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

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

REPLY COMMENTS OF WINDSTREAM COMMUNICATIONS, INC.

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Windstream Communications, Inc., on behalf of itself and its affiliates (collectively “Windstream”), submits the following reply comments in response to the Federal Communications Commission (“Commission”) request for comment on its Notice of Inquiry addressing the legal framework for broadband Internet service.¹

I. INTRODUCTION AND SUMMARY

Windstream agrees with those commenters that suggest that the classification of broadband Internet connectivity services as Title II “telecommunications services” is unwise and unnecessary—no matter how “light” a regulatory touch the Commission promises.² The Commission’s existing unified regulatory structure has allowed innovation in broadband services to flourish across different technological platforms, without giving any technology artificial advantages over any other. The Commission can continue to advance measures intended to

¹ *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry (rel. June 17, 2010) (*NOI*).

² *See, e.g.*, Comments of National Cable & Telecommunications Association, GN Docket No. 10-127 (July 15, 2010) (NCTA Comments); Comments of CTIA—The Wireless Association®, GN Docket No. 10-127 (July 15, 2010) (CTIA Comments); Comments of United States Telecom Association, GN Docket No. 10-127 (July 15, 2010) (USTelecom Comments); Comments of Telecommunications Industry Association, GN Docket No. 10-127 (July 15, 2010) (TIA Comments).

accomplish its policy goals of allowing the communications marketplace to develop, expanding the scope of broadband deployment, and protecting consumers so long as it provides a more detailed explanation of how its regulations are grounded in its Title I ancillary jurisdiction.³

Windstream objects, however, to the suggestion by most mobile wireless companies (and their business collaborators) that wireless broadband Internet service should receive a special exemption from any new regulatory regime that the Commission may create.⁴ Most of these commenters cite generic, broad-brush technical differences between wireless and wired networks, without proving why or how any of the alleged differences justify giving wireless broadband providers a permanent sweeping regulatory advantage over their wired-network competitors.⁵ If the Commission is to consider a more tailored adjustment of rules within a unified regulatory framework, the burden should be on providers seeking the adjustment to establish their need and support it with specific facts. Moreover, while some assert that Section 332 of the Communications Act bars the Commission from applying Title II regulation to wireless broadband services, this reading is unsupported by the actual text of the statute and its implementing rules.⁶ The net neutrality “compromise” announced this week by Verizon and

³ See, e.g., NCTA Comments at 36-46; USTelecom Comments at 63-78; TIA Comments at 7-10.

⁴ See, e.g., Comments of AT&T Inc., GN Docket No. 10-127, at 112-14 (July 15, 2010) (AT&T Comments); CTIA Comments at 55-65; Comments of Leap Wireless International, Inc., and Cricket Communications, Inc., GN Docket No. 10-127, at 6-7 (July 15, 2010) (Leap Wireless Comments); Comments of MetroPCS Communications, Inc., GN Docket No. 10-127, at 37-42 (July 15, 2010) (MetroPCS Comments); Comments of T-Mobile USA, Inc., GN Docket No. 10-127, at 3-22 (July 15, 2010) (T-Mobile Comments); Comments of Verizon and Verizon Wireless, GN Docket No. 10-127, at 72-78 (July 15, 2010) (Verizon Comments).

⁵ See, e.g., CTIA Comments at 55-65; MetroPCS Comments at 38-40; Leap Wireless Comments at 6-7; T-Mobile Comments at 3-7; Verizon Comments at 77-78.

⁶ See, e.g., AT&T Comments at 113; Verizon Comments at 72-73.

Google, business partners in the delivery of mobile wireless services, suffers from the same deficiencies as comments that would have the Commission regulate wired broadband but exempt wireless.⁷

While Windstream opposes the classification of *any* broadband services as Title II telecommunications services, it cautions the Commission against doubling its potential error by exempting wireless broadband Internet platforms from whatever new regulatory framework it may adopt. Windstream agrees with those commenters—including public interest groups,⁸ fixed wireless providers,⁹ and others¹⁰—who assert that the Commission should maintain neutrality toward different technological platforms and should regulate wireless broadband Internet connectivity under the same statutory framework as its wired counterparts. To do otherwise would injure consumers by distorting the competitive marketplace and encouraging regulatory manipulation. As the Commission has acknowledged, wired and wireless broadband services currently compete with each other in various segments of the marketplace and will fast become competitors in others with the deployment of 4G networks. To the extent the alleged technical

⁷ “A joint policy proposal for an open Internet,” Google Public Policy Blog (Aug. 9, 2010), available at <http://googlepublicpolicy.blogspot.com/> (visited Aug. 9, 2010). As rationales for excluding wireless from application of its nondiscrimination principle, Google and Verizon cite both the wireless market’s nascence and, incongruously, its established competitiveness.

