the comments received in response to the Commission’s NPRM were dozens submitted by local, regional, and national organizations representing consumer, civic, and business interests urging the Commission not to take actions that would negatively affect investment and economic development.³¹ Many commenters discussed the valuable contributions to their local economies that have stemmed from broadband infrastructure

²⁹ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

³⁰ NBP at 75.

³¹ See, e.g., Comments of African American Chamber of Commerce – Milwaukee at 1-2, GN Docket No. 09-191 (filed Jan. 13, 2010); Comments of Asian Business Association at 2, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of Black Economic Council at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of The East Los Angeles Community Union at 1, GN Docket No. 09-191 (filed Jan. 8, 2010); Comments of Grand Rapids Area Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of Great River Economic Development Foundation at 1-2, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of Greater Decatur Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of Hamilton County Alliance at 1, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of Illinois Business Roundtable at 1-2, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of Illinois Hispanic Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of League of United Latin American Citizens – Arkansas at 1, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of Missouri Legislative Black Caucus at 1-2, GN Docket No. 09-191 (filed Jan. 13, 2010); Comments of NAACP - Nashville Branch at 1, GN Docket No. 09-191 (filed Jan. 6, 2010); Comments of National Gay and Lesbian Task Force at 1, GN Docket No. 09-191 (filed Jan. 5, 2010); Comments of Orange County Hispanic Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 4, 2010); Comments of Pride Communications at 1-2, GN Docket No. 09-191 (filed Jan. 11, 2010); Comments of Sacramento Asian Pacific Chamber of Commerce at 1, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of State Representative David Rainey (Ark.) at 1, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of State Representative John J. Deberry, Jr. (Tenn.) at 1-2, GN Docket No. 09-191 (filed Jan. 12, 2010); Comments of Urban League of the Upstate, Inc. at 1, GN Docket No. 09-191 (filed Jan. 7, 2010); Comments of Rev. Raleigh Trammell (Southern Christian Leadership Conference) at 1-2, GN Docket No. 09-191 (filed Jan. 8, 2010).

investments, and these commenters have expressed concern that the Commission's proposed rules will stall these important advancements. These commenters have illustrated how flexibility in carrier operations creates incentives for investment and also lowers prices to consumers and small business, which has a ripple effect promoting growth throughout the economy.

The economic and social benefits of ICT development are felt on a global scale as well. Secretary of State Hillary Clinton recently delivered an address on Internet freedom in which she spoke about the significance of communications technologies, and mobile phones in particular, in promoting global economic development and social welfare.³² Secretary Clinton described a connection to the global information networks as "an on-ramp to modernity," and supported this comparison by discussing a World Bank study that found that a 10 percent increase in mobile phone penetration in a developing country will translate into a nearly 1 percent increase in per capita GDP.³³ As Secretary Clinton outlined, the government should aspire to crafting policies that encourage the economic and social gains that come along with increased technology investment and innovation. Internet freedom, after all, is only relevant where there is Internet access and government policy must stimulate the latter if it seeks to protect the former.

While Secretary Clinton described the enormous benefits of communications technology development, these benefits can be easily nullified by heavy-handed regulation. Commissioner Robert McDowell has described the potential negative effects new regulation could have on the economics of the Internet ecosystem.³⁴ As Commissioner McDowell explained, reducing the

³² Secretary of State Hillary Rodham Clinton, *Remarks on Internet Freedom*, The Newseum, Washington, D.C. (Jan. 21, 2010) *available at* <http://www.state.gov/secretary/rm/2010/01/135519.htm> (Clinton Internet Freedom Remarks).

