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Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte Letter in the Open Internet Proceeding*

GN Docket No. 09-191, WC Docket No. 07-52

Dear Ms. Dortch:

We understand that the Commission may be considering the adoption of so-called “net neutrality” rules for broadband Internet access services at its December meeting next week. Given the highly competitive and dynamic retail market for wireless broadband, T-Mobile USA, Inc. (“T-Mobile”) strongly believes that the best course for the Commission is to maintain its current pro-competitive approach and refrain from regulating wireless broadband services. The wireless industry and the Internet are constantly evolving, which leads to new generations of technology, new service offerings, new broadband uses, and increased consumer demand. The U.S. wireless industry in particular is characterized by intensive retail competition, widespread investment, and explosive growth in the content, device, and applications markets. All of this creates enormous benefits for consumers and for the economy as a whole through enhanced productivity and increased employment opportunities.

No one can predict exactly how these technological innovations and shifts in consumer demand will shape the networks of tomorrow. Thus, T-Mobile believes that any net neutrality rules adopted in this proceeding could chill investment in wireless broadband, suppress the introduction of new services and applications that enrich the broadband ecosystem and consumer choice, and produce other unintended consequences.¹

However, to the extent the Commission intends to move forward with net neutrality rules in the above-referenced proceeding, the Commission should ensure that such rules and the

¹ See, e.g., T-Mobile Comments, GN Docket No. 10-127 at 9, 22-23 (filed July 15, 2010); T-Mobile Reply Comments, GN Docket No. 10-127 at 5, 14-16 (filed Aug. 12, 2010); T-Mobile Comments, GN Docket No. 09-191 at 1-4, 15-16, 30-32 (filed Jan. 14, 2010); T-Mobile Reply Comments, GN Docket No. 09-191 at 1-5, 24-28 (filed Apr. 26, 2010).

implementing order are narrowly drawn and recognize the meaningful differences in this area between wireline and wireless services. In particular, we urge the Commission to limit any new rules to the elements contained in the legislative framework proposed by Representative Waxman this past September and not go beyond the framework or impose any new requirements in its order. In addition, the Commission should establish a meaningful process to review those rules within two years so that it can eliminate them or substantially pare them back absent a formal determination that they truly are necessary.

To the extent the Commission adopts any rules in this proceeding, such rules should be limited to the specific terms of the Waxman legislative framework.

While we continue to believe that rules are not necessary in this area, T-Mobile submits that the Waxman framework² correctly recognizes that one-size-fits-all network management rules are inappropriate and that any rules applicable to wireless broadband services must accommodate the technical, operational, and other significant differences between wireless and other broadband platforms.³ Rules or an order more onerous or specific than the elements contained in the Waxman framework would work at cross purposes with the wireless broadband-specific policy agenda of the Commission and would harm the public interest.⁴ Thus, if the Commission proceeds with a net neutrality order and rules, it should track the text of the Waxman proposal, recognize the inherent differences between wireless and other broadband services, and account for the need for wireless broadband providers to carefully manage their networks.

The Commission should eliminate any wireless broadband net neutrality rules it promulgates in this proceeding within two years absent a showing that the rules are necessary.

T-Mobile maintains that wireless broadband rules are not necessary today. Considering the rapid evolution of the nascent wireless broadband market, not only may rules prove to be unnecessary, but maintaining unnecessary rules would be harmful to competitive broadband deployment and innovation. Accordingly, T-Mobile urges the Commission to eliminate any wireless broadband net neutrality rules within two years, absent a showing that the rules are necessary to protect consumers and promote investment, and are in the public interest. The Commission has made similar commitments in the past when, as here, it was unclear whether rules would produce purported benefits or where rapidly changing industries were involved, including in its cable rate

² See Letter from Henry A. Waxman, Chairman, Committee on Energy and Commerce, House of Representatives, to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-191, 10-121 (dated Dec. 1, 2010). T-Mobile notes that it was not party to the prior discussions on the Waxman proposal.

³ See *id.*, Draft Bill §§ 12(b)(1)(A)-(B) (restricting wireless broadband Internet access providers from blocking access to lawful websites or competing applications and preserving reasonable network management flexibility), 12(b)(1)(C) (imposing transparency requirements with respect to the price and performance of a provider's wireless broadband Internet access services, and the provider's network management practices), 12(h)(1)(B) (excluding certain specialized services from the definition of wireless broadband Internet access services), 12(h)(3)(C)(ii) (requiring the Commission to consider the "technical, operational, or other differences between radio and other broadband Internet access service platforms" when determining whether a network management practice is reasonable, including "differences relating to the efficient use of spectrum").

⁴ See, e.g., NCTA *Ex Parte*, GN Docket No. 09-191 (filed Dec. 9, 2010).

regulation and financial interest and syndication rule proceedings described below. Moreover, Congress has also mandated that the Commission review many of its rules periodically to reflect any marketplace changes, including rules applicable to telecommunications service providers, market entry barriers, and broadcast ownership.⁵

Cable Rate Regulation: In a reconsideration order in the 1990s, the Commission committed to reviewing its cable rate regulation rules within approximately three years⁶ to determine whether “the new [rate adjustment] option is producing the expected benefits and whether the quarterly system should be eliminated and replaced with the annual rate adjustment system.”⁷ The Commission should similarly commit to reviewing any net neutrality rules that it adopts in this proceeding.