⁸ See, e.g., Comments of ACLU, GN Docket No. 10-127, at 5 (July 15, 2010); Comments of Center for Democracy and Technology, GN Docket No. 10-127, at 18-19 (July 15, 2010); Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 10-127, at 20-25 (July 15, 2010) .

⁹ See, e.g., Comments of Clearwire Corporation, GN Docket No. 10-127, at 6-7 (July 15, 2010).

¹⁰ See, e.g., Comments of Cablevision Systems Corporation, GN Docket No. 10-127, at 37-39 (July 15, 2010); Comments of Charter Communications, GN Docket No. 10-127, at 11-14 (July 15, 2010); NCTA Comments at 84; Comments of Qwest Communications International, Inc., GN Docket No. 10-127, at 53-55 (July 15, 2010); Comments of SureWest Communications, GN Docket No. 10-127, at 20-21 (July 15, 2010).

differences between wired and wireless broadband services are even relevant or material to the Commission's consideration in this docket, they are disappearing as mobile wireless providers increasingly adopt a strategy of offloading their broadband traffic onto a wired network at the point nearest to the mobile end-user. Furthermore, it would be counterintuitive to place greater burdens on the more open, wired networks, while effectively rewarding the already less open wireless networks with an exemption or lighter regulatory touch.

If the Commission is considering deferring a decision on the classification of wireless broadband Internet service, it should refrain from acting with regard to wired providers as well, rather than creating an uneven regulatory regime. The Commission originally examined classification of broadband on a platform-by-platform basis, which perhaps was warranted then given the relative newness of broadband Internet technologies at the time. Such a staged examination, however, certainly would be inappropriate now in light of the development of the different platforms as robust competitors in the delivery of broadband services. To avoid causing permanent damage to a functioning competitive market, the Commission should make any changes to its regulatory regime governing broadband Internet service contemporaneously for all technologies.

If the Commission elects a Title II classification of wired broadband Internet service, it would possess the legal authority to regulate wireless broadband services under the same statutory framework. Wireless broadband Internet service meets the statutory and longstanding regulatory definitions of commercial mobile radio service ("CMRS"), because it provides subscribers with the technical capability for sending messages to and receiving messages from the public switched telephone network ("PSTN"). While the Commission held otherwise in its

March 2007 *Wireless Broadband Order*,¹¹ it is appropriate for the Commission to reexamine that conclusion in light of more recent factual developments, just as the Commission is reexamining similar findings in its 2002 *Cable Modem Declaratory Ruling*,¹² 2005 *Wireline Broadband Report and Order*,¹³ and 2006 *BPL-Enabled Broadband Order*.¹⁴ The fundamental concern motivating the *Wireless Broadband Order* was maintaining regulatory parity between wireless broadband services and the wired services considered in the previous three orders. If the Commission moves forward with Title II classification proposals, that same concern necessitates a reexamination of the *Wireless Broadband Order*'s conclusions now, so that the Commission can preserve a unified regulatory framework for all providers.

II. THE COMMISSION SHOULD PRESERVE REGULATORY PARITY BETWEEN WIRELESS AND OTHER BROADBAND SERVICES.

Windstream agrees with the diverse range of commenters asserting that the Commission should maintain its existing practice of regulating wireless broadband Internet service providers under the same framework as their wired counterparts. Wireless and wired broadband Internet services are competitors in the communications marketplace, and disparate regulatory treatment

¹¹ *See Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

¹² *Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities; Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Ruling, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*).

¹³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Report and Order*).

¹⁴ *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL-Enabled Broadband Order*).

would distort marketplace competition. The Commission has long acknowledged the importance of regulatory parity, and has scrupulously avoided favoring any one broadband Internet technological platform. The alleged differences between wired and wireless networks are at most matters of degree, not kind, and do not justify placing the technologies under entirely different regulatory regimes. Any decision changing the classification of broadband Internet access service should apply simultaneously and consistently to all types of broadband Internet service providers.

A. Wireless and Wired Broadband Services Compete in the Same Market and Frequently Use the Same Technology.

As the Commission has repeatedly acknowledged, wired and wireless broadband services compete with one another in the marketplace. At present, given the (relatively) limited speeds of 3G networks, wired and wireless providers compete by offering consumers multiple options that provide different tradeoffs among cost, speed, and mobility.¹⁵ But as the spectral efficiency (and speed) of wireless technologies continues to increase rapidly,¹⁶ 4G and future wireless

¹⁵ See, e.g., Federal Communications Commission, Connecting America: The National Broadband Plan at 40-41 (rel. March 16, 2010) (National Broadband Plan) (noting that “[c]onsumers’ preferences differ depending on how they use their broadband connections and how much they are willing to pay for such use”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, WT Docket No. 09-66, FCC 10-81, at ¶ 342 (rel. May 20, 2010) (*Fourteenth Mobile Wireless Competition Report*) (stating that “[m]obile wireless Internet access service could provide an attractive alternative to wireline offerings for consumers who are willing to trade off speed for mobility, and also consumers who are relatively indifferent with regard to the attributes, performance, and pricing of mobile and fixed platforms”).