³³ *Id.*

³⁴ Commissioner Robert M. McDowell, Federal Communications Commission, *The Best Broadband Plan for America: First, Do No Harm* at 13-15, Free State Foundation Keynote, National Press Club, Washington D.C. (Jan. 29, 2010) *available at*

ability of broadband service providers to experiment with innovative business models and explore new revenue streams is likely to reduce network investment and result in increased prices to retail consumers as the majority of average users end up subsidizing the handful of individuals who consume more bandwidth.³⁵

Significantly, some commenters claim that new network neutrality regulations would actually promote network investment by requiring network operators to develop more physical capacity rather than allowing them to deal with increasing congestion solely through aggressive network management.³⁶ This position, however, is simply not supported by the facts. Under the current regime, without the codified proposed rules, it is clear that network operators have engaged a strategy that combines physical network development with limited, reasonable network management. Although there is no new evidence in the record of harmful discrimination occurring, the evidence of the existence and benefits of network development are visible nearly everywhere in the numbers of jobs created and amount of money invested in infrastructure.

As explained by GSMA and others, wireless operators are planning to make further substantial investments in their networks.³⁷ The National Broadband Plan discussed at least five significant 4G deployments that will be underway in the near future, including LTE deployments by Verizon Wireless, AT&T, MetroPCS and Cox, and a major WiMAX deployment by Clearwire/Sprint.³⁸ Indeed, Deutsche Bank has estimated that mobile operators around the world

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296081A1.pdf (Commissioner McDowell State of the Net Speech).

³⁵ *Id.* at 15.

³⁶ *See* Free Press Comments at 153-154; Open Internet Coalition Comments at 45-46.

³⁷ *See, e.g.*, AT&T Comments at 84-85, 146-47; CTIA Comments at 7; GSMA Comments at 7 n.17; Verizon and Verizon Wireless Comments at 29-30.

³⁸ NBP at 22.

will invest up to \$72 billion on mobile broadband technologies in 2010.³⁹ Yet there is a finite limit, based on the laws of physics, to the speed and capacity that can be accessed in spectrum-based networks. Current technologies may be approaching these limits, such that options for increasing physical capacity may be insufficient to meet future demands.⁴⁰ Network innovation and investment are certain to continue as competitors seek to gain subscribers through better services and more coverage, however without the ability to explore economic and technical means of network management, mobile network operators may be unable to deliver the quality of service consumers rightfully expect.

IV. THE PROPOSED RULES WOULD DIVERGE SIGNIFICANTLY FROM INTERNATIONAL REGULATORY NORMS.

The record offers clear evidence to support GSMA's assertion in its initial comments that the proposed rules are unusually intrusive and may have unintended adverse consequences. Numerous commenters provided examples of how the proposed rules would stand out among the international crowd in terms of the severity of its interference with the broadband market. Even more striking, however, is that the proposal put forth by some commenters that the Commission should reclassify broadband services as "telecommunications services" under Title II of the Communications Act could usher in a new era of regulatory activism involving numerous national and International regulatory bodies.

A. The Proposed Rules Would Be Outliers On The International Telecommunications Regulatory Scene

Many commenters observed that the Commission's proposed rules would be among the most restrictive regulation of broadband service providers anywhere, and that adoption would

³⁹ The GSM Association, *Press Release: Mobile Broadband Investment Set to Soar as HSPA Connections Pass 200 Million*, <http://gsmworld.com/newsroom/press-releases/2010/4621.htm> (Feb. 10, 2010).

⁴⁰ See Comments of Qualcomm at 15-17, GN Docket No. 09-191 (filed Jan. 14, 2010) (discussing the limited bandwidth and capacity of wireless networks).

risk significant adverse international consequences.⁴¹ These commenters pointed to the numerous examples of other regulators that examined the broadband service market and determined that competitive forces would be sufficient to protect consumers without added network neutrality regulations. For example, AT&T quoted from an Ofcom report that indicated that “in a competitive market, with consumers that are well informed in relation to the activities of different ISPs and who can easily move to competing providers, competition itself can provide a constraint on behaviours that reduce consumer benefits.”⁴²

Some commenters mistakenly assert that the Commission’s proposed rules would be relatively mild or otherwise in keeping with international norms,⁴³ however these comments tend to have little relevance when applied to the United States mobile broadband market. For example, the comments of the Computer and Communications Industry Association (CCIA) rely upon a study by Ingenious Consulting in asserting that the proposed rules would be among the more mild forms of government intervention employed internationally to address the risk of competitive harm in the telecommunications sector.⁴⁴

⁴¹ See, e.g., Comments of Alcatel Lucent at 25-28, GN Docket No. 09-191 (filed Jan. 14, 2010); Comments of AT&T at 87-93, GN Docket No. 09-191 (filed Jan. 14, 2010) (AT&T Comments); Comments of CTIA at 27-31, GN Docket No. 09-191 (filed Jan. 14, 2010); Comments of NTT at 6, GN Docket No. 09-191 (filed Jan. 14, 2010).

