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Executive Summary

Ericsson urges the Commission to refrain from additional regulation of broadband Internet access. The unregulated Internet is thriving. One need look no further than the explosive growth in mobile broadband investment to see this. By contrast, certain areas of the world that are heavily regulated exhibit relatively low investment in infrastructure.

Should the Commission nonetheless move forward with regulations, Ericsson encourages it to move carefully and to protect what is working in the ecosystem. In particular, we remind the Commission that any regulation of the mobile Internet should reflect the unique nature of wireless telecommunications technology and the wireless marketplace. We also encourage the Commission to recognize that, outside a showing of harm to consumers or significant anticompetitive effects, consumers, operators, and content providers should be generally free to contract with each other for differentiated experiences over broadband networks. Prioritization in its many forms should be permissible, subject to the concept of no unreasonable discrimination.

The Commission should not regulate the Internet as if it were common carriage. This would subject a vibrant, competitive industry to a host of anachronistic regulation and chill investment and innovation. This could also sweep in some of the very entities that argue so strongly in favor of obtrusive Net Neutrality regulation. Indeed, the scope of Internet regulation proposed in the Notice is unclear and could sweep in a host of currently-exempt entities.

Finally, the minimum-level-of-service rules proposed by the Commission are too vague. We propose that the Commission leverage transparency rules to guide what defines a minimum level of service.

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

In the Matter of)
)
Protecting and Promoting the Open Internet) GN Docket No. 14–28

COMMENTS OF ERICSSON

Ericsson submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”) seeking comment on the correct public policies to ensure that the Internet remains open.¹ As Ericsson has stated in its previous filings with the Commission regarding the open Internet, Ericsson supports the ability of consumers to access the content and applications of their choice when using a broadband Internet access service, subject to the right of broadband access providers to manage their networks.²

I. Additional Regulation of Broadband Internet Access Would Chill Investment, Innovation and the Thriving Internet Economy.

Ericsson states at the outset that it does not support additional regulation of broadband Internet access.³ Given the dynamism of so many aspects of the Internet ecosystem, it may not even be practicable to try. The *Notice* presupposes that the Internet “space” will continue to look much as it does today—that “apps” *as we know them* will continue to exist, that “specialized services” have a look and feel that will endure, that the current construct of content delivery

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

² See Comments of Ericsson Inc, *Preserving the Open Internet and Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) (“Ericsson January 2010 Comments”) and Comments of Ericsson Inc, *Preserving the Open Internet and Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (filed Oct. 12, 2010) (“Ericsson October 2010 Comments”).

³ This is not to suggest that rules and laws of general applicability should not apply in the Internet space. Laws against fraud, for example, are necessary in the context of online business dealings just as they are in the bricks-and-mortar world.

networks being generally thought of as separate from network operators' own networks will remain so. But, this is an industry that did not know what "social media" meant 15 years ago,⁴ an industry that saw third party apps for smart phones *begin* to hit virtual shelves only 6 years ago,⁵ and that last year saw fully *half* of all downstream Internet traffic generated by only two sources.⁶ In the end, all that is certain is that the Internet of today will bear little resemblance to the Internet of the future.

In addition to the impossibility of trying to predict and pin down the future, there simply is no evidence that there is a problem that needs to be solved with regulation. To the contrary, demand for, and investment in, wireless broadband networks has led to the U.S. becoming the envy of the world when it comes to mobile data. Wireless is proof that the unregulated Internet is thriving. The wireless industry in the U.S. has been almost completely unfettered by open Internet/Net Neutrality rules,⁷ and over the past five years in particular, has become the envy of much of the world in terms of price, speed, competition, and breadth of offerings. LTE will represent the majority of subscriptions in North America by 2015, and by 2019 around 85 percent of subscriptions will be LTE.⁸ By contrast, in Latin America, the Middle East and Africa in 2019, WCDMA/HSPA will be dominant; today large numbers of subscribers still use

⁴ See Jeff Bercovici, *Who Coined 'Social Media'? Web Pioneers Compete for Credit*, Forbes, Dec. 9, 2010, available at <http://www.forbes.com/sites/jeffbercovici/2010/12/09/who-coined-social-media-web-pioneers-compete-for-credit/>.

⁵ See Edwin Kee, *App Store Celebrates 6th Anniversary*, Ubergizmo, July 11, 2014, available at <http://www.ubergizmo.com/2014/07/app-store-celebrates-6th-anniversary/>.