¹⁶ See National Broadband Plan at 41, Exhibit 4-F.

technologies will pose significant competition to a broad range of wired broadband offerings.¹⁷

As the National Broadband Plan acknowledges, “[t]he ongoing upgrade of the wireless infrastructure is promising because of its potential to be a closer competitor to wireline broadband, especially at lower speeds.”¹⁸

In addition, networks used to support wireless and wireline broadband services are becoming increasingly interchangeable. Wireless companies are increasingly responding to their own capacity limits by offloading their traffic onto wireline broadband networks at the point closest to the end-user. This approach began with PSTN calls, with the deployment of handsets that used the 3rd Generation Partnership Project’s Unlicensed Mobile Access standard to shift voice calls seamlessly back and forth between a GSM network and a Wi-Fi link to a wired broadband Internet connection.¹⁹ T-Mobile reports that its customers now make more than 1.6 million voice calls via a Wi-Fi link to a wired connection *every month*.²⁰ Similarly, several national wireless providers have begun offering business and residential customers “femtocells”—small cellular base stations that provide enhanced wireless coverage (over the

¹⁷ See, e.g., National Broadband Plan at 41 (noting that “[g]iven enough spectrum, however, a variety of engineering techniques—including higher transmitter power, high-gain directional antennas and externally mounted antennae—may make wireless a viable price/performance competitor to wired solutions at far higher speeds than are possible today, further increasing consumer choice”); *Fourteenth Mobile Wireless Competition Report* at ¶ 342 (“[A]dvances in wireless technologies, coupled with increases in the supply of spectrum, have the potential to make mobile wireless service a more viable competitor at higher data speeds at some future date.”).

¹⁸ National Broadband Plan at 41.

¹⁹ See *Fourteenth Mobile Wireless Competition Report* at ¶ 349 & fn.926-27; <http://www.smart-wi-fi.com/history.php> (providing a history and timeline of UMA services).

²⁰ See “T-Mobile Extends Wi-Fi Calling Leadership” (Apr. 26, 2010), available at <http://www.marketwire.com/press-release/T-Mobile-Extends-Wi-Fi-Calling-Leadership-1162333.htm> (visited Aug. 9, 2010).

carrier's licensed spectrum) of the customer's premises and plug into the customer's *wired* broadband connection to carry PSTN and broadband traffic over the public Internet.²¹ The Commission has noted that approximately 350,000 femtocells were shipped in 2009,²² and one analyst has predicted that there will be almost six femtocell base stations for every larger base station by 2014.²³

As the Commission has acknowledged, wireless companies' attempts to offload traffic onto wired broadband connections have greatly increased with the recent explosion of smartphone usage.²⁴ "Wireless" handsets now account for 35 percent of all Wi-Fi hot spot connections, and are projected to account for half of all hot spot connections by 2011.²⁵ About 40 percent of iPhone traffic in the United States is transmitted via a Wi-Fi connection supported by a wired network²⁶—due in part to policies that encourage and sometimes require users to employ Wi-Fi enabled by wired facilities, rather than the 3G network, for the most data-intensive

²¹ See, e.g., *Fourteenth Mobile Wireless Competition Report* at ¶ 350 & fn.929-31 (describing femtocell offerings from Sprint Nextel, Verizon Wireless, and AT&T).

²² *Id.* at ¶ 350.

²³ See "Berg Insight Forecasts 70 Million Users of Femtocells Worldwide by 2014" (Aug. 21, 2009), available at http://berginsight.com/News.aspx?m_m=6&s_m=1 (visited Aug. 9, 2010).

²⁴ See *Fourteenth Mobile Wireless Competition Report* at ¶ 348 (noting that "with the recent growth of wireless data traffic, Wi-Fi provides a means for providers to offload some data traffic from their wireless networks").

²⁵ *Id.* at ¶ 348, fn.924.