⁴² AT&T Comments at 88 (quoting Ofcom, Regulation of VoIP Services: Statement and publication of statutory notifications under section 48(1) of the Communications Act 2003 modifying General Conditions 14 and 18, at 80-81 (Mar. 29, 2007), <http://www.ofcom.org.uk/consult/condocs/voipregulation/voipstatement/voipstatement.pdf>). As AT&T reports, the U.K. has also recognized that net neutrality regulations might prevent innovation in network operator business models and hinder investment in next generation access networks. *Id.* at 88-89 (quoting Dep’t for Culture, Media, and Sport & Dep’t for Business Enter. and Regulatory Reform, Digital Britain, The Interim Report, at 22 (Jan. 2009), http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf).

⁴³ See, e.g., Comments of the Computer and Communications Industry Association at 8-9, GN Docket No. 09-191 (filed Jan. 14, 2010) (“CCIA Comments”).

⁴⁴ *Id.*; see also Kip Meek & Robert Kenny, Ingenious Consulting Network, *Network Neutrality Rules in Comparative Perspective: A Relatively Limited Intervention in the Market* (Jan. 2010) attached to CCIA Comments (“Ingenious Paper”).

Reliance upon the Ingenious paper for this point is misplaced for two reasons. First, the Ingenious paper does not purport to promote regulation or find that the proposed rules are appropriate in the present context; rather, the paper simply indicates that the Commission's proposed rules are a less severe intervention than remedies like structural separation or local loop unbundling.⁴⁵ Clearly it is true that government-mandated business models and organizational structures are more interventionist actions than a nondiscrimination obligation, but this does not mean that the proposed rules are justified under present circumstances or are even a good idea. Second, the Ingenious paper concerns itself almost exclusively with regulation of traditional wireline broadband service providers. The paper's findings are not relevant to the mobile broadband context, where concepts like local loop unbundling don't have a clear analogue. Indeed, the experience of GSMA members has been that mobile networks globally are generally much less regulated than wireline networks, and thus the proposed rules would be more severe in the mobile broadband ecosystem.

Other commenters have looked to the recently adopted Canadian regulation of network management techniques – there known as Internet traffic management practices, or ITMPs – and found that this regime is an example of strong network neutrality regulations similar to the Commission's proposed rules.⁴⁶ However, the Canadian model provides little support for the FCC's proposal. Those rules provide significantly more flexibility than the instant proposal in that the Canadian Radio-television Telecommunications Commission (CRTC) explicitly declined to make its traffic management rules enforceable upon mobile wireless data services at the time

⁴⁵ See Ingenious Paper at 11-22 (discussing network neutrality rules as a less interventionist remedy to telecommunications “bottlenecks” than open access requirements or separation).

⁴⁶ See, e.g., Free Press Comments at 92 (alleging that the Canadian regime requires that network management practices discriminate “as little as reasonably possible”).

of their adoption.⁴⁷ The CRTC had long engaged in a policy of forbearance with respect to regulation of mobile broadband and it chose not to reevaluate that policy in this proceeding. The Canadian example, then, simply lends more support to the proposition that mobile broadband networks should be exempted from any open Internet rules the FCC may choose to adopt.

