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

In the Matter of)
)
Framework for Broadband Internet Service) GN Docket No. 10-127
)

T-Mobile USA, Inc. (“T-Mobile”) submits these comments in response to the Notice of Inquiry (“*NOI*”) released on June 17, 2010 in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

To ensure that the wireless broadband market continues to develop and thrive, the Commission should maintain its current pro-competitive regulatory approach and defer making any decision regarding changes to the regulatory classification of wireless broadband. As the Commission recognized previously in its Open Internet proceedings and again here in the *NOI*, there are technological, consumer usage and historical differences between mobile wireless and wireline/cable networks. The complexity of wireless networks and their dependence on limited spectrum resources make flexibility in network management particularly essential to providing wireless consumers with the service and experience they expect. Moreover, consumers do not yet view wireless broadband as a substitute for wired access. Accordingly, even if the Commission subjects wireline broadband to Title II regulation, these distinctions easily justify treating wireless broadband differently for the present time.

¹ *Framework for Broadband Internet Services*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-27 (rel. June 17, 2010) (“*NOI*”).

The wireless broadband market is already very competitive, which has led providers to open their platforms without regulation, and wireless is poised to become an even more important broadband platform as additional spectrum is deployed. Due to the relatively nascent nature of wireless broadband and the dynamic nature of the technology and business models, any shift to a new regulatory regime could slow the innovation and investment the market has seen to date.

The Commission can best encourage the continued development of a dynamic and innovative wireless broadband market, which the Obama Administration has correctly recognized as a driver of economic growth and job creation, by declining to reclassify wireless broadband at this time. The uncertainties created by a change in the regulatory framework would chill the very investment and innovation needed to make this potential a reality. The Commission can, and should, revisit this issue in three years, which will give the wireless broadband marketplace an opportunity to mature before classification decisions are set in stone, and which will allow the Commission to better assess the results of its open access mandate for the 700 MHz C Block licensee.

If, despite the important differences between wireline and wireless broadband, the Commission chooses to reclassify the transmission component of wireless broadband as a Title II service at this time, it should avoid adopting all of the obligations proposed to be imposed on wireline broadband including, in particular, one-size-fits-all network management rules. Such regulations would work at cross purposes with the aggressive wireless broadband-specific policy agenda of the Commission and Administration.

I. DIFFERENCES BETWEEN WIRELINE AND WIRELESS JUSTIFY CONTINUED REGULATORY RESTRAINT FOR WIRELESS BROADBAND

A. Finite Spectrum Resources and the Complexity of Managing Wireless Networks Present Unique Challenges for Wireless Broadband Providers

In a speech last year, Chairman Genachowski correctly explained that “the biggest threat to the future of mobile in America is the looming spectrum crisis,” noting that wireless providers are on record as needing anywhere from 40 to 150 MHz *each* to deploy mobile broadband to U.S. consumers.² Likewise, the United States Department of Justice has identified spectrum scarcity as “the fundamental obstacle” for the provision of wireless broadband, explaining that “without access to sufficient spectrum a firm cannot provide state-of-the-art wireless broadband service.”³ In its *Open Internet NPRM*, the Commission recognized that each wireless broadband provider “has a finite amount of spectrum available to it,” and that “bandwidth intensive Internet services already create challenges for wireless networks, and these challenges are likely to increase.”⁴

Options for Increasing Bandwidth Are More Limited for Wireless Providers. Limited network capacity resulting from finite spectrum resources is the principal differentiator between wired and wireless networks. When wireline or cable operators need more capacity to serve their subscribers, they have the option of installing more copper, coax, or fiber, which can expand the available bandwidth by multiple-fold. Wireless operators do not have this option. As Americans utilize more and more data, additional spectrum suitable for mobile broadband is not readily accessible. While the Commission has committed to making more spectrum available, Chairman

² Remarks of Chairman Julius Genachowski, CTIA Wireless I.T. & Entertainment, San Diego, California (Oct. 7, 2009) (“Genachowski CTIA Remarks”).

³ *Ex Parte* of the United States Department of Justice, GN Docket No. 09-51, at 21-22 (filed Jan. 4, 2010).

⁴ *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13123, at ¶ 172 (2009) (“*Open Internet NPRM*”).

Genachowski has acknowledged that “it takes years to reallocate spectrum and put it to use.”⁵ Meanwhile, demand for mobile data services continues to grow at exponential rates.⁶ Wireless operators can often achieve some increases in capacity by cell sectorization and constructing additional cell sites in a given area, but the efficiency gains are quite limited. Moreover, such strategies quickly become cost prohibitive because, unlike adding new cable lines, the physics of spectrum engineering subjects these techniques to the law of diminishing returns – *i.e.*, adding a cell site does not increase the capacity in an area nearly as much as it increases operating costs (*e.g.*, additional tower lease payments, backhaul expenses, and maintenance).⁷

Upgrading Consumers’ Wireless Technology Is More Challenging. Another means of increasing capacity – for both wired and wireless networks – is to upgrade to more efficient technology as it becomes available. While this is expensive in either context, the key difference between wireless and wired networks is that providers of wired broadband service typically retain ownership of the customer premises equipment (“CPE”) that interfaces with the network, which the customer usually rents. This retention of ownership and control makes it easier to upgrade or exchange the CPE to take advantage of more efficient technology. In the wireless context, by contrast, the consumer owns and controls the handset or other device used to access the network, which increases the complexity and expense of upgrading technologies. Because technological transition efforts can take years to complete, and can be disruptive to consumers, wireless operators usually must continue to devote a portion of their limited spectrum resources to the older technology.

⁵ Genachowski CTIA Remarks.

⁶ *See id.* (noting estimates that mobile data usage will grow from 6 petabytes per month in 2008 to nearly 400 petabytes per month in 2013).

⁷ *See, e.g.*, MetroPCS Open Internet Comments, GN Docket No. 09-191, at 43 (filed Jan. 14, 2010).