²⁶ *Id.* at ¶ 348, fn.925.

applications.²⁷ To ease network congestion, AT&T also has begun deploying Wi-Fi “hot zones” in Times Square and other urban areas, in which AT&T phones will automatically switch over from the 3G network to Wi-Fi supported by the wireline network.²⁸ These practices enable “a very large data off-load in a venue where traditionally data would go over our old voice and data network,” according to an AT&T official.²⁹ Verizon, likewise, is pursuing measures that use Wi-Fi connections to place more and more so-called wireless traffic directly onto the wireline network. As a former Verizon Wireless marketing executive recently stated, “Two years ago, all the carriers thought Wi-Fi was a threat” to their cellular networks. “Now it’s a lifeline.”³⁰

The result of these developments is that for a very large percentage of broadband communications—including approximately 40 percent of iPhone traffic—there is simply *no technological difference* between the broadband connectivity used to support traditional wireline broadband service and the connectivity used to support a “wireless” handset’s broadband service. Both types of communications may be carried from a Wi-Fi access point to the public Internet over a wired connection. The only difference is that with the handset, a wireless company has sold the equipment that connects to the Wi-Fi access point. As discussed below, this is a very

²⁷ For example, Apple and AT&T have specified that Apple’s new FaceTime video-calling application for iPhone 4 can be used only over a Wi-Fi connection, not AT&T’s 3G network. See iPhone 4 Features, available at <http://www.apple.com/iphone/features/facetime.html> (visited Aug. 11, 2010).

²⁸ Niraj Sheth, “AT&T Sets Up Free Wi-Fi in Times Square To Ease iPhone Load,” *Wall St. J.* (May 24, 2010), available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704113504575265323937207404.html (visited Aug. 8, 2010).

²⁹ *Id.*

³⁰ Peter Burrows, “AT&T Mulls Plans to Deal with iPhone Data Demand,” *Bloomberg BusinessWeek* (Dec. 21, 2009), available at http://www.businessweek.com/technology/content/dec2009/tc20091221_605613.htm.

thin reed on which to rest the creation of separate regulatory regimes for wired and wireless broadband Internet services.

B. The Commission Has Acknowledged the Importance of Preserving Regulatory Parity Among Broadband Services.

The Commission has long acknowledged, in many contexts, the importance of regulating like technologies and services alike, particularly where a service is new. Regulatory parity across different broadband services “encourage[s] all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions. This is particularly true for new technologies and services that provide voice, video, Internet access, and other broadband applications.”³¹

In its various broadband Internet classification orders, the Commission has scrupulously avoided favoring one technological platform over another, recognizing that doing so would distort a developing marketplace to the detriment of consumers. When the Commission addressed wireline broadband services, it adopted the same regulatory classification as it had for cable modem services to “further[] the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner.”³² BPL-based broadband services were also brought under the same rules for exactly the same reason.³³

³¹ *In re Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II Non-Dominant Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd 12260, 12287-88 ¶¶ 51-52 (2008) (footnotes omitted).

³² *Wireline Broadband Order* at ¶ 1.

³³ *See BPL-Enabled Broadband Order* at ¶ 2.

When it comes to wireless broadband, the Commission has continued to recognize the importance of bringing fixed and mobile wireless technologies under the same regulatory umbrella as wired technologies. In the *Wireless Broadband Order*, the Commission cited “the Congressional goal of promoting broadband deployment and encouraging competition in the provision of broadband services, by ensuring regulatory parity among all broadband Internet access services—regardless of whether they are offered through wireline, cable, or wireless technology.”³⁴ The Commission specifically warned of the dangers of treating wireless broadband services differently: “Without a consistent approach toward all Internet access providers (both within the wireless industry and across diverse technologies), and absent a showing that an application of common carrier regulation to only one type of Internet access provider will promote the public interest, *the possibility of full and fair competition will be compromised.*”³⁵ Moreover, the terms of the Commission’s existing broadband openness principles apply to all modes of broadband Internet transmission, wired or wireless.³⁶

³⁴ *Wireless Broadband Order* at ¶ 55.

³⁵ *Id.* (emphasis added).

³⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14988 (2005) (adopting principles “to ensure that *broadband networks* are widely deployed, open, affordable, and accessible to all consumers” (emphasis added)).

C. Alleged Differences Between Wireless and Wireline Networks Do Not Justify Giving Wireless Broadband Providers a Structural Regulatory Advantage over Other Broadband Providers.

The wireless commenters uniformly point to supposed differences between wireless and wired networks—virtually all revolving around spectrum scarcity and network management practices.³⁷ But for a large and ever-growing portion of “wireless” broadband communications, those differences are nonexistent. As described above, traffic to and from a handset sold by a wireless provider may never touch the wireless provider’s cellular network at all; instead, the customer’s handset automatically switches modes and offloads the communication via Wi-Fi onto a *wired* broadband connection. There is no network or other difference between the “wireless broadband Internet connectivity” provided by AT&T over an iPhone at a Wi-Fi access point and the “wireline broadband Internet connectivity” provided by Windstream to a subscriber connecting a netbook or other device to a HomePortal wireless gateway. Certainly, any alleged differences do not warrant the wholesale exemption of wireless broadband Internet from the regulatory regime that other broadband providers must follow, or any delay in deciding the proper classification of wireless service in light of a new classification of wired service.

