
**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
Protecting and Promoting the Open Internet) GN Docket No. 14-28
Framework for Broadband Internet Service) GN Docket No. 10-127
)

COMMENTS OF T-MOBILE USA, INC.

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July 18, 2014

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SUMMARY

The application of new open Internet regulations to mobile wireless broadband providers is unnecessary and would be inappropriate. The mobile wireless broadband market is highly competitive, such that providers have little ability or incentive to block or degrade Internet traffic or otherwise undermine the consumer experience. Mobile providers such as T-Mobile are driven to promote Internet openness by competition and customer demand for access to the content, applications, and devices of their choice, particularly given the ease with which dissatisfied customers can switch carriers. Moreover, the unique nature of mobile wireless broadband networks militates against further regulation.

Mobile networks present serious operational and technical constraints that do not apply to fixed broadband. Additional regulation could hamper a mobile broadband provider's ability to proactively manage its network and provide high-quality service to all users, the importance of which will only grow with increasing consumer demand for bandwidth-intensive applications. To the extent the Commission determines to apply additional requirements to mobile broadband services, it should do so consistent with the limited scope of the 2010 rules.

There is no need to expand the existing transparency rule. The current rule has been and continues to be effective, and mobile broadband providers already disclose extensive information about their services. Expanding the rule would require providers to make disclosures that could be too complex and technical to be useful, or too vague to be meaningful. Moreover, overly granular disclosures would be unworkable, given constantly changing network management practices.

There also is no need to apply a new no-blocking rule to mobile broadband providers, given the competitive nature of the wireless marketplace and technological distinctions between wireless and wireline networks. The provision of a constant minimal level of service is impossible in the mobile context, and attempting to enforce such a standard would arbitrarily punish providers and their customers. If it adopts a no-blocking rule for mobile broadband, the Commission should not extend such a rule beyond the carefully-tailored approach taken in the 2010 rule, which recognized the distinct features of the wireless marketplace and networks. Indeed, application of overly broad requirements could prevent mobile providers from taking steps to improve traffic flow on a moment-to-moment basis, which is needed to optimize network performance and the customer experience.

To the extent it adopts a new non-discrimination requirement, the Commission should exempt mobile providers from its reach, as it did in 2010 and as the NPRM proposes here. Mobile providers already have strong incentives to behave reasonably, and any undesirable conduct is effectively constrained by competition and existing legal mechanisms. In contrast, a broad non-discrimination rule would hinder the development of new pro-consumer innovations to the detriment of consumers.

Reclassification of mobile broadband service as including a distinct "telecommunications" component also would be unlawful and would harm consumers. There is no factual basis for classifying broadband Internet access as including a distinct telecommunications service component subject to Title II. Moreover, reclassification would subject twenty-first century mobile broadband services to a regulatory regime designed decades

ago to address problems arising from old narrowband telephone monopolies. Even if the Commission forbears from applying certain Title II requirements to mobile broadband services, the remaining requirements would generate uncertainty, lead to years of litigation, and depress innovation and investment, stymieing consumer interests and crippling the broadband marketplace's development. The Commission should instead act to foster the innovation and competition that has been the hallmark of the mobile broadband ecosystem.

Finally, the Commission should not adopt broadband-specific enforcement mechanisms. Its existing enforcement regime, which relies on Commission-initiated investigations, informal complaints, and formal complaints, has served the Commission and the public interest well. The Commission should not depart from this well-tested enforcement approach without compelling evidence that it has failed or is insufficient. No such evidence exists here.

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To: The Commission

COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”)¹ hereby responds to the Commission’s Notice of Proposed Rulemaking seeking comment on the adoption of new open Internet rules² and the Wireline Competition Bureau’s Public Notice seeking to refresh the record in the *Framework for Broadband Internet Services* docket.³ The competitive and innovative nature of the mobile broadband marketplace forestalls any need for new open Internet mandates. Mobile providers such as T-Mobile promote Internet openness without such requirements because their customers demand access to the content, applications, and devices of their choice. Additional requirements therefore are unlikely to help consumers.

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly-traded company.

² *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (rel. May 15, 2014) (“*Open Internet NPRM*”).

³ *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access*, Public Notice, DA 14-748 (rel. May 30, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0530/DA-14-748A1.pdf.