Wireless Capacity Is Dynamically Shared. Capacity management issues are also much more complex for wireless broadband networks because the capacity at any given cell site is dynamically shared among all network users – whether subscribers or roamers – who happen to be in the vicinity of that site. As the Commission explained, “The users in a cell share the spectrum at any given time and the demands on capacity can vary widely depending on such factors as the number of users within that cell at any given time and the applications they are using.”⁸ Thus, without proper network management, a small number of users of high-bandwidth or “selfish protocol”⁹ applications can negatively impact service to other customers attempting to access the same cell site.¹⁰

Certain wired networks (*e.g.*, cable modem service) are also shared in that a finite quantity of bandwidth may be available to a given geographic area (*e.g.*, a neighborhood), but such networks are not subject to the highly dynamic, constantly-changing nature of sharing on wireless networks that results from mobility. The Commission has already acknowledged that “wireless networks are more sensitive to user behavior than wireline networks, so capacity management is a constant concern of wireless engineers.”¹¹ For example, a cell site that normally operates with plenty of capacity can require additional capacity due to a special event or traffic incident in an area. Indeed, T-Mobile devotes significant ongoing personnel resources

⁸ *Open Internet NPRM* at ¶ 172.

⁹ Applications with “selfish” protocols include those “that keep an access connection alive for more than is needed for typical usage through the use of ‘keep alive’ and ‘retry’ functions, which tie up available resources without providing any benefit to customers.” *See Verizon and Verizon Wireless Open Internet Comments*, GN Docket No. 09-191, at 62-64 (filed Jan. 14, 2010).

¹⁰ An engineering analysis commissioned by AT&T concluded that “even a single user of bandwidth-intensive P2P application in a crowded cell could end up affecting dozens of other users. And because users frequently (and unexpectedly) shift from one cell to another, the bandwidth-intensive user could disrupt service for end users in a number of nearby cells.” *AT&T Open Internet Comments*, GN Docket No. 09-191, at 160 (filed Jan. 14, 2010) (citing attached paper by Jeffrey Reed and Nishith Tripathi).

¹¹ *Open Internet NPRM* at ¶ 172.

to monitoring local news sources for anticipated special events so that it can predict where and when extra capacity will be needed. As needed, it deploys cells on wheels (“COWs”) or cells on light trucks (“COLTs”) to maintain acceptable levels of customer service, and takes other measures to maintain its service. However, as in the traffic incident scenario, not all spikes in demands can be predicted in advance given the mobility of network users. In contrast, a cable broadband provider generally knows how many subscribers it has in an area (there are no roamers), knows in advance before that number increases, and can generally predict demand based on relatively stable usage patterns.

In addition to being shared among all users in the vicinity of a cell site, the spectrum used on many wireless broadband networks is also shared between voice and data services. Thus, without proper management, heavy broadband users could not only degrade the service for other data users, but also impact voice calls. To ensure high quality voice service, which is very sensitive to latency, carriers often must prioritize voice calls over data sessions to provide a positive customer experience.

Wireless Networks Require More Active Management. Another difference between wired and wireless networks is the level of engineering complexity and active management required to maintain quality of service and ensure privacy and security. As the Commission aptly explained in the *Open Internet NPRM*, “wireless networks must deal with particularly dynamic changes in the communications path due to radio interference and propagation effects such as signal loss with increasing distance of the wireless phone to the base station, fading, multipath, and shadowing.”¹² Interference can result from natural sources (*e.g.*, weather and terrain) and manmade sources (*e.g.*, other wireless devices and buildings). Moreover, because

¹² *Id.* at ¶ 159.

signals may be intercepted by anyone in the area, wireless providers must employ effective encryption technology to ensure customer privacy and network security. In contrast to the challenges faced by wireless networks, transmissions on wired networks travel through insulated cables that are relatively unaffected by the same external factors.

In summary, the technological differences between wired and wireless broadband – most of which have already been recognized by the Commission in other proceedings – are significant. As Chairman Genachowski noted, “managing a wireless network isn’t the same as managing a fiber network.”¹³ Thus, regardless of what action the Commission decides to take regarding the regulatory classification of wireline broadband networks, it would not be in consumers’ best interest to apply a new regulatory framework to wireless broadband.¹⁴

B. The Wireless Broadband Market Is More Nascent than the Wireline Broadband Market, and Consumer Perceptions and Usage Reflect that It Has Not Become a Substitute for Wireline Broadband

In contrast to the relatively mature wireline broadband market, wireless broadband is only just emerging. While wireline broadband has been on the market since the late 1990s, the first 3G services were not launched until 2003.¹⁵ Only recently has the wireless broadband market seen significant deployments of the next generation of speed technologies: T-Mobile launched its HSPA+ service late last year and has now made it available in 25 metropolitan

¹³ Genachowski CTIA Remarks.

¹⁴ In the *Open Internet NPRM*, the Commission recognized the differences between wired and wireline networks, yet proposed the same rules to apply to both. The Commission should not repeat that outcome here.

¹⁵ See *NOI* at ¶ 101; *Implementation of 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Tenth Report, 20 FCC Rcd 15908, 15952, at ¶ 114 (2005).

areas,¹⁶ with plans to cover 185 million people by the end of this year.¹⁷ Sprint Nextel just released its first WiMax phone on June 4,¹⁸ and while Verizon Wireless has announced plans for LTE deployment, service and devices are not yet available to consumers.

The United States had approximately 25 million mobile-wireless high-speed Internet subscribers by the end of 2008,¹⁹ but nearly 77 million high speed wireline connections were counted at that same time.²⁰ Wireless broadband's relative youth and lower subscribership demonstrate that its market is nowhere near as developed as the wireline market.

Today, new mobile broadband capabilities are allowing wireless providers to experiment in offering new types of services – beyond plain-old Internet access – which will run over the same network. The wireless industry is aggressively innovating, developing novel uses for wireless broadband such as machine-to-machine (“M2M”) applications, mobile video, and even programs that facilitate healthcare treatment, smart grid management, and education.²¹ The

¹⁶ See, e.g., Walter S. Mossberg, *Carriers Go to Battle Over Faster Networks*, Wall Street Journal (June 30, 2010), available at <http://ptech.allthingsd.com/20100630/carriers-go-to-battle-over-faster-networks/> (last visited July 14, 2010).