Even where differences between wireless and wireline broadband Internet platforms currently exist, the differences are matters of degree and not kind. While wireless providers have spectrum scarcity and network management issues, wireline and cable providers have to manage finite network capacity as well—and these capacity constraints are compounded by the wireless

³⁷ See, e.g., CTIA Comments at 55-65 (asserting the challenges faced by wireless providers and the uniqueness of the wireless ecosystem); MetroPCS Comments at 38-40 (arguing that wireless providers must use the same spectrum space for voice and data); Leap Wireless Comments at 6-7 (asserting that constraints on wireless platforms and the “technical complexities” faced by wireless warrant different management techniques); T-Mobile Comments at 3-7 (discussing finite spectrum resources and a need for active wireless); Verizon Comments at 78 (claiming significant challenges in “dynamically managing spectrum”).

providers' strategy of offloading PSTN and broadband traffic onto wired broadband networks wherever possible. Wireline carriers have faced massive increases in consumer demand for bandwidth in recent years. In July 2006, Windstream's 568,000 Internet customers generated an average of 2.1 Gbps of total Internet traffic—an average of 3.7 Kbps per customer. Comparatively, in July 2010, Windstream's 1.3 million broadband customers generated an average of 35 Gbps of Internet traffic—an average of 26.9 Kbps per customer, a more than seven-fold increase per customer and a nearly 17-fold increase in overall traffic. Deploying additional fiber and upgrading electronics to handle this increased demand may not be the same process as acquiring new spectrum in an auction, but these measures are hardly so inexpensive and inconsequential that wired providers have a less significant need to manage capacity on their networks.

Placing wireless broadband Internet providers under a less stringent regulatory regime—or postponing a decision on these providers' status while moving forward with Title II classification of broadband services offered by their wired counterparts—would effectively penalize the wired broadband providers that have invested the most in ensuring optimum performance for their customers (whether that performance be measured by degree of network openness or degree of speed). Wireline broadband Internet providers would have to meet capacity constraints with additional investment, while their wireless competitors would be allowed to address capacity constraints with further network management. Such a policy would discourage the very private investment that the National Broadband Plan seeks to foster.³⁸ And by imposing disparate compliance costs, this policy would compromise wired broadband Internet

³⁸ See National Broadband Plan at 9 (noting that the Plan recommends ways that governments can “unleash private investment” in broadband).

access providers' ability to receive high-cost universal service funding, if the Commission intends for wireless and wireline providers to compete for these funds in the future.³⁹

To the extent that wireless providers claim special technological constraints, at most they should be permitted to seek waivers of specific rules within a uniform regulatory regime, consistent with current Commission practice governing waivers to rules of general applicability.⁴⁰ In that context, wireless providers would bear the burden of proof, and any differential treatment should be provided on a narrow, case-specific basis in response to a specific, well-documented demonstration of need. The regime would presume parity among technologies, and only modify the presumption in cases of proven need.

II. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT THE SAME REGULATIONS FOR WIRELESS BROADBAND SERVICES AS FOR WIRED BROADBAND SERVICES.

If, against the counsel of Windstream and many others, the Commission decides to classify wired broadband Internet connectivity services as Title II “telecommunications services,” the Commission has the legal authority to preserve regulatory parity and technological neutrality by bringing wireless broadband Internet connectivity services under the same regulatory framework. Just as it would be revisiting its findings in the *Cable Modem Declaratory Ruling*, the *Wireline Broadband Report and Order*, and the *BPL-Enabled Broadband Order*, the Commission may revisit the *Wireless Broadband Order* and reclassify wireless broadband Internet connectivity service as a “commercial mobile service,” or “CMRS.” Doing so would bring wireless broadband Internet connectivity under Title II and give the

³⁹ See *id.* at 145 (recommending that the “eligibility criteria for obtaining support from [the Connect America Fund] should be company- and technology-agnostic so long as the service provided meets the specifications set by the FCC”).

⁴⁰ See 47 C.F.R. § 1.3.

Commission discretion to “specify by regulation” the particular provisions of Title II that should apply.⁴¹ The suggestion by several wireless commenters⁴² that Section 332(c) somehow forecloses reclassification of wireless broadband services misreads the language of the statute, including its express delegation of authority to the Commission to define CMRS as it deems appropriate.