To the contrary, application of additional transparency mandates, broad no-blocking requirements, or a refurbished anti-discrimination requirement to mobile broadband providers could harm consumers by undercutting ISPs' flexibility to manage their networks and meet consumer needs. Thus, to the extent the Commission believes that additional requirements are needed with regard to mobile broadband, it should at most enact rules that track the scope of the 2010 rules – *i.e.*, rules that apply no-blocking requirements only with respect to lawful websites and applications that compete with the mobile provider's own voice or video telephony offerings, subject to reasonable network management, and that do not apply any successor to the non-discrimination requirement to mobile services. Finally, reclassification of mobile broadband service as including a distinct "telecommunications" component would be unlawful and especially harmful to consumers, generating business and legal uncertainty and inhibiting innovation and investment in the marketplace.

I. THERE IS NO NEED FOR ADDITIONAL REGULATION OF MOBILE WIRELESS BROADBAND PROVIDERS.

The application of new open Internet regulations to mobile wireless broadband providers is unnecessary and would be inappropriate. Mobile broadband providers have neither the incentive nor the ability to interfere with the delivery of Internet traffic or content, because their conduct is already governed by competitive market forces and consumer demand. Moreover, technological challenges unique to mobile wireless networks, such as their reliance on limited spectrum and issues associated with mobility itself, militate against further regulation in this area. These facts warrant the rejection of new rules for mobile broadband, or – at most – adoption of a regime that tracks the scope of the 2010 rules, leaving mobile broadband providers with substantial discretion.

A. The Competitive Nature Of The Mobile Wireless Broadband Marketplace Has Driven Network Openness and Obviates Any Need For Further Regulatory Intervention.

The market for mobile wireless broadband service is competitive, such that providers have little ability or incentive to block or degrade Internet traffic or otherwise undermine the consumer experience. As the 2010 Open Internet Order recognized, “most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband.”⁴ Nearly 92 percent of Americans can choose among at least three mobile wireless broadband providers (and often more), and more than four out of five Americans can choose among *four* or more mobile providers.⁵ These figures, of course, are in addition to the *fixed* broadband services available to these consumers.

Competition in the mobile broadband marketplace has also prompted providers to ensure that customers are able to move from one carrier to another. In 2013, for example, T-Mobile – along with AT&T, Verizon Wireless, Sprint, and U.S. Cellular – agreed to new phone unlocking principles, which allow postpaid customers to unlock mobile wireless devices at the end of their service or equipment financing contracts, and permit prepaid customers to do so no later than one year after activation.⁶ In March 2013, as part of the “Un-carrier” strategy, T-Mobile announced radical changes to its service lineup that eliminated annual service contracts and early termination fees and created new device-upgrade programs, enabling consumers to obtain

⁴ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17957 ¶ 95 (2010) (“*Open Internet Order*”).

⁵ *See 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*, Sixteenth Report, 28 FCC Rcd 3700, 3749 (2013).

⁶ *See* Letter from Steve Largent, CTIA, to Hon. Tom Wheeler et al., FCC, Carrier Unlocking Voluntary Commitment (Dec. 12, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-324664A1.pdf.

affordable unlimited talk, text and data plans and the devices they want whenever they want.⁷ T-Mobile followed up by offering to pay the early termination fees new customers incur when switching from AT&T, Verizon, or Sprint.⁸ Other recent T-Mobile consumer initiatives include providing consumers an iPhone 5s with which they can “test-drive” the network for free for seven days,⁹ free data for life on new tablets,¹⁰ and free international data and text roaming in a number of markets.¹¹

Network openness is another critical basis on which providers compete. Customers demand access to the services, applications, and content of their choice, and a provider that fails to fulfill such expectations risks losing its customers. T-Mobile is strongly committed to preserving and promoting openness of the Internet. It was a founding member of the Open Handset Alliance, which was created in 2007 by companies dedicated to promoting openness in the mobile ecosystem. Together, the Open Handset Alliance developed Android, the first open and free platform designed for mobile devices, facilitating the development of a variety of new and innovative mobile applications over a wide range of devices. Since then, the Android

⁷ T-Mobile, News Release, *T-Mobile Makes Bold “Un-carrier” Moves* (Mar. 26, 2013), available at <http://newsroom.t-mobile.com/news/t-mobile-makes-bold-un-carrier-moves.htm>.

⁸ T-Mobile, News Release, *T-Mobile Delivers Contract Freedom for Families By Paying Off Early Termination Fees* (Jan. 8, 2014), available at <http://newsroom.t-mobile.com/news/t-mobile-delivers-contract-freedom-for-families-by-paying-off-early-termination-fees.htm>.

⁹ T-Mobile, News Release, *T-Mobile Transforms the Way Americans Buy Wireless... Again* (June 18, 2014), available at <http://newsroom.t-mobile.com/news/t-mobile-transforms-the-way-americans-buy-wireless-again.htm>.