¹⁷ See T-Mobile USA, *T-Mobile Expands Super-Fast Network and Availability of T-Mobile webConnect Rocket USB Laptop Stick to Cover 25 Major Metropolitan Areas*, Press Release (June 16, 2010), available at http://www.t-mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20100616&title=T-Mobile%20Expands%20Super-Fast%20Network%20and%20Availability%20of%20T-Mobile%20webConnect%20Rocket%20USB%20Laptop%20Stick%20to%20Cover%2025%20Major%20Metropolitan%20Areas (last visited July 14, 2010).

¹⁸ See Sprint-Nextel, *The Wait Is Over – America's First 3G/4G Phone, HTC EVOTM 4G, Available Nationwide Today, Exclusively from Sprint*, Press Release (June 4, 2010), available at http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1434543&highlight= (last viewed July 8, 2010).

¹⁹ See Federal Communications Commission, Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of December 31, 2008* (Feb. 2010) at 7, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf (last viewed July 8, 2010) (“*FCC Broadband Status Report*”).

²⁰ See *id.* at 6.

²¹ See, e.g., CTIA Wireless Competition Comments, WT Docket No. 09-66, at 40-54 (filed Sept. 20, 2009) (describing new wireless developments).

necessary throughput speeds for many of these new applications are only now becoming available.

Because it is not yet clear what technologies – or even what business models – will evolve as a result of these new developments, imposition of new regulations at this stage would be premature and would risk stifling the industry’s investment and innovation. Even if the Commission plans to exercise regulatory restraint through the so-called “Third Way” option, the mere threat of increased regulation would likely chill investment.²²

Furthermore, if the Commission finds it necessary to regulate wireline broadband under Title II or a “Third Way” approach, there is no need to paint wireless broadband with the same brush because consumers do not view the two products as substitutes for each other. Today’s wireless broadband is still slower and more expensive on a megabits-per-second basis than wireline broadband. This dynamic even prompted the Commission to conclude in the FCC’s National Broadband Plan (the “NBP”)²³ that “[w]ireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers.”²⁴ Indeed, the NBP Consumer Survey found that consumers do not use wireless and wireline broadband interchangeably. According to the Commission’s working paper, “those [consumers] saying they use mobile broadband were as likely as the

²² See George S. Ford & Lawrence J. Spiwak, *Phoenix Center Policy Paper No. 40: The Broadband Credibility Gap*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, at 23-24 (June 2010) (“[T]he existence of strong authority under Title II will not diminish, but will, in fact, increase the chances that, ultimately, the broadband firms face significant price regulation. Thus, all Internet firms, and particularly broadband providers, would plausibly and reasonably incorporate a higher probability of prescriptive regulation into their investment decisions upon reclassification.”) (“*Ford and Spiwak*”), available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf> (last viewed July 8, 2010).

²³ See Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), available at www.broadband.gov (last viewed July 8, 2010) (the “*National Broadband Plan*”).

²⁴ *Id.* at 41.

average to say they use DSL, cable modem service and other wireline means such as fiber.”²⁵

This statistic led to the conclusion that “mobile broadband is mainly a *supplementary* broadband access pathway.”²⁶ Likewise, the Consumer Federation of America and Consumers Union corroborate that consumers treat wireless and wireline broadband as separate products.²⁷

As consumer patterns demonstrate, wireless broadband as of now is a fundamentally different product than wireline broadband. Still in its early stages of development, it is both unnecessary and unwise to regulate it at this time.

C. The Wireless Broadband Market Is Already Very Competitive

Competition in the wireless industry on a retail basis is vibrant, fierce, and flourishing.²⁸ The vast majority of Americans today have meaningful choice among wireless providers. According to the Commission’s *2010 Wireless Competition Report*, 90.9% of Americans have a choice of at least four distinct facilities-based wireless providers, and 95.8% can choose between three.²⁹ As of last year, 58% of the U.S. population had a choice of at least four mobile wireless *broadband* providers, and 76.1% of Americans could choose between three.³⁰ This number is rapidly trending upward – the percentage of Americans with a choice of three mobile wireless

²⁵ John B. Horrigan, Ph.D., Federal Communications Commission, *Broadband Adoption and Use in America: OBI Working Paper Series No. 1*, at 24 (rel. Feb. 23, 2010).

²⁶ *Id.* (emphasis added).

²⁷ Consumer Federation of America and Consumers Union Comments, GN Docket No. 09-51, at 21 (filed June 8, 2009) (“There is virtually no correlation between the penetration of wireless and wireline, suggesting that they are neither substitutes nor complements, but simply different products.”).

²⁸ See Everett Ehrlich et al., *The Impact of Regulation on Innovation and Choice in Wireless Communications*, at 3 (September 2009) *available at* <http://ssrn.com/abstract=1478528> (last viewed July 8, 2010) (concluding that “there has been no demonstration of market failure in the markets at issue,” and that “while the markets for wireless carriage, devices, handsets and applications are (like most technology markets) characterized by product differentiation and dynamic competition, the temporary market power associated with such markets is a driver of competition and innovation, not a deterrent”).

²⁹ See *Fourteenth Annual Report on Wireless Competition*, WT Docket No. 09-66, FCC 10-81, at ¶ 44 (rel. May 20, 2010) (“*2010 Wireless Competition Report*”).

³⁰ See *id.* at ¶ 47.

broadband providers leapt from 51% to 76% from May 2008 to November 2009.³¹ All told, more than 150 facilities-based wireless providers do business in the United States,³² 46 different providers offer wireless mobile broadband service,³³ and at least 60 non-facilities-based Mobile Virtual Network Operator (“MVNO”) providers operate in the U.S. as well.³⁴

Fierce competition, coupled with consumer demand, has molded a wireless industry that trades on market innovation. Given the market’s dynamic nature, wireless providers – by necessity – are attuned to consumer concerns and needs. As a prime example, upon the first Apple iPhone hitting the market in 2007, wireless providers immediately responded to consumers’ enthusiasm: the Commission estimates that 67 new smartphones were released in 2008 and 2009 alone.³⁵ The Open Handset Alliance (“OHA”), of which T-Mobile is a founding member, developed the Android platform, an open source platform that enables third-party developers to create their own mobile applications.³⁶ Wireless providers have further responded to consumer demand by opening their systems, providing for VoIP and Wi-Fi access, facilitating handset unlocking in many situations, and permitting customers to use their own compatible devices and applications.³⁷

The wireless industry’s history is marked by constant reinventions of how to serve customers with calling plans that best fit their needs – including free long-distance and roaming,

³¹ *See id.*

³² T-Mobile Wireless Innovation Comments, GN Docket No. 09-157, at 7 (filed Sept. 30, 2009).