⁶ See Amanda Holpuch, *Netflix and YouTube Make Up Majority of US Internet Traffic, New Report Shows*, The Guardian, Nov. 11, 2013, available at <http://www.theguardian.com/technology/2013/nov/11/netflix-youtube-dominate-us-internet-traffic>.

⁷ The only exceptions are transparency rules, and a no-blocking rule limited only to basic Web browsing and applications that compete with operators' voice and video telephony offerings. See *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17959-60, ¶ 99, *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir 2014).

⁸ See Ericsson Mobility Report, June 2014, at 9, available at <http://www.ericsson.com/res/docs/2014/ericsson-mobility-report-june-2014.pdf>.

GSM/EDGE.⁹ Central and Eastern Europe already show a strong increase in HSPA subscriptions, but it will be 2015 before LTE will be present in almost all countries.¹⁰ At the same time that operators deployed LTE in the U.S., the price of mobile data fell dramatically. Overall, the price per megabyte of mobile data has fallen more than 93% in just five years, from \$0.46 in 2008 to \$0.03 in 2012.¹¹

In 2013, mobile operators expended \$33 billion in capital investment in wireless networks—a ten percent increase over the previous year.¹² Spending on wireless infrastructure equipment rose 11.7 percent in 2013, following an 18.9 percent increase in 2012. TIA projects further substantial investment in wireless infrastructure between 2014 and 2017, totaling \$159.3 billion—40 percent more than the \$113.9 billion spent over the previous four years.¹³

By contrast, certain areas of the world that are heavily regulated exhibit relatively low investment in infrastructure. In Europe, public-utility regulation of broadband last mile connections appears to be at least partially to blame for this. The following chart illustrates investment per household in the electronic communications sector (defined as fixed-line telecommunications, mobile telecommunications, and pay television) in the U.S. and Europe between 2007 and 2012.¹⁴

⁹ *See id.* at 8-9.

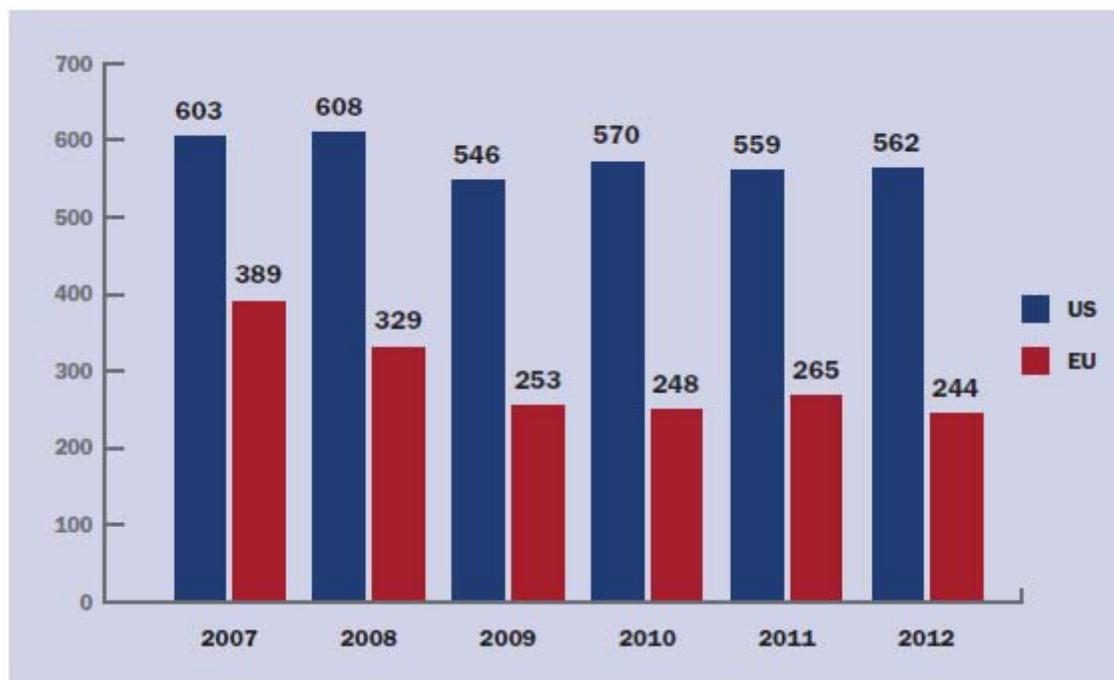
¹⁰ *See id.* at 9.