¹⁰ T-Mobile, News Release, *T-Mobile Revolutionizes How Customers Buy and Use Tablets with Free Data for Life* (Oct. 23, 2013), available at <http://newsroom.t-mobile.com/news/t-mobile-revolutionizes-how-customers-buy-and-use-tablets-with-free-data-for-life.htm>.

¹¹ T-Mobile, News Release, *T-Mobile Makes the World Your Network - at No Extra Charge And Now Delivers Nationwide 4G LTE* (Oct. 9, 2013), available at <http://newsroom.t-mobile.com/news/t-mobile-makes-the-world-your-network--at-no-extra-charge-and-now-delivers-nationwide-4g-lte.htm>.

marketplace has exploded. Whereas there were only about 20,000 Android applications in 2010, today there are more than 1.2 million.¹² Android’s rivals have also been innovating: the number of active applications in Apple’s competing iTunes App Store has grown from approximately 95,000 in 2008 to more than 1.1 million in 2014.¹³

The market’s expansion will create even stronger incentives favoring network openness. Mobile application downloads are expected to grow to more than 268 billion by 2017, generating over \$77 billion in revenue.¹⁴ As the 2010 *Open Internet Order* recognized, “[m]obile broadband is an earlier-stage platform than fixed broadband, and it is rapidly evolving.”¹⁵ To remain competitive, mobile broadband providers have every incentive to attract and work with application developers and content providers to ensure their customers have access to the content they demand. Efforts to block or degrade user access to these applications would be contrary to broadband providers’ business interests.

B. The Unique Nature Of Mobile Wireless Broadband Networks Militates Against Further Regulation.

The *Open Internet Order* correctly recognized that “mobile networks present operational constraints that fixed broadband networks do not typically encounter,”¹⁶ and tailored the open Internet rules accordingly. The distinctions between fixed and mobile networks persist, and, if

¹² Comments of T-Mobile, GN Docket No. 09-191, WC Docket No. 07-52, at 12 (Jan. 14, 2010); AppBrain, *Number of Android applications*, <http://www.appbrain.com/stats/number-of-android-apps> (last visited July 14, 2014).

¹³ *App Store Metrics*, POCKETGAMER.BIZ, <http://148apps.biz/app-store-metrics/?mpage=appcount> (last visited July 14 2014).

¹⁴ CTIA, *App to Reach 268 Billion Downloads by 2017*, CTIA RESOURCE LIBRARY, Jan. 22, 2014, <http://www.ctia.org/resource-library/facts-and-infographics/archive/mobile-app-downloads-grow-2017>.

¹⁵ *Open Internet Order*, 25 FCC Rcd at 17956 ¶ 94.

¹⁶ *Id.* at 17957 ¶ 95.

anything, have become even more significant as mobile broadband usage has grown. The distinctive nature of mobile wireless networks and services continues to counsel against imposing additional regulations on mobile broadband providers. Rather, mobile ISPs must maintain the flexibility to proactively manage their networks and provide high quality service to all users.

The capacity and functioning of mobile broadband networks are limited by the amount of spectrum available. The industry has made great strides to improve spectral efficiency, and will continue to do so as providers develop new technologies and transition customers to 4G and successor protocols. In this regard, T-Mobile also applauds the Commission's efforts to make spectrum available for mobile broadband through the upcoming AWS-3 and incentive auctions. But the reality is that spectrum is a finite resource, and these measures may not be sufficient to meet exploding demand. As customers rely more and more on mobile video, the Internet of Things, and other offerings, spectrum demand will continue to skyrocket,¹⁷ and mobile providers need continued flexibility to manage growing traffic flows in an era of continued spectrum scarcity.

The shared nature of a mobile broadband network, and the role played by customer-selected devices, also create unique and significant engineering and network management challenges that must be addressed on a dynamic basis. One user or application can impede the services of other network users. Heavy bandwidth applications such as streaming video and gaming, even if used by a small percentage of users, can monopolize capacity to the detriment of other users and services. Similarly, devices not optimized for the particular network can create

¹⁷ Cisco predicts that global mobile IP traffic levels will grow from less than 18 exabytes in 2013 to 190 exabytes in 2018 – a more than tenfold increase. See Cisco, *Visual Networking Index*, <http://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/index.html#~forecast> (last visited July 14, 2014).

unpredictable bandwidth drains. Providers must therefore continually accommodate competing demands for network resources by allocating network resources to best meet the needs of *all* users, applications and devices. To this end, T-Mobile utilizes Self Organizing Networks (“SON”), an automation technology designed to make the planning, configuration, management, optimization, and healing of mobile radio access networks simpler and faster through automation and real-time network management. SON is based on 3GPP standards, and consists of a suite of solutions for self-optimization, self-healing, and self-configuration.