³³ T-Mobile Open Internet Comments, GN Docket No. 09-191, at 9 (filed Jan. 14, 2010); *FCC Broadband Status Report* at 23, 44-45, Tbl. 10, Tbl. 20.

³⁴ *2010 Wireless Competition Report* at ¶ 33.

³⁵ *Id.* at ¶ 4.

³⁶ *See* Open Handset Alliance, <http://www.openhandsetalliance.com/> (last visited July 13, 2010).

³⁷ T-Mobile Open Internet Comments at 11.

family plans, unlimited use, prepaid and pay-as-you-go plans, messaging bundles and buckets, and data plans.³⁸

Robust competition does not just exist among service providers; broader industry-wide statistics also confirm that the mobile device and applications markets are thriving, providing consumers with a wide range of choices. CTIA recently reported that there are 33 different companies manufacturing more than 630 unique wireless devices for the U.S. market, more than in any other country in the world.³⁹ The list of devices includes some of the most advanced handsets available anywhere. In the second quarter of 2009, 28% of all handsets sold in the U.S. were smartphones.⁴⁰ Buoying the vast array of mobile device options, wireless applications have exploded as well. iPhone applications alone currently stand at 200,000.⁴¹ Adding the 50,000 Android applications brings the total to a quarter million, up 100,000 in just the last six months.⁴² Even operating systems enjoy robust competition: according to CTIA, more than nine distinct operating systems currently compete in the market, and not one of them is owned by a wireless provider.⁴³

Vigorous retail competition and the ever-increasing demand for stronger, faster and cheaper wireless voice and broadband has led to an extended period of high investment in wireless networks throughout the country. In 2008, former Vice President Al Gore noted that the United States has the “most competitive wireless industry of any nation in the world,” and

³⁸ See, e.g., CTIA Wireless Innovation Comments, GN Docket No. 09-157, at 56-60 (filed Sept. 30, 2009). Providers have further responded to consumer demand by providing services such as parental controls and by pro-rating early termination fees.

³⁹ See CTIA Open Internet Comments, GN Docket No. 09-191, at 14 (filed Jan. 14, 2010).

⁴⁰ *Id.* at 5-6.

⁴¹ See Apple, Learn about apps available on the App Store, <http://www.apple.com/iphone/apps-for-iphone/> (last visited July 8, 2010).

⁴² See CTIA Open Internet Comments at 22 (reporting 150,000 apps at the end of 2009).

⁴³ See CTIA Wireless Innovation Comments at 23.

“because of competition, we are seeing a continued pulse of investment to expand the capacity of broadband networks.”⁴⁴ In 2009, T-Mobile spent more than a billion dollars building out its 3G network,⁴⁵ and it has invested \$10 billion in its 3G network since 2006.⁴⁶ According to CTIA, wireless operators have contributed more than \$90 billion to America’s economy since 2006.⁴⁷ This investment has created real results. T-Mobile, for instance, now has a 3G network that reaches 200 million people, has deployed HSPA 7.2 across its entire 3G network, and plans to overlay HSPA+ across most of its 3G footprint by the end of this year.⁴⁸ An independent study prepared at the request of the FCC’s Omnibus Broadband Initiative reported that “[w]ireless broadband service providers expect to offer wireless access at advertised speeds ranging up to 12 mbps downstream . . . to about 94% of the population by 2013.”⁴⁹ Constant investment by their competitors requires wireless providers to continue pressing forward and developing newer and better technology and infrastructure.

Wireless broadband’s competitiveness is perhaps most evident in its advertising. CTIA reports that in 2007 AT&T, Verizon, Sprint, and T-Mobile ranked as first, second, third, and twelfth in national advertising.⁵⁰ As one analyst has written, “If the industry were not

⁴⁴ See T-Mobile Wireless Innovation Comments at 6 (quoting statement of Former Vice President Al Gore from April 2008).

⁴⁵ See T-Mobile Open Internet Comments at 7.

⁴⁶ See T-Mobile Open Internet Reply Comments at 10.

⁴⁷ See *id.* at 11; CTIA Comments, GN Docket Nos. 09-51, 09-47, 09-137, at 12-13 (filed Aug. 31, 2009).

⁴⁸ T-Mobile Open Internet Comments at 7.

⁴⁹ See *id.* at 8; Robert C. Atkinson & Ivy E. Schultz, *Broadband in America, Where It Is and Where It Is Going*, at 7 (Columbia Institute for Tele-Information, Nov. 11, 2009), http://www.broadband.gov/docs/Broadband_in_America.pdf (last visited July 8, 2010).

⁵⁰ T-Mobile Wireless Innovation Comments at 54-55.

competitive[,] why would the industry spend more on marketing and advertising than any other industry in the U.S.?”⁵¹

All evidence points to the fact that the wireless industry has been, and remains, one of the most competitive and dynamic industries in the country. The industry’s growth and creativity have been fostered by the market-oriented and hands-off approach adopted by the Commission in the past. There is simply no need to overlay more regulation or a Title II classification on an industry that already operates at this heightened level of competition.