¹¹ Letter from Scott K. Bergmann, CTIA, to Chairman Thomas E. Wheeler, et al., FCC, GN Docket No. 09-51, WT Docket No. 13-135 (filed Nov. 13, 2013).

¹² *See* Annual Wireless Industry Survey, Year-End U.S. Figures from CTIA's Annual Survey Report (2014), available at <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

¹³ *See* TIA's 2014-2017 ICT MARKET REVIEW & FORECAST (2014), at 5-18.

¹⁴ Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?*, June 2014, at 13, available at <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.



Investment Per Household in US Dollars

These relatively low levels of investment have led to calls to reduce regulation. For example, lackluster fiber-to-the-home penetration has prompted some to seek to lift burdensome regulation:

“We need to lift price regulation of high-speed networks where it is not warranted, and make regulation of copper prices stable and consistent across the EU.”

Today operators also have little flexibility to experiment with the fees they can charge competitors for renting space on their “next generation” networks. This is despite a range of different conditions in the various national markets in Europe. The Commission believes that, in certain circumstances, it is possible to avoid over-regulation and encourage investment by giving investors in fibre networks the possibility to experiment with access charges. The goal would be increased investor confidence about the potential for return on their investments in infrastructure.¹⁵

Operators understand what consumers demand, and they have indicated their intention to continue to provide the broadband Internet experience to meet that demand—*without* the need

¹⁵ Press Release, European Commission, Regulatory Mess Hurting Broadband Investment: Consumers and Businesses Stuck in Slow Lane (Aug. 30, 2013) (quoting Nellie Kroes) *available at* http://europa.eu/rapid/press-release_MEMO-13-756_en.htm.

for regulation of the Internet. There is recognition and a commitment among network operators in the U.S. that fostering the openness of the Internet is not only good for society, but also for the bottom line of the industry. This can be seen in the multiple commitments by operators to continue to hew to the vision of an open Internet, without the need for regulations.¹⁶

Ericsson hopes that recent announcements from operators show an increased willingness to experiment with innovative service offerings that, in the past, they may have shied away from in the face of vague or overbroad Internet regulations. AT&T, for example, has begun testing the concept of sponsored data, under which subscribers would not have to concern themselves with monthly data caps for data consumed by certain applications.¹⁷ And, despite some heated rhetoric, the marketplace has found solutions to Netflix video streaming quality issues *without* the need for Internet regulation.¹⁸ According to a recent MIT study, “[w]hile the issues with delivery of Netflix content are taking a while to resolve, it would appear that all parties are moving toward adequate resolution. *We would actually find it surprising if there were widespread congestion on peering links.*”¹⁹

Ericsson believes that regulation of the Internet is not only unnecessary, but ill-advised. As described above, recent history demonstrates the familiar truism that investment occurs where regulation is light. Further, it is simply not possible to regulate broadband Internet access effectively as the very terms that define the market can change at light speed.

¹⁶ See, e.g., Verizon’s Commitment to Our Broadband Internet Access Customers, *available at* <http://responsibility.verizon.com/broadband-commitment> (“On any of our Internet access services, wireline or wireless, you and other users of our service can access and use the legal content, applications, and services of your choice, regardless of their source.”); David L. Cohen, *Comcast Reaffirms Commitment to Open Internet* (Mar. 20, 2014), *available at* <http://corporate.comcast.com/comcast-voices/comcast-statement-in-response-to-netflix> (“[Comcast] supported the FCC’s Open Internet rules because they struck the appropriate balance between consumer protection and reasonable network management rights for ISPs. We are now the only ISP in the country that is bound by them.”).

¹⁷ See <http://www.att.com/att/sponsoreddata/en/index.html#fbid=N21oXUH43W>.

¹⁸ Mass. Inst. of Tech., MIT Information Policy Project, *Measuring Internet Congestion: A Preliminary Report at 2*, *available at* ipp.mit.edu/sites/default/files/documents/congestion-handout-final.pdf.