Section 332 mandates common-carrier treatment of any service that is a “commercial mobile service,” while prohibiting it for anything that is a “private mobile service.”⁴³ “Private mobile service” is defined as any mobile service that is both (a) “not a commercial mobile service,” and (b) “not . . . the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”⁴⁴ The statute in turn defines “commercial mobile service” as “any mobile service . . . that is provided for profit and makes interconnected service available” to the public.⁴⁵ And “interconnected service” means “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission).”⁴⁶

These definitions make several things clear. First, Congress specified that a mobile service does not *by itself* have to provide interconnection with the PSTN in order to be classified as CMRS; the mere fact that the mobile service “makes interconnected service *available*” is

⁴¹ 47 U.S.C. § 332(c)(1)(A) (“A person engaged in the provision of a service that is a commercial mobile service shall, insofar as the person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of Title II as the commission may specify by regulation as inapplicable to that service or person.”).

⁴² See, e.g., AT&T Comments at 112-14; Verizon Comments at 72-74.

⁴³ 47 U.S.C. §§ 332(c)(1)(A), (c)(2).

⁴⁴ *Id.* at § 332(d)(3).

⁴⁵ *Id.* at § 332(d)(1).

⁴⁶ *Id.* at § 332(d)(2).

enough to trigger the definition.⁴⁷ Second, Congress expressly gave the Commission discretion to define what it means to be “interconnected,” rather than defining the term itself.⁴⁸ Third, Congress expressly gave the Commission discretion to expand the definition of CMRS to services that are *functionally equivalent* to CMRS services, even if they do not meet the exact technical definition of commercial mobile service.⁴⁹

Wireless broadband Internet connectivity services meet all the requirements imposed by the Commission’s existing regulations defining interconnected services. These regulations are consistent with Congress’s language and its delegation of authority. The Commission defines interconnected service for mobile services, in relevant part, as service that “is interconnected with the public switched network, *or interconnected* with the public switched network *through an interconnected service provider*, that gives subscribers *the capability* to communicate to or receive communication from all other users on the public switched network.”⁵⁰ The same regulation further specifies that “interconnection” can entail *either* a “direct or indirect connection,” as long as it “permit[s] the transmission or reception of messages or signals to or from points in the public switched network.”⁵¹ Thus, like Section 332(d), the Commission’s definition of interconnected service focuses on whether the mobile service gives the end user the

⁴⁷ *Id.* at § 332(d)(1) (emphasis added).

⁴⁸ *Id.* at § 332(d)(2) (“‘interconnected service’ means service that is interconnected with the public switched network (*as such terms are defined by regulation by the Commission*)” (emphasis added)).

⁴⁹ *See id.* at § 332(d)(3) (excluding “any mobile service . . . that is not . . . the functional equivalent of a commercial mobile service, as specified by regulation by the Commission” from the definition of “private mobile service”).

⁵⁰ 47 C.F.R. § 20.3 (emphasis added).

⁵¹ *Id.* (defining “Interconnection or Interconnected”).

technical capacity (the “capability”) to send and receive messages to and from PSTN users, and it explicitly does not require that the service directly connect to the PSTN itself. This definition is met even if the mobile service is merely providing access to a separate entity that provides the actual PSTN connection—that is, even if the end user’s PSTN connection is “through an interconnected service provider” rather than the one providing the mobile service. As the Commission has repeatedly emphasized, “for a service to be interconnected, our rules merely require the technical capability to communicate or receive calls from other users of the Public Switched Telephone network.”⁵²

Wireless broadband Internet connectivity services also meet the statutory and longstanding regulatory definitions of CMRS. It is indisputable that these services are offered “for profit” and to the public.⁵³ They also “make interconnected service available,”⁵⁴ because they provide subscribers with the technical “capability” to send and receive messages to and from PSTN users, either directly through the mobile service provider’s own interconnection with the PSTN or indirectly through another provider or service.⁵⁵ As the FCC has recognized, a number of mobile providers (including T-Mobile and Cincinnati Bell) offer customers dual-mode handsets that allow subscribers to make ordinary PSTN calls interchangeably using *either*

⁵² *In re Calling Party Pays Service Offering in the Commercial Mobile Radio Services, Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 8297, 8301-02 ¶ 15 (2001). *See also In re Implementing Section 3(n) and 332 of the Communications Act as amended by Section 6002(b) of the Omnibus Reconciliation Act of 1993*, 9 FCC Rcd 1411, 1434 ¶ 54 (1994) (“[B]y using the phrase ‘interconnected service,’ Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network.”).

⁵³ *See* 47 U.S.C. § 332(d)(1).