D. Despite Being a Nascent Marketplace, Wireless Broadband Providers Have Already Aggressively Embraced Openness to the Benefit of Their Consumers

As mentioned briefly above, T-Mobile has been at the forefront of the open wireless platform movement. In November 2007, T-Mobile became a founding member of the OHA, a broad industry alliance formed to support the release of the Android open source mobile operating system platform, with the aim of lowering the cost of developing and distributing mobile devices and services. Google explained at the time, “[B]y providing developers a new level of openness that enables them to work more collaboratively, Android will accelerate the pace at which new and compelling mobile service are made available to consumers.”⁵² In April of this year, there were already over 50,000 Android applications, and that number stands at considerably more today.⁵³ Of course, T-Mobile customers can choose devices based on other operating systems, each with their own applications, and any smartphone can be used to access

⁵¹ T-Mobile Open Internet Comments at 10; Scott Cleland, *Anti-Competition Groups’ Assertion Wireless Industry Not Competitive Ignores Facts & Common Sense* (June 6, 2009), <http://precursorblog.com/content/anti-competition-groups-assertion-wireless-industry-not-competitive-ignores-facts-common-sense> (last visited July 8, 2010).

⁵² Google, *Industry Leaders Announce Open Platform for Mobile Devices*, Press Release (Nov. 5, 2007), available at http://www.google.com/intl/en/press/pressrel/20071105_mobile_open.html (last visited July 8, 2010).

⁵³ Seth Weintraub, *Android Market hits 50,000 apps*, FORTUNE, Apr. 26, 2010, available at <http://tech.fortune.cnn.com/2010/04/26/android-market-hits-50000-apps/> (last visited July 8, 2010).

web-based applications and content. T-Mobile also allows consumers to “bring their own device” so long as it is compatible and does not harm the network, and unlocks handsets after only 40-60 days, depending on the customer’s service plan. Indeed, the networks of wireless providers like T-Mobile are apparently more open than some of the application providers or Internet service companies themselves. For example, recent reports indicate that messaging aggregator Fring is accusing VoIP provider Skype of blocking access to Skype’s service.⁵⁴

Other major wireless industry players have joined the open network bandwagon, illustrating that wireless platform openness has become a competitive differentiator in the industry – not something that is at risk without regulatory intervention.⁵⁵ One year ago, economists Gregory Rosston and Michael Topper analyzed the market and concluded that “[r]ecent developments suggest that wireless providers are responding to consumer demands for

⁵⁴ See “Skype-Fring Connection Unravels Over TOS Dispute,” PCMag.com (July 12, 2010), available at <http://www.pcmag.com/article2/0,2817,2366354,00.asp>. Ironically, Skype became prominent in the “openness” debate in 2007 by filing a petition asking the FCC to apply the *Carterfone* network openness principles to the wireless industry. See Petition of Skype Communications S.A.R.L. to Confirm a Consumer’s Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361, at 2 (filed Feb. 20, 2007).

⁵⁵ See, e.g., See Kevin Fitchard, *VZW Promises Family of Android Phones and Commits to More Open Network*, Connected Planet (Oct. 6, 2009), available at <http://connectedplanetonline.com/mobile-apps/news/vzw-android-phones-1006/> (last visited July 8, 2010) (Verizon is now offering Android phones, allowing access to the full breadth of Android applications, including Google Voice.); AT&T, *AT&T Launches Major Initiative to Bring ‘Apps to All,’* Press Release (Jan. 6, 2010) available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30353> (last visited July 8, 2010) (AT&T allows compatible devices to operate on its network, offers Android handsets, and announced a goal to offer all major app stores. AT&T will “preload the corresponding store for each device – giving customers convenient access to thousands of apps optimized for their smartphones.”); Open Internet Comments of Clearwire, GN Docket No. 09-191, at 2-6 (filed Jan. 14, 2010) (Clearwire is constructing its 4G wireless broadband network on the open WiMAX standard, and offers non-exclusive wholesale access to its network.); Letter from Henry Goldberg, Counsel to Harbinger Capital Partners Funds, to Marlene Dortch, Secretary, IB Docket No. 08-184 (Mar. 26, 2010), at Attachment 1 (Harbinger Capital Partners Fund, which controls SkyTerra, has committed to constructing a nationwide 4G broadband network operated on a wholesale-only, open access basis.).

more ‘openness’ to third-party content and applications without the need for regulatory mandate.” The examples above confirm that this conclusion is even more true today.⁵⁶

E. A Number of Pending or Completed FCC Proceedings Will Result in Increased Competition in the Wireless Broadband Marketplace, Further Undermining Any Rationale for More Regulation

The Commission has long recognized in a variety of contexts that growing competition in a market lessens or eliminates the need for regulation.⁵⁷ As established above, the wireless broadband market is already extremely competitive at the retail level. Upcoming and recently completed FCC proceedings are likely to increase competition. Imposing greater regulation on wireless providers, operating in such a competitive market, would be counterproductive and inappropriate at this time.

Notably, both the FCC’s NBP and President Obama’s recent Presidential Memorandum call for unleashing an additional 500 MHz of spectrum for wireless broadband over the next ten years.⁵⁸ A number of FCC proceedings relate to this goal, which will create opportunities for new wireless providers and services:

- *WCS-SDARS Order* – In May, the FCC adopted an order providing WCS licensees with the ability to offer mobile broadband services in 25 megahertz of the 2.3 GHz band.⁵⁹

⁵⁶ Gregory L. Rosston and Michael D. Topper, Stanford Institute for Economic Policy Research, *An Antitrust Analysis of the Case for Wireless Network Neutrality* (July 2009) available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/08-040.pdf> (last visited July 8, 2010).

⁵⁷ See, e.g., *Implementation of Section 621(A)(1) of the Cable Communications Act of 1984*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581, 18581, at ¶ 1 (2005) (“as marketplace competition disciplines competitors’ behavior, all competing cable service providers could require less federal regulation”); *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1999-2000, at ¶ 13 (2005) (noting plans to “lessen, and eventually eliminate, rate regulation as competition develop[s]”); *Review of the Commission’s Broadcast Ownership Rules*, Report and Order, 18 FCC Rcd 13620, 13638, at ¶ 56 (2003) (“greater competition ... would lessen the need for prescriptive ownership regulations”).

⁵⁸ See *National Broadband Plan* at Recommendation 5.8; The White House, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, Press Release (Jun. 28, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution> (last visited July 8, 2010) (“Broadband Presidential Memorandum”).