¹⁹ *Id.*

Nevertheless, if the Commission proceeds with adopting rules to regulate broadband Internet access, many of the proposals in the *Notice* do appear to recognize marketplace realities and allow for some flexibility based on the guidance given by the D.C. Circuit Court of Appeals in *Verizon v. FCC*.²⁰ With that background, Ericsson urges the Commission to consider several basic ideas that we believe will minimize the negative impacts of Internet regulation:

- Outside a showing of harm to consumers or significant anticompetitive effects, consumers, operators, and content providers should be generally free to contract with each other for differentiated experience over broadband networks.
- Any regulation of the mobile Internet should reflect the unique technical challenges facing wireless telecommunications technology and the wireless marketplace.
- Reclassification of broadband Internet access as common carriage would chill investment and innovation.
- The scope of Internet regulation proposed in the *Notice* is unclear and could lead to sweeping in a host of entities that today enjoy exemption from Net Neutrality rules.
- Prioritization in its many forms should be permissible, subject to the concept of commercial reasonability.
- The minimum-level-of-service rules proposed by the Commission are too vague; instead the Commission should leverage disclosure rules to guide what defines a minimum level of service.

II. Outside a Showing of Harm to Consumers or Significant Anticompetitive Effects, all Parties in the Internet Ecosystem Should be Free to Engage in Commercially Reasonable Relationships.

Ericsson's position on the open Internet is based on considering the matter from the point of view of three broad categories of participants in the Internet ecosystem: consumers, operators, and content/application providers (who are analogous to the Commission's "edge provider" terminology).

²⁰ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

Consumers. Ericsson supports an open, unrestricted, and accessible Internet experience for all users. Connectivity is the key ingredient for building the “Networked Society,” Ericsson’s vision for the future. In the Networked Society everyone and everything will be connected everywhere, in real time. The Networked Society goes beyond more than 50 billion connected devices and is the result of people starting to use those connections to make their lives and businesses better and more efficient. In order to continue building this society, consumers of all types—individuals, industries, the public sector—demand networks that are open, unrestricted, and accessible. Cost-conscious consumers also should be able to pay less for more limited access if they so desire.

Operators. Ericsson supports maximum flexibility for operators to manage their networks. In order to serve their customers, operators must find economically viable options for deploying broadband infrastructure and providing social value while maintaining their competitiveness. This requires that they make the most efficient possible use of their resources, as well as maximize the value they provide to customers, while maintaining the rewards of service innovation.

As Ericsson set forth in detail in our comments to the Commission in 2010, network operators require flexibility to ensure their networks function efficiently. For example, voice is often prioritized over all other traffic because it requires a constant bit rate connection in order for users to understand each other. In the absence of this differentiation and prioritization, all voice users would experience suboptimal service.²¹

Multiple network management techniques are in use at all times in communications networks and they are critical to a satisfactory consumer experience. They typically operate in micro- and millisecond time frames. Without network management, network performance is not

²¹ See Ericsson January 2010 Comments at 7.

optimized and users experience instances of degraded service caused by packet loss, packet delay (latency), and jitter—problems that are more prevalent when networks are congested.²²

Content Providers. Ericsson supports an environment in which providers of broadband content, services, and applications benefit from the ability to offer differentiated user experiences. Content providers can and do benefit from the ability to offer an experience tailored to their customers.²³

Demand for broadband continues to explode, and the market has responded with continued investment in broadband. However, market realities can affect any industry, even one that would appear over the past several years to operate outside of normal business cycles. But, as evidenced in other contexts, overly burdensome regulation of the Internet would have a chilling effect on further network investment.

Consistent among all these different perspectives is the recognition that the marketplace should be left to function in order to continue to fund the investment in network deployment that characterizes the market today. The various participants in the market need the freedom to make deals with each other to continue to deliver the services consumers demand today, and those that will require network investments in the future.

III. Wireless Networks are Unique and Any Internet Regulation Should Take into Account the Technological and Marketplace Realities at Play.

While Ericsson would prefer a lightly regulated Internet regardless of whether access is via cable, fiber, or RF spectrum, we are encouraged that the Commission appears to understand that wireless operators should continue to operate largely free from Net Neutrality regulation.

²² *Id.* at 8.

²³ For example, Comcast's Xfinity service offers its customers the ability to access television programming on a Microsoft Xbox 360 without customers being charged for data from the monthly usage allowance. *See* Xfinity FAQs: Xbox 360 at <http://xbox.comcast.net/faqs.html> ("similar to traditional cable television service that is delivered to the set-top box, this content doesn't count toward our data usage threshold").