Furthermore, even with respect to the broadband access services that the policy does affect, the Canadian regulatory structure provides significantly more flexibility than the FCC's proposed rules. Indeed, the Canadian regime specifically allows for prioritization and recognizes the need to treat time-sensitive and non-time-sensitive traffic differently.⁴⁸ Thus, contrary to the few commenters who urge otherwise, the proposed rules would represent a radical departure from international norms when it comes to Internet policy, and the Commission should be appropriately hesitant to ignore the numerous examples of countries that have looked at similar situations and decided to refrain from adopting harsh regulations.

B. The Proposed Rules May Significantly Increase Global Regulation of The Internet

As explained in GSMA's initial filing, the Commission's proposed rules threaten to embolden other national regulators who may desire to exercise a more restrictive authority over the Internet. Recent proposals that the Commission reclassify broadband services under Title II of the Communications Act have further amplified these concerns. This proposal has the potential for stimulating a broad increase in international Internet regulation as it may act to trigger International Telecommunication Union jurisdiction over broadband services.

Furthermore, Title II reclassification would create the impression of a wide-reaching new pro-

⁴⁷ See CRTC Telecom Regulatory Policy CRTC 2009-657, ¶ 115.

⁴⁸ See AT&T Comments at 93; Comments of Sandvine at 17-18, GN Docket No. 09-191 (filed Jan. 14, 2010); see also Alcatel Lucent Comments at 26; Comments of Charter Communications at 20-22, GN Docket No. 09-191 (filed Jan. 14, 2010) ("Charter Comments").

regulatory agenda in the United States with respect to the Internet, setting a dangerous international precedent.

Recently, the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *Comcast v. FCC* addressing the Commission's assertion of ancillary authority over the cable Internet service provider's network management practices.⁴⁹ Although GSMA does not take a position with respect to the Commission's authority to act in the present context, it notes that in order to remedy perceived weaknesses in the Commission's jurisdictional arguments in the NPRM, some commenters have suggested that the FCC consider undoing years of sound agency precedent by reclassifying broadband services as "telecommunications services" under the Communications Act.⁵⁰ This proposal seems to be receiving serious consideration by the Commission, as evidenced by its discussion in the National Broadband Plan.⁵¹ In the Plan, the Commission indicates that it will give serious consideration to these proposals, including a potential selective application of Title II common carrier regulations under its "forbearance authority."⁵²

GSMA is surprised that this proposal would get such serious attention by the Commission, as it would seem to be a dramatic shift in the FCC's international regulatory policy, which has traditionally promoted deregulation and liberalization as a way to enhance liberty and stimulate economic and social development. Although historically the U.S. government has

⁴⁹ See *Comcast v. FCC*, No. 08-1291, slip op. (D.C. Cir. 2010).

⁵⁰ See, e.g., CDT Comments at 22; Free Press Comments at 31-32; Comments of Prof. Barbara Cherry at 5-8, GN Docket No. 09-191, WC Docket NO. 07-52 (filed Jan. 14, 2010); Public Interest Comments at 20-21.

⁵¹ NBP at 337.

⁵² *Id.*

opposed United Nations regulation of the Internet,⁵³ reclassifying broadband services as telecommunications services under Title II may inadvertently support an expansion of the regulatory jurisdiction of the International Telecommunication Union (“ITU”) over the Internet. ITU, a treaty-based organization under the auspices of the United Nations, has among its purposes to promote the use and benefits of telecommunications and the adoption of a broader international approach “to issues of telecommunications in the global information economy and society.”⁵⁴ A reclassification of broadband services as “telecommunications services” would seem to bring these services well within the regulatory jurisdiction of the ITU, contrary to the U.S. policy that the U.N. should not act as a global Internet regulator.

Internationally, reclassification may be interpreted as a significant shift in administrative perspective about Internet regulation, towards a policy that more actively interferes with free market relationships. Commissioners Copps and McDowell both discussed the need for the U.S. to be a leader and to be mindful of the international significance of this proceeding in their separate addresses at the State of the Net conference in Washington, D.C.⁵⁵ The Commission must not lose sight of the fact that its actions are being closely monitored abroad. GSMA and others have pointed out that interventionist Internet regulation by the United States would be likely to encourage even more heavy-handed actions by other regimes. As Commissioner

⁵³ See, e.g., A resolution expressing the sense of the Senate that the United Nations and other international organizations should not be allowed to exercise control over the Internet, S. Res. 323, 109th Cong. (2005) (enacted).