Financial Interest and Syndication Rules: The Commission made a similar commitment in an order in the 1990s to review its financial interest and syndication rules (“Fin-Syn” rules).⁸ While relaxing its Fin-Syn rules in a 1991 order, the Commission committed to reviewing its rules again after four years because the industries affected were “in transition” and had experienced “significant marketplace changes” during the previous decade.⁹ After a remand¹⁰ of its 1991 order, the Commission further relaxed its Fin-Syn rules and committed once again to review its remaining restrictions.¹¹ It also indicated that it would eliminate the remaining restrictions unless commenters could persuade it that such rules were still warranted.¹² The Commission ultimately eliminated the Fin-Syn rules within two years, concluding that “market conditions and network behavior” over the

⁵ See, e.g., 47 U.S.C. §§ 161, 257, and 303.

⁶ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 390 ¶¶ 2-3, ¶ 5, and 417 ¶ 67 (1995). The Commission committed to reviewing its rules prior to December 31, 1998, approximately three years after the Order was adopted on September 15, 1995.

⁷ *Id.*; 47 C.F.R. § 76.922. As required by rule, the Commission reviewed both the annual and quarterly rate adjustment methods prior to December 31, 1998. *Cable Servs. Action: Comm’n to Keep Both FCC Form 1240 (Annual Update Form) and FCC Form 1210 (Update Form) for Cable Rate Justification Purposes*, 13 FCC Rcd 24164 (1998).

⁸ See *Evaluation of the Syndication and Financial Interest Rules*, Report and Order, 6 FCC Rcd 3094, 3156 ¶ 179 (1991) (rules adopted to limit network control over television programming and encourage more diverse television programming).

⁹ *Id.*

¹⁰ On appeal, the Seventh Circuit vacated the 1991 decision and remanded the matter to the Commission because the Commission did not explain adequately how its continued restrictions on network control furthered its goal of programming diversity. See *Schurz Commc’ns v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

¹¹ The Commission stated that it would commence the review 18 months after the District Court for the Central District of California lifted certain consent decree prohibitions. See *Evaluation of the Syndication and Financial Interest Rules*, Second Report and Order, 8 FCC Rcd 3282, 3338-42 ¶¶ 113-19 (1993).

¹² See *id.*

previous two years did not justify retaining the rules and that “no public interest purpose would be served by allowing the rules to remain in effect.”¹³

Proposed Review Rule: Again, the current market for retail wireless broadband Internet service is experiencing dramatic changes, intense competition, and constant evolution. Rules adopted today may prove anachronistic, counterproductive and harmful very quickly. Therefore, T-Mobile urges the Commission to expressly commit to a process in its rules for the Commission to review and eliminate any rules promulgated in this proceeding within two years absent a particularized showing of need. To this end, T-Mobile suggests the following language for such a review process:

The Commission will review the rules in this [Section] biennially and eliminate such rules (or portions thereof) unless the Commission finds that they are necessary in the public interest to protect consumers of broadband Internet access service; to increase competition in the provision of broadband Internet access services; and to promote investment in broadband Internet access services. The Commission will commence its first review of the rules in this [Section] no later than two years after the effective date of such rules (to the extent such rules have different effective dates, two years after the earliest effective date), and biennially thereafter. The Commission will seek public comment as part of its review and issue a decision completing the review and eliminating any rules or portions thereof within 180 days of commencement.

Two years is sufficient time to observe and confirm that the marketplace for wireless broadband Internet service is competitive and to determine if continued regulation is warranted to protect consumers and promote competition and investment.

Conclusion. As discussed herein, T-Mobile believes the best course for the Commission is to stay its hand in adopting any net neutrality rules for wireless services. There are no compelling reasons to adopt rules for wireless at this time, and a “watchful waiting” approach for this dynamic sector would best serve the public interest. However, to the extent the Commission adopts net neutrality rules applicable to wireless broadband services, it should limit those rules to the provisions contained in the Waxman legislative proposal. In addition, just as wireless providers must respond to a constantly evolving demand for broadband Internet service, the Commission should ensure that it establishes an appropriate mechanism to revisit its rules to adapt to the inevitable marketplace changes that will occur. Accordingly, T-Mobile urges the Commission to commit, in any newly adopted net neutrality rules, to a biennial review process to ensure that the rules adopted are not counterproductive and harmful.

¹³ See *Review of the Syndication and Financial Interest Rules*, Report and Order, 10 FCC Rcd 12165, 12172 ¶¶ 30-31 (1995).

Pursuant to Section 1.1206(b)(1) of the Commission's rules, an electronic copy of this letter is submitted for filing in the public docket of the above-referenced proceeding.

Sincerely,

/s/ Thomas J. Sugrue

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