Subject to the preceding sentence, Ericsson supports adoption of the 2010 no-blocking obligation, which would prohibit blocking only web content and competing voice/video telephony applications,²⁴ and the tentative conclusion that the discrimination rule should not apply to mobile broadband.²⁵

Wireless networks are unique. They are influenced by the radio environment, where operating parameters are constantly changing. The number of users, the level of interference, and the profile of data and voice traffic in a wireless network at a given time all contribute to how well the network functions from a capacity and coverage perspective. User location relative to a site in a network also impacts propagation characteristics and can affect the user's perception of equipment and application performance. Capacity limitations compound these challenges, as does the amount of spectrum available and its RF characteristics. All of these factors require constant network management. Even in the absence of these limitations, adding capacity does not eliminate the need for network management to optimize operation and resource utilization, for the benefit of all.

Traffic characteristics in wireless networks are inherently more variable due to user movements and the varying nature of radio links that are subject to, among other things, interference and atmospheric conditions. Traffic management technologies need to be more dynamic and more sophisticated for wireless networks because of the variable nature of demand and supply.

²⁴ See Notice ¶ 105.

²⁵ See *id.* ¶ 140 (“The Commission chose not to apply its no unreasonable discrimination rule to mobile broadband providers in 2010 based on considerations including the rapidly evolving nature of mobile technologies, the increased amount of consumer choice in mobile broadband services, and operational constraints that put greater pressure on the concept of reasonable network management for mobile broadband services. We have tentatively concluded that we will continue that approach in the proposed rules.”)

Multiple techniques are widely employed to improve traffic flow, combat congestion, and deliver services. These management techniques are largely standardized, so their propriety and suitability have been reviewed by technical experts from a broad cross-section of the industry. Some of these tools, such as schedulers and timers, are automatic and are built into networks at their most fundamental level; they operate at the “heart-beat” level of networks to manage resource allocations. Others, like traffic analysis, are more dynamic and more intelligently manage traffic flow. Without these, and other, network management tools, networks could not support the numerous applications and services essential to daily living and commerce. Imposing strict Net Neutrality obligations on wireless network providers carries the very real possibility of undermining access to the Internet in an attempt to ensure equality of opportunity for access.

Beyond the engineering realities, as described above in Section I, the sheer competitiveness that continues to characterize the mobile broadband experience is proof that the minimal level of regulation applied to wireless is working. By every measure, the mobile broadband market in the U.S. continues to be the envy of the world in terms of competition, innovation, and investment. There are multiple, facilities-based providers offering a dizzying array of plans and services differentiated by service tiers, speeds, and billing arrangements. There are thousands of devices available running multiple operating systems. Subscriberhip is above 100% penetration,²⁶ and prices continue to fall.

IV. Reclassification of Broadband Internet Access as Common Carriage Would Chill Investment and Innovation.

Title II of the Communications Act was enacted to ensure that customers and potential new entrants were protected from a monopolistic environment for voice telephony. To suggest that it is the proper model for Internet regulation directly contradicts statements from Republican

²⁶ The Ericsson Mobility Report measures broadband penetration in North America at 102%, as the number of subscriptions per user increases from adding multiple devices such as tablets. *Ericsson Mobility Report* at 5, 8.

and Democratic FCC Chairmen dating back to the Nineties.²⁷ Treating the Internet as if it were common carriage would not only subject a vibrant, competitive industry to a host of anachronistic regulation, but could also sweep in some of the very entities that argue so vehemently in favor of obtrusive Net Neutrality regulation.

Consider just a sampling of some of the statutes contained in Title II and the effect that going through contortions to apply them to broadband could have on the Internet economy and by extension—given the importance of the Internet—to the economy as a whole. The risks of long-term rate regulation, unbundling, and other uncertainties caused by the application of Sections 201 and 202 of the Act²⁸ to broadband Internet access would stifle investment and innovation. Beyond those sections, Section 214, could subject ISPs to seek permission from the Commission before providing new services or discontinuing services. In a dynamic marketplace, the barriers to entry (and exit) would almost certainly discourage entry in the first place. Section 203 could require any charges relating to the provision of Internet access be “tariffed” and filed with the Commission before they could take effect. Section 226 could dictate the provision of telephone operator services to Internet access.

Some have suggested that forbearance from certain Title II requirements could be an acceptable method of regulating the Internet while avoiding potentially onerous burdens on ISPs.