⁵⁴ *Id.*

⁵⁵ *See* 47 C.F.R. § 20.3.

a GSM/UMTS network *or* a wireless broadband connection (in this case, Wi-Fi) to the public Internet, switching back and forth seamlessly mid-call so that subscribers do not need to use their wireless plan minutes when a wireless broadband connection is available.⁵⁶ And as noted above, T-Mobile announced in April that its customers now make over 1.6 million PSTN calls over Wi-Fi every month.⁵⁷ More generally, the 3rd Generation Partnership Project’s Generic Access Network (GAN) standard (including its Voice over LTE via Generic Access standard, or VoLGA) allows mobile operators to route all mobile services, including interconnected PSTN voice services, over wireless broadband connections in a way that is invisible to users, allowing them to “leverage Wi-Fi as a seamless extension of the mobile network.”⁵⁸ Even where the mobile provider itself does not use wireless broadband Internet connectivity to provide PSTN calling, that connectivity still “gives subscribers *the capability* to communicate to or receive communication from all other users on the public switched network” using third-party applications from providers such as Skype, Vonage, or the open-source IMSDroid project.⁵⁹

As demonstrated by this analysis, wireless broadband Internet connectivity services may be regulated under Sections 201, 202, and 208, as well as whatever other provisions of Title II the Commission deems appropriate, because these services meet all the requirements for the

⁵⁶ *Fourteenth Mobile Wireless Competition Report* at ¶ 349, fn.926-27.

⁵⁷ See “T-Mobile Extends Wi-Fi Calling Leadership” (Apr. 26, 2010), available at <http://www.marketwire.com/press-release/T-Mobile-Extends-Wi-Fi-Calling-Leadership-1162333.htm> (visited Aug. 9, 2010).

⁵⁸ <http://www.smart-wi-fi.com/overview.php> (accessed Aug. 8, 2010).

⁵⁹ See, e.g., *Fourteenth Mobile Wireless Competition Report* at ¶ 151 (detailing history of AT&T and Verizon Wireless decisions to allow subscribers to access third-party VoIP applications); http://en.wikipedia.org/wiki/Comparison_of_VoIP_software (accessed Aug. 8, 2010) (cataloging mobile phone VoIP applications); <http://code.google.com/p/imsdroid/> (accessed Aug. 8, 2010) (specifications and download links for IMSDroid).

Commission’s existing regulations defining interconnected services and commercial mobile services.⁶⁰ Moreover, even assuming, for the sake of argument, that the technical differences between wireless broadband and traditional commercial mobile services foreclosed a “commercial mobile service” characterization, the Commission would still have the authority and discretion to declare that wireless broadband Internet connectivity is “the functional equivalent of a commercial mobile service,”⁶¹ and thus not a “private mobile service” that must not be regulated under Title II.

To be sure, the Commission came to a different conclusion in the *Wireless Broadband Order* back in March 2007⁶²—before T-Mobile and Cincinnati Bell had deployed the first GAN/Unlicensed Mobile Access services in the United States,⁶³ and certainly well before mobile providers routinely began to use Wi-Fi offload as a “lifeline” for their wireless broadband services and networks.⁶⁴ But the bases for that earlier conclusion do not hold true now, and the Commission must revisit them.

First, the *Wireless Broadband Order* suggested that wireless Internet access was not “interconnected service,” because that service *by itself* did not involve making PSTN calls;

⁶⁰ 47 U.S.C. § 332(c)(1)(A).

⁶¹ *Id.* at § 332(d)(3).

⁶² *Wireless Broadband Order* at ¶¶ 41-46.

⁶³ See “T-Mobile Introduces Unlimited Calling over Wi-Fi with the National Launch of HotSpot @Home” (June 27, 2007), available at <http://press.t-mobile.com/articles/t-mobile-HotSpot-atHome>; “CB Home Run Integrates Mobile Phone and Wireless Internet For Improved Indoor Reception” (June 18, 2007), available at <http://www.cincinnati-bell.com/aboutus/news/articles/news.asp?page=20070618.asp>.