⁵⁴ Constitution of the International Telecommunication Union, Art. 1.

⁵⁵ See Commissioner Michael J. Copps, Federal Communications Commission, *Remarks at the State of the Net Preconference of the Congressional Internet Caucus* at 2, Washington, D.C. (Jan. 26, 2010) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295974A1.pdf; Commissioner McDowell State of the Net Speech at 17-18.

McDowell warned, “the reality is that regulation *always* spreads,” and the Commission should be wary of creating a precedent that will inject political influence into the enforcement process.⁵⁶

Ambassador Philip Verveer, United States Coordinator for International Communications and Information Policy, was merely stating the obvious in recent remarks before the Media Institute to the effect that Title II reclassification and the net neutrality proceeding in general “could be employed as a pretext or as an excuse for undertaking public policy activities that we would disagree with pretty profoundly.”⁵⁷ Regardless of how the Commission tries to limit their scope, internationally the FCC’s proposed actions, if adopted, will be perceived as a significant shift in U.S. Internet policy. As Ambassador Verveer has explained, “[t]he United States has traditionally taken a view and continues to take a view that we think the Internet generally should be left free of intergovernmental regulation or of any significant regulation.”⁵⁸ He correctly notes that this perception may encourage other countries to push for a more active role in Internet governance for their own national regulators. Unfortunately, from the perspective of openness and the free flow of information online, it is unlikely that all of these countries would exercise the same restraint and “forbearance” in their regulatory efforts as the FCC.

⁵⁶ Commissioner McDowell State of the Net Speech at 18 (quoting Berin Szoka and Adam Thierer, *Net Neutrality, Slippery Slopes & High Tech Mutually Assured Destruction*, Progress Snapshot, Oct. 2009 available at <http://www.pff.org/issues-pubs/ps/2009/ps5.11-net-neutrality-MAD-policy.html>); see also CDT Comments at 12 (warning that the Commission’s broad jurisdictional assertion will result in even more interventionist and politically motivated Internet regulation in the future).

⁵⁷ See John Eggerton, “FCC’s Net Neutrality Proceeding Means More Work For State Department,” *Broadcasting & Cable* (March 17, 2010) available at http://www.broadcastingcable.com/article/450391-FCC_s_Net_Neutrality_Proceeding_Means_More_Work_For_State_Department.php.

⁵⁸ Howard Buskirk, “Public Safety Bureau Building Case for 700 MHz Plan,” *Communications Daily* 9 (March 25, 2010).

V. **THE PROPOSED RULES CONTRADICT IMPORTANT ADMINISTRATION PRIORITIES**

In addition to ill-serving the goals of the Commission, the proposed rules seem to directly undermine key aspects of the U.S. technology policy agenda as publicly expressed by senior administration officials. As mentioned above, Secretary of State Hillary Clinton recently delivered a powerful speech on the importance of Internet freedom around the world. However, the proposed rules seem to disserve this principle, and, as explained by many commenters, actually inhibit the freedom of speech. Furthermore, as expressed by the U.S. Director of National Intelligence and in the National Broadband Plan, cyber security is an increasingly vital aspect of national security. Yet, as is made abundantly clear in the record, the proposed rules have the dual effects of both further equipping those who would attack our information networks and tying the hands of those who would defend them.

A. **Mobile Broadband Networks Currently Promote Increased access to Information Around The World**

The United States has one of the world's longest and most celebrated traditions of protecting free speech through its strong First Amendment. The FCC should not lay the ground work for restricting this freedom. If the U.S. is perceived as regulating the Internet, this will set a negative precedent that will both undermine U.S. diplomatic efforts abroad and may inspire further restrictions of individual liberty in other nations. Instead, the U.S. should continue to be a leader in terms of nurturing free expression and the free flow of information online.