²⁷ See William Kennard, *The Road Not Taken: Building a Broadband Future for America*, FCC (June 15, 1999), available at <http://www.fcc.gov/Speeches/Kennard/spwek921.html> (outlining decision not to impose “open access” requirements on cable TV systems: “the FCC has taken a hands-off, deregulatory approach to the broadband market”); Jon Brodtkin, *Cable lobbyist who once led the FCC is glad he didn’t regulate the Internet: Michael Powell made sure Internet access wouldn’t be treated as a utility*, *Ars Technica* (Apr. 29, 2014), available at <http://arstechnica.com/business/2014/04/cable-lobbyist-who-once-led-the-fcc-is-glad-he-didnt-regulate-the-internet/>; Statement of Chairman Kevin J. Martin, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14,853 (2005) (“With this Order, wireline broadband Internet access providers, like cable modem service providers, will be considered information service providers and will no longer be compelled by regulation to unbundle and separately tariff the underlying transmission component of their Internet access service.”).

²⁸ 47 U.S.C. §§ 201, 202.

Such an approach is, at best, an awkward means to achieve a policy goal: recognize that an admittedly overly burdensome set of requirements is not appropriate for a dynamic industry, apply those requirements anyway, but in the same breath make the determination that only a subset of those requirements should *actually* apply. However, more dangerously for the Internet economy and the U.S. economy as a whole, the potential for reversals of forbearance decisions based on shifts in political winds and accompanying Commission leadership changes would deter investment in the short *and* long term. Further, given that the legal mechanism of regulating the Internet would first be to look through the lens of Title II, any new offering would have to go through an analysis of whether that offering would fall under a prior forbearance decision and whether a future Commission would agree with that analysis. Quite simply, every new offering would have to be tested by the lawyers first, rather than go straight to the marketplace for validation.

In addition to burdening current operators, the other very real danger of applying common carrier regulation to the Internet is the scope of entities that could be swept in. As Jim Cicconi of AT&T put it in a recent blog posting:

Title II could turn every edge or content company into a common carrier for at least part, if not all, of their services. In the original Internet classification litigation, the Brand X case, the Supreme Court in 2005 affirmed the FCC's decision to lightly regulate Internet access service by looking at the entirety of the service being sold, concluding that if the service involved computer processing – as all Internet services do – then Title II regulation should not apply. Proponents of Title II regulation, however, point to Justice Scalia's dissent in Brand X to argue that the majority got it wrong. . . . Scalia would conclude that every service sold over the Internet– be it access or content – has a Title II transmission component. The implications of that rationale for every Internet company are enormous. . . Innovators would be paralyzed before they even get off the ground.²⁹

²⁹ Jim Cicconi, *Net Neutrality and Modern Memory*, AT&T Public Policy Blog: News, perspectives and thoughts on government broadband policies (June 6, 2014), *available at* <http://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/>.

The Commission itself recognized that public-utility regulation of “just” Internet access service could cover any actor in the Internet ecosystem that arranges for the transmission of data, including, for example, VoIP providers and search engines: “[I]t would be difficult to devise a sustainable rationale under which *all* ... information services did not fall into the telecommunications service category.”³⁰

Finally, Ericsson is concerned about the message it would send to the rest of the world if the U.S. were to determine that broadband Internet access is a common carriage service. Regions of the world that have already applied utility regulation to Internet access would be encouraged to extend that model to affect all players in the Internet ecosystem. In addition, some countries have expressed interest in extending the settlements regime for international telephone calls to data that flows across country boundaries. This argument becomes much easier to make if the policy of the U.S. is to treat Internet communication in the same manner as circuit-switched voice telephony.

The Internet has been a driver for economic growth, job creation, educational opportunities, as well as leading to experimentation and innovation that has touched every facet of modern day life. The ability to experiment online—both by content providers with new services and applications and broadband service providers with new investments and service offerings—has led to the vast amount of innovation and numbers of products available today. Ericsson believes that the correct method to maintain these incentives to invest is to regulate the Internet ecosystem as little as possible and to treat broadband Internet access as an information service, rather than a telecommunications service.

³⁰ Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11,501, 11,529 ¶ 57 (1998) (emphasis added).

V. Prioritization in its Many Forms Should be Permissible Subject to the Concept of Commercial Reasonability.

If the Commission sees it necessary to regulate broadband Internet access, Ericsson favors the approach suggested by the *Verizon v. FCC* court and built upon in the *Notice* that would allow for commercial dealings among the various parties in the Internet value chain, so long as they are commercially reasonable.³¹ As Ericsson has stated in the past, so long as competition and consumers are not harmed, operators ought to be generally free to manage their networks as they deem fit.³² These goals comport generally with the inquiries proposed by the Commission relating to the impact to competition and to consumers.³³ This approach allows for flexibility to offer new services.