- *MSS Flexibility* – The FCC is expected to propose rules that will facilitate the use of 90 megahertz of mobile satellite service (“MSS”) spectrum for the provision of mobile broadband.⁶⁰
- *AWS-2/3* – The FCC commenced a proceeding on the AWS-2 band in 2004 and on the AWS-3 band in 2007.⁶¹ More recently, OET sought comment on the potential for combining some portion of the 1675-1710 MHz with AWS-3, for a total of 60 MHz of new spectrum available for broadband.⁶²
- *Spectrum Inventory* – Commissioner Baker announced that the FCC will move forward with a spectrum inventory (even if Congress does not mandate one), which could facilitate the identification and reallocation of underused spectrum for wireless broadband.⁶³
- *700 MHz D Block* – The Commission’s National Broadband Plan called for a reauction of the 700 MHz D Block to entities who would use it to provide commercial services, but would provide priority access for public safety entities when needed in emergencies.⁶⁴
- *TV Spectrum Incentive Auction* – The FCC recently released a paper that discussed options for “incentive auctions” that, if authorized by Congress, could create opportunities for new wireless broadband services by allowing broadcasters to voluntarily put up some or all of their spectrum for auction in exchange for a portion of the proceeds.⁶⁵

⁵⁹ *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 22 FCC Rcd 22123 (2010).

⁶⁰ “FCC to Propose Giving MSS Licensees Flexibility to Promote Terrestrial Use,” Telecommunications Reports, 2010 WLNR 1277551 (July 1, 2010).

⁶¹ *Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, Notice of Proposed Rulemaking, 19 FCC Rcd 19263 (2004); *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd. 17035 (2007).

⁶² *Office of Engineering and Technology Requests Information on Use of 1675-1710 MHz Band*, ET Docket No. 10-123, Public Notice, DA 10-1035 (rel. June 4, 2010).

⁶³ *TV White Spaces Proponents Call for Speedy FCC Action*, TELECOMM. REP., 2010 WLNR 1277553 (2010).

⁶⁴ See *National Broadband Plan* at 86.

⁶⁵ Federal Communications Commission, *Spectrum Analysis: Options for Broadcast Spectrum*, OBI Technical Paper No. 3 (June 2010), available at <http://www.broadband.gov/> (last visited July 8, 2010).

In addition to these spectrum-related dockets, other pending FCC proceedings also have the potential to enhance wireless broadband competition.⁶⁶ The sheer number of proceedings that will impact wireless broadband illustrates just how dynamic and fluid the wireless broadband market is at this time and how active the FCC has been in ensuring its robust development. Even industry-favored regulatory activity (*e.g.*, releasing spectrum) creates short-term uncertainties until final decisions are made, first by the FCC, and then by market participants. Overlaying a new and uncertain regulatory regime on the wireless industry at the same time would add yet another “moving part” to complicate the many business decisions that will need to be made in the next few years.

It should be clear, based on the current status of the industry as described in the discussions above, that now is not the time to reclassify wireless broadband and impose net neutrality obligations on wireless broadband providers. If, as suggested, the Commission deferred a decision on the reclassification of wireless broadband, it could certainly decide to reassess the market in the future, once it had more time to digest the many technological and spectrum-related changes taking place. Because the Commission has already imposed certain open access requirements on the Upper 700 MHz C Block, it would be prudent to wait at least until the licensee has commenced operations in that spectrum⁶⁷ so that the Commission can evaluate the impact of its rules as applied to the spectrum block.

⁶⁶ See, *e.g.*, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 24 FCC Rcd. 4181 (2010); *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, Public Notice, DA 09-2388 (rel. Nov. 5, 2009); *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM No. 11592, Public Notice, DA 10-278 (rel. Feb. 18, 2010); *Connect America Fund*, Notice of Inquiry and Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 10-58 (rel. Apr. 21, 2010).

⁶⁷ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007).

II. DEFERRAL OF A DECISION TO RECLASSIFY WIRELESS BROADBAND WOULD BEST ENCOURAGE THE DEVELOPMENT OF A DYNAMIC AND INNOVATIVE WIRELESS BROADBAND MARKET

A. Enlightened “Light Touch” Regulation Has Fostered Numerous Consumer Benefits and the Great Promise of Wireless Broadband

President Obama recently recognized that “[f]ew technological developments hold as much potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet.”⁶⁸ On the same day, the President’s National Economic Council (“NEC”) Director Lawrence Summers estimated that “[e]ach dollar invested in wireless [broadband] deployment [will result in] as much as \$7 to \$10 higher GDP,”⁶⁹ a significant figure when one considers that “major American wireless firms [will be] spending \$10 billion and rising on these efforts.”⁷⁰ As discussed above, the benefits already provided and tremendous future promise of wireless broadband emerged not by accident, but as a result of a deliberate policy of regulatory restraint. The Commission would be wise to adhere to the regulatory restraint policy at this pivotal moment in our nation’s economy.

The efficacy of the existing policy approach for addressing consumer concerns and fostering innovation in the wireless marketplace has been demonstrated repeatedly since Congress decreed that wireless services be lightly regulated in 1993.⁷¹ For example, in the late 1990s, consumers were subject to high per minute air time charges, even when receiving wireless calls. This discouraged them from disclosing their wireless phone numbers – and caused some to

⁶⁸ Broadband Presidential Memorandum.

⁶⁹ Lawrence Summers, Director, Nat’l Econ. Council, Remarks at the New America Foundation on the President’s Spectrum Initiative, Technological Opportunities, Job Creation, and Economic Growth, at 5, *available at* <http://www.whitehouse.gov/administration/eop/nec/speeches/technological-opportunities-job-creation-economic-growth> (last visited July 8, 2010).

⁷⁰ *Id.*

⁷¹ *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002(b), 107 Stat. 312, 392 (codified in relevant part at 47 U.S.C. § 332).

leave their phones turned off – which, in turn, discouraged wireless usage. Although the FCC initially considered adopting provisions to facilitate a calling party pays regime as a way to eliminate the disincentive for receiving wireless calls, competitive market forces proved capable of addressing consumer needs much more quickly than the Commission. Before the Commission could issue a decision on calling party pays, wireless providers, responding to a demonstrated market opportunity, began offering calling plans with large “buckets” of minutes.