Secretary Clinton discussed the importance of the free flow of information to ensure government accountability and increased social welfare in her remarks on Internet Freedom.⁵⁹ The Secretary specifically discussed the unique ability of mobile broadband to allow people to

⁵⁹ Clinton Remarks on Internet Freedom at 1, 3-4.

connect with each other and share information about their lives in ways that can have profound personal or political impact.⁶⁰ As the Secretary recognizes, the mobile Internet is already a profound tool for social change and the free flow of information globally. However, the Secretary also spoke out strongly against government censorship and she promoted the need for an unrestricted Internet, both laudable principles that the proposed rules risk undermining.

Proponents of network neutrality rules argue that they are speech-enhancing regulations and thus serve to bolster First Amendment values, not to restrict them. Yet, this distinction will not be clear in other countries that do not have similar traditions, where the Commission's proposed rules will instead be seen as simply a proactive regulation of the Internet in order to achieve an important social policy goal of the Federal government. Indeed, there are substantial reasons to suspect that the proposed rules themselves would not withstand First Amendment scrutiny. In a paper attached to the Comments of Time Warner Cable, prominent American Constitutional Law scholar Laurence Tribe and Supreme Court litigator Thomas Goldstein explain how net neutrality rules thrust the government into private decisions about speech, in violation of the First Amendment.⁶¹ For example, by prohibiting network operators from providing certain offerings such as a "family friendly" service that would block out adult content, the FCC's nondiscrimination rule would limit private decisions about private speech.⁶²

The issue of compelled speech was central to the Supreme Court's reasoning in the recent *Citizens United* case that reaffirmed the free speech rights of corporations and other

⁶⁰ *Id.* at 3 (discussing the use of mobile phone by demonstrators in the wake of the Iran's disputed presidential elections).

⁶¹ See Laurence H. Tribe & Thomas C. Goldstein, "Proposed 'Net Neutrality' Mandates Could Be Counterproductive And Violate The First Amendment" (Oct. 19, 2009) *attached to Comments of Time Warner Cable Inc.*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

⁶² *Id.* at 3.

organizations by striking down government regulations that restricted the speech rights of some speakers in favor of perceived social policy goals.⁶³ The Supreme Court’s recent decision adds more force to the arguments made by several commenters who claim that the proposed rules would infringe upon the First Amendment rights of network operators.⁶⁴ Although GSMA does not take a position on the validity of the proposed rules under the First Amendment, it reiterates that mobile broadband access already plays a strong pro-democratic role and serves as a valuable channel for the free flow of information around the world. Any government interference in the mobile Internet will not further promote speech, and is more likely to provide cover for those countries that Secretary Clinton said “have erected electronic barriers” to keep their people isolated and themselves insulated from criticism.⁶⁵

B. The Proposed Rules will Hinder Important Cyber Security Efforts.

Network operators need the ability to proactively protect their networks without worrying about violating expansive network management and discrimination rules or needing to seek Commission approval while their networks are vulnerable to a known threat. Recent events in

⁶³ See *Citizens United v. Federal Election Commission*, No. 08-205, slip op. at 24 (U.S. Jan. 21, 2010) (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”).

⁶⁴ See, e.g., AT&T Comments at 235-244; Charter Comments at 25-27; Comments of the Free State Foundation at 16-21; GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010); Comments of Bright House Networks at 15-16, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010); Comments of National Cable and Telecommunications Association at 49-64, GN Docket No. 09-191, WC Docket No. 07-53 (filed Jan. 14, 2010); Comments of Time Warner Cable Inc. at 44-50, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010); Randolph J. May, “Net Neutrality Mandates Likely Violate the First Amendment” *attached to* Letter from Stephen Pociask, The American Consumer Institute Center for Citizen Research to Marlene H. Dortch, Secretary, Federal Communications Commission at 69-70, GN Docket No. 09-191, WC Docket No. 07-52 (Nov. 24, 2009); Verizon and Verizon Wireless Comments at 111-119.