One such example is AT&T's sponsored data offering. Treating data as "toll-free" in the context of the broadband Internet access world should be no different than a toll-free call in the voice telephony world.³⁴ It is this type of experimentation that is good for consumers (it is hard to argue—although some have—that zero-rated data is somehow a *bad* idea) but straddles the line on what might be permissible under the 2010 Net Neutrality regime. Indeed, similar arrangements were called into question under that construct.³⁵ Ericsson hopes that a less restrictive approach will lead to an expansion of such offerings, as well as products that have yet to be dreamt up by "two guys in a garage."

³¹ See *Notice* ¶ 136.

³² See Ericsson January 2010 Comments at 22.

³³ See *Notice* ¶¶ 124-130.

³⁴ See *supra* at 5 & n.17.

³⁵ See Mark Hachman, *Comcast's Xfinity-on-Xbox Plans Draw Net Neutrality Fire*, PC Magazine, Mar. 26, 2012, available at <http://www.pcmag.com/article2/0,2817,2402149,00.asp>; see also Timothy B. Lee, *Net Neutrality Concerns Raised about Comcast's Xbox on Demand Service*, Ars Technica, Mar. 26, 2012, available at <http://arstechnica.com/tech-policy/2012/03/net-neutrality-concerns-raised-about-comcasts-xbox-on-demand-service/>.

The proposal outlined in paragraph 141 of the *Notice* bears exploration. The safe harbor approach is a simple means of determining whether a practice is commercially reasonable, without having necessarily to consider a multitude of factors in a case-by-case analysis. Non-exclusive arrangements would seem, on their face, not to be anti-competitive. Ericsson urges the Commission to give AT&T's proposal serious consideration as it deliberates new Net Neutrality regulation.

VI. The Minimum-Level-of-Service Rules Proposed by the Commission are too Vague; Instead the Commission Should Leverage Transparency Rules to Guide What Defines a Minimum Level of Service.

The Commission tentatively concludes that it should re-adopt the no-blocking rule, subject to a proposal that it allow for individualized bargaining for service above a minimum level of access.³⁶ This is a very reasonable approach to allowing differentiated experiences from content providers and operators to end users.

The difficulty with this rule, of course, is determining what constitutes a minimum level of access. While the Commission has proposed several options, some suffer from being too vague— “best effort” and “reasonable person” —while another— “minimum quantitative performance”³⁷ —runs the risk of codifying a number that will almost certainly need to change over time.

One other possibility, perhaps which could be viewed as a modification of the proposed “reasonable person” standard, could be simply to require that consumers get what they pay for. The provider would simply disclose in its terms and conditions or service level agreement the minimum service it will provide to all users and edge providers. That way, customers could compare minimum levels of service, and the Commission would have an enforceable means of

³⁶ See *Notice* ¶ 95.

³⁷ See *Notice* ¶¶ 102-04.

keeping providers to their word. The standard would be objective, without the need for potential one-size-fits-all regulation to set the number in a regulatory manner.

The Commission could, if it feared that investment in broadband Internet access was lagging, undertake periodic reviews of providers' contractual minimum levels of service standards. If this mechanism was found to lead to stagnating levels of service, the Commission could then take further action, possibly considering some of the other possibilities set forth in the *Notice*.

Conclusion

As stated at the outset, Ericsson would prefer an Internet as free from regulation as possible. If the Commission determines that it must revisit a Net Neutrality regime, Ericsson urges it to allow parties in the Internet value chain to continue to manage their relationships with each other commercially. Such dealing will lead to greater investment, increased options for consumers, and continued world-leading technological innovation.

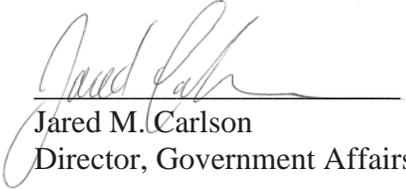
The rest of the world is looking to the U.S. The U.S. initially led the way with concern for Net Neutrality, and the U.S. can now show the world that the path toward greater investment

in the broadband ecosystem comes not from the heavy hand of government but with the invisible hand of the marketplace.

Respectfully submitted,

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