As noted above in Section I, encouraged by a policy of regulatory restraint, this same dynamic has allowed wireless providers to introduce a wide variety of additional market innovations, including unlimited roaming, unlimited local calling; unlimited nationwide calling; unlimited wireless data usage; service plan trial periods during which early termination fees (“ETFs”) do not apply; pro-rated ETFs;⁷² non-contract wireless plans; real-time, easy access to usage and billing information (on wireless devices and online);⁷³ parental controls on wireless use by minors;⁷⁴ “personal coverage check” maps of signal strength down to the street address level;⁷⁵ and many others. These reforms, which were enacted much faster than would have been possible if compelled by the Commission, addressed consumer needs in a manner that allowed

⁷² See FCC Consumer Task Force, *Early Termination Fees Made Simple*, available at hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298416A1.doc (last visited July 8, 2010).

⁷³ See Comments of T-Mobile USA, Inc. CG Docket No. 09-158, at 3-7 (filed July 6, 2010).

⁷⁴ See T-Mobile, *Family Wireless 101*, available at http://www.t-mobile.com/shop/addons/services/information.aspx?PAsset=FamilyWireless&tp=Svc_Tab_FW101FamilyAllowances (last visited July 8, 2010) (“*Family Wireless 101*”).

⁷⁵ T-Mobile introduced the Personal Coverage Check (“PCC”), a street-level interactive coverage tool, several years ago because it recognized early the importance of offering complete transparency to customers about T-Mobile coverage. The PCC (located both in T-Mobile retail stores and on www.t-mobile.com) allows customers to check whether T-Mobile’s wireless coverage is appropriate for them *in advance* of purchasing service. The PCC has been celebrated in industry trade articles as an “honest” approach to wireless service and subsequently imitated by our competitors. See Sascha Sagan, PC Mag.com, *T-Mobile Personal Coverage Check Gets “A” for Honesty* (Mar. 9, 2005), available at <http://www.pcmag.com/article2/0,2817,1774481,00.asp> (last visited July 8, 2010).

wireless providers to distinguish their service offerings in the market and obviated the need for prescriptive government regulation.

All wireless providers have responded to consumer needs without regulatory intervention. For instance, the CTIA Consumer Code was completed in 2003.⁷⁶ Since its inception, 31 companies have become signatories and the rate of wireless consumer complaints to the Commission has fallen in half, from an annualized rate of 80 billing and rate-related complaints per one million subscribers in 2004 to just 40 such complaints in 2008.⁷⁷

As the nation's fourth largest wireless provider, T-Mobile has been a key driver in the success of the wireless marketplace as a tool for change. Building on a legacy of recognition reflecting T-Mobile's commitment to delivering an industry-leading retail experience, T-Mobile this year won its eighth top ranking since 2004 from J.D. Power & Associates in the Wireless Retail Sales Satisfaction Study.⁷⁸ T-Mobile also has been regularly recognized by J.D. Power as performing particularly well in cost of service, billing and customer care.⁷⁹ These awards are

⁷⁶ See CTIA, Consumer Code, available at <http://www.ctia.org/content/index.cfm/AID/10352> (last visited July 8, 2010).

⁷⁷ See CTIA Comments, CG Docket No. 09-158 (filed Oct. 13, 2009).

⁷⁸ See T-Mobile USA, Inc., *T-Mobile Repeats Highest Ranking in Wireless Retail Customer Satisfaction by J.D. Power and Associates*, Press Release (Mar. 4, 2010) http://www.t-mobile.com/company/PressReleases_Article.aspx?assetName=Prs_Prs_20100304&title=%20T-Mobile%20USA%20Repeats%20Highest%20Ranking%20in%20Wireless%20Retail%20Customer%20Satisfaction%20by%20J.D.%20Power%20and%20Associates (last visited July 14, 2010). T-Mobile also received highest ranking among national wireless carriers in the J.D. Power 2009 Wireless Retail Sales Satisfaction Study (Volume 2), see J.D. Power and Associates, *2009 Wireless Retail Sales Satisfaction Ratings (Volume 2)*, Press Release (Sept. 17, 2009) available at <http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2009200> (last visited July 8, 2010) ("*J.D. Power 2009 Wireless Retail Sales Awards*"), and in the J.D. Power 2010 U.S. Business Wireless Satisfaction Study. See J.D. Power and Associates, *2010 U.S. Business Wireless Satisfaction Ratings*, Press Release (May 20, 2010) available at <http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2010079> (last visited July 8, 2010).

⁷⁹ See, e.g., J.D. Power & Associates, *Despite Higher Costs for Additional Services, Wireless Customers Report Particularly High Levels of Satisfaction with Wireless Plan Upgrades*, Press Release (Apr. 24, 2008), available at <http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2008044> (last visited July 8, 2010).

indicative of T-Mobile's commitment to customer satisfaction, which is spurred by its desire to compare favorably to its competitors in the marketplace.

B. The Current Beneficial Market Dynamic Would Be Lost If Wireless Broadband Were Subject to More Extensive Regulation and a “One-Size-Fits-All” Regime

Prescriptive regulation could require wireless broadband providers to tailor their business plans to a set of “one-size-fits-all” rules more appropriate for a less competitive and less dynamic marketplace. The uncertainties inherent in such a regime would certainly chill innovation in the wireless broadband sector and orient wireless providers less to their existing and potential customers and more to discerning what they need to do to be in compliance with the Commission's rules. Uncertainties regarding network management in particular would stifle innovation,⁸⁰ including consumer-friendly business models developed by T-Mobile and others, and eliminate one of the truly most remarkable aspects of the wireless sector – its unvarnished dynamism.