The inherent mobility of wireless broadband only intensifies the technological and logistical complexities involved in managing the network, which do not exist in a fixed broadband environment. Use of mobile systems is highly unpredictable. Providers therefore cannot fully anticipate how many users will be sharing the network at any particular time or location, or what kind of demands those users will make on the network. Unexpected events, from traffic jams to flash mobs to celebrity sightings, can lead to unpredictable crowds, forcing unusually high numbers of people to share limited network resources. These and other developments can cause network congestion to fluctuate by the minute and second. Moreover, wireless providers must take into consideration users who move within and between cell sites, interference from other devices, weather, distance from cell sites, and other factors that can affect traffic and wireless signals.

II. THE COMMISSION SHOULD NOT EXPAND THE TRANSPARENCY RULE FOR MOBILE WIRELESS BROADBAND PROVIDERS

There is no need for the Commission to adopt additional transparency requirements for mobile wireless broadband to supplement those it adopted in 2010. The competitive mobile broadband marketplace has led providers to disclose extensive information regarding their offerings. Expanded requirements of the type contemplated by the NPRM will render

disclosures either too complex and technical to be useful to customers or too vague to be meaningful. These outcomes would undermine rather than promote consumer interests. Such requirements would also be unworkable, given constantly changing network management practices.

A. Mobile Wireless Broadband Providers Are Already Disclosing Extensive Information About Their Services.

Competition in the mobile broadband marketplace ensures that all users receive the information they need to make informed decisions. Mobile broadband providers want and need to provide consumers with information relevant to their services, lest they alienate their customers and lose business. Similarly, providers keep content, application and device developers well informed so they can continue to meet consumer demand for new and innovative applications and content. Indeed, relevant technical information for developers is already available for open platforms such as Android.

T-Mobile shares the Commission's goal of ensuring that consumers and other stakeholders understand the services offered by broadband providers, and makes every effort to disclose pertinent information about its services and practices. Consistent with the existing transparency rule, T-Mobile publicly discloses on its website information about the commercial terms on which it offers mobile broadband service, the features and capabilities of such service, and the practices it employs to manage traffic on its mobile network. It does so to ensure that consumers can make informed choices, and so that content, application, service and device providers can develop, market and maintain the Internet offerings that make T-Mobile's network

attractive to end users.¹⁸ T-Mobile also provides customers with tools and information to help them monitor and control data usage.¹⁹

All evidence shows that the existing transparency rule is effective and that further regulation in this area is unnecessary for mobile broadband services. The *Open Internet NPRM* references anecdotal consumer complaints regarding broadband provider disclosures, but it does not provide any real data regarding the number of complaints received or the extent to which they applied to mobile broadband service.²⁰ Indeed, the concerns cited by the Commission seem to address categories of information that are already covered by the existing rule, indicating that there is no need to expand the scope of the rule.²¹

¹⁸ See, e.g., T-Mobile, *Company Information: Consumer – Internet Services*, http://www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_ConsumerInfo&tsp=Abt_Sub_InternetServices (last visited July 14, 2014). T-Mobile, like the other national wireless providers and many regional providers, also is a signatory to CTIA’s Consumer Code for Wireless Service, which requires providers to disclose limitations on data service usage and whether there are network management practices that could materially impact a customer’s wireless data experience. CTIA, *Consumer Code for Wireless Service*, CTIA POLICY & INITIATIVES, <http://www.ctia.org/policy-initiatives/voluntary-guidelines/consumer-code-for-wireless-service> (last visited July 14, 2014).

¹⁹ See, e.g., T-Mobile, *Company Information: Consumer – Billing Information*, http://www.t-mobile.com/Company/CompanyInfo.aspx?tp=Abt_Tab_ConsumerInfo&tsp=Abt_Sub_BillingInfo (last visited July 14, 2014).

²⁰ See, e.g., *Open Internet NPRM*, 29 FCC Rcd at 5586-87 ¶ 69 nn.163-66. Indeed, the Commission’s quarterly “Summary of Top Six Consumer Informal Complaint Subjects” very rarely identify broadband access as one of the wireless-related matters about which consumers have complained. See FCC, *Quarterly Reports – Consumer Inquiries and Complaints*, <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints> (last visited July 14, 2014). The increase in reported wireless broadband access related complaints in the third and fourth quarters of 2012 coincides with AT&T’s refusal to allow video chat apps on its network, a policy AT&T later abandoned.