⁶⁵ Clinton Internet Freedom Remarks at 2.

the U.S. and around the world have demonstrated that cyber attacks are being employed by increasingly sophisticated parties and that cyber threats may be entering a new era of severity and ubiquity. Although the category of reasonable network management practices is broad and rightfully encompasses a number of quality of service, congestion controls, and other practices beyond network security, the potential negative impact of the proposed rules on cyber security is a major reason why operators require wide flexibility in managing their networks.

Strengthening the nation's cyber security has been repeatedly identified as a priority by administration officials. In his testimony on the Annual Threat Assessment of the U.S. Intelligence Community before the U.S. Senate, the Director of National Intelligence, Admiral Dennis C. Blair, discussed the "Far-Reaching Impact of the Cyber Threat" first among all the threats currently facing U.S. national security.⁶⁶ As Admiral Blair described it, "[t]he national security of the United States, our economic prosperity, and the daily functioning of our government are dependent on a dynamic public and private information infrastructure This critical infrastructure is severely threatened."⁶⁷ Admiral Blair outlined a strategy for a coordinated and collaborative effort between the U.S. public and private sectors and its international partners with focuses including building capacity, shared responsibility for cyber security and encouraging innovation.⁶⁸ Secretary of State Clinton also spoke about cyber security in her recent speech on Internet freedom. The Secretary talked about the global nature

⁶⁶ Dennis C. Blair, Director of National Intelligence, *Annual Threat Assessment of the US Intelligence Community for the Senate Select Committee of Intelligence* (Feb. 2, 2010) available at <http://intelligence.senate.gov/100202/blair.pdf>.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 4.

of the Internet and cyber threats (including cyber intrusions into U.S. networks originating abroad), the need for enhanced cyber security and the role of the private sector.⁶⁹

The National Broadband Plan noted that “[p]rotecting the Internet and providing for cybersecurity is both an economic and national security challenge and collectively, one of the most serious challenges of the 21st century.”⁷⁰ To this end, the Plan lays out numerous proposals for enhancing cybersecurity, many of which will rely upon voluntary and dynamic participation by the private sector.⁷¹ The FCC also recognized the need for security in its Open Internet NPRM, in which it repeatedly indicated that the proposed rules would be subject to the needs of homeland and national security.⁷²

Yet, despite this emphasis on security, the proposed transparency rule, if not carefully applied, could undermine cyber security efforts and provide additional sensitive information to would-be bad actors, shining a light on network vulnerabilities. Additionally, an overly broad nondiscrimination rule is likely to restrict network operators’ abilities to proactively address potential security threats. Carriers have a strong financial motivation to protect consumers, both in the interest of customer satisfaction and also to avoid potential legal liability that may stem from compromised data or privacy breaches. At bottom, cyber security is good for business, however these efforts can be thwarted by inflexible regulatory obligations. Although some additional transparency requirements may be useful to consumers in notifying them of the basic terms, conditions, and expected performance characteristics of their services, overly broad

⁶⁹ Clinton Internet Freedom Remarks at 4.

⁷⁰ NBP at 287.

⁷¹ *See, e.g., id.* at 287-89, 320-23.

⁷² *See* Open Internet NPRM, ¶¶ 11, 16, 96, 100, 105, 119, 133.

transparency and nondiscrimination rules are unnecessary, potentially harmful, and contrary to administration policy goals.

VI. CONCLUSION

As detailed above and in its initial comments, the GSM Association continues to support an open Internet that enables consumers and business customers to access the lawful content and services of their choice in ways that provide them with the best possible experiences. The FCC should remain a global leader in sound, moderate regulatory policy, as it has been since its inception. The record in this proceeding demonstrates that although there is no evidence of anticompetitive or anticonsumer conduct occurring in the mobile broadband market, there are serious reasons to believe that the proposed rules would undermine important administration goals with respect to economic development and national security, and would represent a dramatic divergence from international regulatory norms that could set a dangerous precedent. Especially with respect to mobile broadband, the Commission's proposal in the NPRM is unnecessary and potentially harmful, and should be rejected.

Respectfully Submitted,

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