If the Commission reverses course and designates the transmission component of wireless broadband as a telecommunications service as subject to Title II, the job creation and economic growth potential of wireless broadband celebrated by the Obama Administration and

⁸⁰ See Charles M. Davidson and Bret T. Swanson, Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem, at 28 (June 2010), available at http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf (last visited July 8, 2010) (“Davidson and Swanson Report”). Addressing concerns regarding the Commission's proposed broadband network non-discrimination rule, the article states that “[r]egardless of the FCC's best intentions, the imposition of an *ex ante* nondiscrimination requirement would have an immediate chilling effect on established business practices, and would eliminate any flexibility that broadband service providers currently have to adjust their business models to accommodate new consumer demands.” See also *id.* at 30 (stating that with regard to wireless networks, “current network management practices provide stakeholders throughout the ecosystem – innovators at the edge, device manufacturers, and consumers – with certainty regarding how certain types of data will be transmitted. As a result, innovators can adapt their offerings to meet existing guidelines. Prohibiting continued implementation of wireless network management techniques would upend this dynamic and inject uncertainty throughout the sector.”).

Commission would also likely ebb. As George Ford and Larry Spiwak have noted, the fear of over-regulation often is sufficient by itself to chill investment, especially in the current fragile economic environment.⁸¹ And, one recent study estimates that implementation of the Commission's net neutrality proposal (a possible consequence of any reclassification) would jeopardize 65,000 jobs in 2011 and negatively impact over 1.4 million jobs by 2020.⁸² Given the significant capital requirements associated with the deployment of new 4G networks, this is a critical juncture for wireless broadband. T-Mobile therefore urges the Commission to defer any decision on the regulatory classification of wireless broadband at this time.

III. IF THE FCC DOES CLASSIFY ALL BROADBAND SERVICES AS TITLE II SERVICES, IT SHOULD AVOID IMPOSING ALL OF THE OBLIGATIONS IT ADOPTS FOR WIRELINE BROADBAND PROVIDERS ON WIRELESS BROADBAND PROVIDERS

If, despite the salient differences between wireless and wireline broadband, the Commission chooses to classify the transmission component of wireless broadband as a Title II service, it should avoid imposing on wireless broadband all of the obligations proposed to be imposed on wireline broadband. As outlined above, the differences between wireline and wireless justify regulatory restraint for wireless broadband, particularly if the FCC decides to include wireless broadband in any Title II reclassification efforts. Moreover, in contrast to the relatively stagnant policy development occurring in the wireline broadband arena, the FCC has

⁸¹ *Ford and Spiwak* at 33 (June 2010), available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf> (last visited July 8, 2010) (noting "large negative abnormal returns on the equity of publicly-traded broadband providers whom investors believe would be negatively affected by the Commission's proposal to reclassify broadband). Ford and Spiwak state that "the markets looked at the FCC's *Statements* and sent the stock prices of the relevant firms downward. This decline suggests that the capital markets do not accept the FCC's promises [of light regulation], nor their characterization of the proposed change in regulation." *Id.*

⁸² See Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis*, at ii, a report for Mobile Future (submitted by Mobile Future as part of its Reply Comments in GN Docket No. 09-191) (Apr. 26, 2010).

embarked upon an aggressive wireless broadband-specific policy agenda, as reflected by the discussion in Section I.E above.

Therefore, at the very least, restrictions on network management certainly should not be imposed on wireless broadband. In particular, as discussed above in Section I.A, the unique technological challenges of providing wireless broadband – and, indeed, the increasing openness of providers’ networks – make it more important than ever for wireless operators to have significant flexibility to manage their networks. T-Mobile, for example, experienced an overload of its facilities for an entire city, caused by a single Android-based instant messaging application. No problems with the application were discovered when the developer tested the application in a WiFi-to-wireline environment, but once released onto T-Mobile’s wireless network, the application caused an exponential increase in signaling, which was compounded as it became popular and more customers began downloading it to their smartphones.⁸³ Similarly, upgrades to faster technologies, such as T-Mobile’s ongoing deployment of HSPA+, can invite new usage patterns, possibilities for congestion and potential vulnerabilities and security risks which are impossible to anticipate.⁸⁴ Wireless broadband providers need the flexibility to make quick decisions in responding to network traffic issues, without having first to consult a lawyer to determine if they might later be second-guessed at the Commission.

Even proposals to require detailed advance disclosure of management techniques could harm wireless networks, as these techniques are often proprietary and competitively sensitive, and some providers combine network management with network security information, the release of which could leave the network vulnerable to cybersecurity threats.⁸⁵ Moreover, with

⁸³ See T-Mobile Open Internet Comments at 22.

⁸⁴ See *id.* at 24.

⁸⁵ See T-Mobile Open Internet Reply Comments at 36.

enough detail, content and application providers could engineer around the management techniques to render them useless.

In addition, as discussed above in Section I.A, certain network management restrictions proposed by the Commission, notably the proposed nondiscrimination provision, arguably would prevent wireless providers from prioritizing traffic based on application type – *i.e.*, prioritizing latency-sensitive applications like voice and video, while imperceptibly delaying latency-insensitive applications such as e-mail.⁸⁶ Prioritization in this manner can be a useful way to ensure that the different needs of different users, devices and applications are being met, and should not be prohibited. Consumers will not appreciate “nondiscrimination” if it results in nonperformance.

As noted earlier in Section I.B, the wireless broadband market is still nascent. The fact that the FCC and wireless providers have already taken a number of steps to foster open networks suggests that these efforts should be allowed time to develop and mature without intrusive network management regulation. Regulatory flexibility will encourage increased wireless broadband deployment, as new services and applications will drive greater consumer adoption and demand.

⁸⁶ See T-Mobile Open Internet Comments at 25-27.

IV. CONCLUSION

For the reasons discussed above, the Commission should defer any decision reclassifying wireless broadband as a Title II service at this time.

Respectfully submitted,



Thomas J. Sugrue
Kathleen O'Brien Ham
Sara F. Leibman
Amy R. Wolverton

Ari Q. Fitzgerald
Michele C. Farquhar
David L. Martin
Mark W. Brennan

HOGAN LOVELLS LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600

T-MOBILE USA, INC.
401 Ninth Street, NW Suite 550
Washington, DC 20005
(202) 654-5900

Attorneys for T-Mobile USA, Inc.

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