⁶⁴ Peter Burrows, “AT&T Mulls Plans to Deal with iPhone Data Demand,” *Bloomberg BusinessWeek* (Dec. 21, 2009), available at http://www.businessweek.com/technology/content/dec2009/tc20091221_605613.htm.

customers had to use another provider or application to reach the PSTN.⁶⁵ But the rapid deployment since March 2007 of handsets that send PSTN calls over Wi-Fi broadband connections seamlessly and invisibly to the caller demonstrates that this factual determination is no longer true; wireless broadband Internet connectivity is now a key part of mobile providers' core voice services. Moreover, the *Wireless Broadband Order's* reading of the statute and regulations was erroneous from the start. The question, according to the statute, is not whether the service itself establishes PSTN connections, but whether it “makes interconnected service available.”⁶⁶ The regulatory definition of “interconnected service” similarly turns on whether a service gives users the technical “*capability* to communicate to or receive communication” from the PSTN—even if the actual PSTN connection is provided not by the mobile carrier, but by a *separate* “interconnected service provider.”⁶⁷ Wireless broadband Internet connectivity has always provided subscribers with the capability to send and receive messages to the PSTN, and the *Wireless Broadband Order* was incorrect in concluding otherwise.

The *Wireless Broadband Order's* classification of wireless broadband as a “private mobile service” was also premised on the idea that classifying wireless broadband service as CMRS would result in an “internal contradiction in the statutory framework,” given the *Order's* earlier conclusion that wireless broadband services were “information services.”⁶⁸ If wireless broadband had been deemed both an information service and a CMRS, then Section 3 of the Act, 47 U.S.C. § 153(44), would *bar* Title II regulation (given the “information service”

⁶⁵ *Wireless Broadband Order* at ¶ 45.

⁶⁶ 47 U.S.C. § 332(d)(1).

⁶⁷ 47 C.F.R. § 20.3.

⁶⁸ *Wireless Broadband Order* at ¶ 48.

classification), while 47 U.S.C. § 332(c)(1)(A) would *require* it (given the CMRS classification).⁶⁹ However, if the Commission now concludes that *all* broadband Internet connectivity services—wired and wireless alike—are “telecommunications services,” rather than “information services,” this internal contradiction vanishes. Section 3 would require common carrier regulation of this telecommunications service, and so would Section 332(c)(1)(A).

At its root, the *Wireless Broadband Order* was most concerned with preserving regulatory parity between wireless broadband services and the wired services the Commission had considered in previous classification orders. The Commission’s construction of the definition of CMRS was driven by its understanding of “the Congressional goal of promoting competition in the provision of broadband services, by ensuring regulatory parity among all broadband Internet access services—regardless of whether they are offered through wireline, cable, or wireless technology.”⁷⁰ As the Commission explained,

Classifying all wireless broadband internet access services as non-CMRS information services[] will result in a uniform, technology neutral regulatory scheme for the provision of all wireless Internet access services—regardless of whether providers are using mobile, portable, or fixed technologies, or a combination of those technologies. Without a consistent approach toward all Internet access providers (both within the wireless industry and across diverse technologies), and absent a showing that an application of common carrier regulation to only one type of Internet access

⁶⁹ *See id.* at ¶¶ 50-51. Section 153(44), the Act’s definition of a “telecommunications carrier,” provides that “[a] telecommunications carrier shall be treated as a common carrier under the Act *only to the extent that it is engaged in providing telecommunications services*”; therefore, the carrier cannot be regulated as a common carrier to the extent it is providing an information service. 47 U.S.C. § 153(44) (emphasis added). By contrast, Section 332 provides that “[a] person engaged in the provision of a service that is a commercial mobile service *shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act.*” *Id.* at § 332(c)(1)(A) (emphasis added).

⁷⁰ *Wireless Broadband Order* at ¶ 55.

provider will promote the public interest, the possibility of full and fair competition will be compromised.⁷¹

Given that rationale, to the extent the Commission revisits its classification of broadband provided over DSL, cable, or other wired technologies, the best way to be faithful to the *Wireless Broadband Order* is to revisit its time- and context-bound conclusions. The *Order*'s overriding concern was in ensuring that wireless broadband services were regulated in the same fashion as their wired counterparts. For wireless commenters now to rely on that decision as grounds for *preventing* the maintenance of regulatory parity eviscerates the *Order*'s intent.

III. CONCLUSION

It is essential that the Commission continue to preserve regulatory parity with respect to all providers of broadband Internet access, regardless of the technologies they use.

Reclassification of any broadband Internet services at this time would be unnecessary and unwise, but subjecting wired broadband providers to a new regulatory regime while failing to do the same for their wireless competitors at the same time would be worse still—giving wireless providers an immediate, structural advantage and distorting competition, to the detriment of consumers. If the Commission classifies wired broadband Internet service as a “telecommunications service,” it must not delay in doing the same for its wireless counterpart, and clarify that wireless broadband Internet service is not a “private mobile service” to pave the way for equal regulatory treatment. If the Commission is unprepared or unwilling to impose regulatory obligations on wireless broadband Internet providers, it should refrain from acting with regard to wired providers as well, rather than creating an uneven regime that likely will cause lasting damage to the competitive market.

⁷¹ *Id.*

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