²¹ *Open Internet NPRM*, 29 FCC Rcd at 5586-87 ¶ 69 (citing complaints regarding actual vs. advertised speeds, charges levied on end users, network congestion, and throttling in response to “excessive use”).

B. Additional Disclosure Mandates Would Be Infeasible in the Mobile Wireless Context and Would Harm Consumer Interests.

The NPRM asks whether broadband providers should disclose specific information regarding packet loss and corruption, latency, jitter, and upstream and downstream speeds, as well as “meaningful information” regarding the source, location, timing, speed, packet loss, and duration of network congestion.²² Given the many operational factors that influence network performance and service, however, it would not be practical for mobile ISPs to collect and report these data in a meaningful way. Attempts to provide accurate information would result in lengthy, detailed disclosures that are overly technical and will not add value for the average user. In fact, inundating users with highly technical statistical information describing specific levels of packet loss and corruption, latency, jitter, upstream and downstream speeds, and congestion during each moment during which the network carried traffic would only cause confusion and make it more difficult for customers to act on pertinent information. On the other hand, attempts to shoehorn network and performance data into a standardized format would fail to provide an accurate representation of a provider’s network or services. Providers use different technologies and management tools, and face different network challenges, making standardized disclosures harder to craft and less relevant to users.

Moreover, mandatory disclosure of detailed operational information about the network and related management techniques would raise significant concerns regarding the release of proprietary and confidential information. Information produced subject to such a mandate would potentially benefit not only a provider’s competitors, but also criminals, hackers, and others seeking to disrupt a provider’s network security and integrity. These opportunities would put the network and all users at risk.

²² *Open Internet NPRM*, 29 FCC Rcd at 5587-88, 5591 ¶¶ 72-73, 83.

Given the ever-changing face of mobile network management, more granular disclosures would also be dated almost immediately upon publication. The constant need to update disclosures – and to do so in a way that offered sufficient detail without burying customers and others in numbing details – would consume significant time and resources, particularly given that the disclosures could necessitate changes to advertising, promotional, and legal materials. The associated costs ultimately would be borne by customers, directly or indirectly, and would divert resources away from other initiatives focused on providing affordable, reliable broadband services.

III. THE COMMISSION SHOULD NOT ADOPT A NO-BLOCKING RULE FOR MOBILE BROADBAND.

In light of the competitive state of the wireless marketplace and key technological distinctions between wireless and wireline broadband networks, there is no need to adopt a no-blocking rule to ensure that consumers have “the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking.”²³ To the contrary, an expansive mobile no-blocking rule would hamstring provider flexibility and thus threaten evolving technological approaches to network challenges, including cybersecurity protections. If the Commission nevertheless decides to apply a no-blocking rule to mobile broadband, the rule should be carefully tailored and consistent with the 2010 approach, which recognized the distinct features of the wireless marketplace and wireless networks and expressly maintained a “reasonable network management” exemption to ensure that providers would not be punished for acting to protect their end users.

²³ *Id.* at 5593 ¶ 89 (citing *Open Internet Order*, 25 FCC Rcd at 17941 ¶ 62).

A. In the Competitive Mobile Broadband Marketplace, Competition Ensures that Providers Do Not Block Lawful Content, Applications, or Devices.

As discussed above, the mobile broadband marketplace is competitive, and providers vie to meet consumers' demands for access to the content and applications of their choice. Carriers that do not keep pace with customer demands simply cannot survive. This basic fact eliminates any provider incentive to limit access to content or applications in a manner that would harm consumers.²⁴ Rather, carriers seek to make their offerings as attractive as possible in order to win customers and collect revenues sufficient to recover the billions of dollars they have invested in their networks.

The mobile broadband ecosystem's competitive dynamic also ensures that customers will enjoy access to the devices they wish to use. T-Mobile's network supports a wide range of devices, including some of the most advanced smartphones and other devices currently available in the market.²⁵ T-Mobile also allows consumers to "bring their own devices," so long as they are compatible with the network, and, relatedly, to unlock devices associated with a T-Mobile account so a customer can switch to another carrier.²⁶ Consumers increasingly are demanding unlimited choices in the devices and applications they use, and mobile wireless providers are responding accordingly.

²⁴ Moreover, even if providers did face such incentives, the competitive marketplace would also destroy any ability to act in a manner contrary to consumer interests.

²⁵ ²⁵ See T-Mobile, *Bring your own device*, <http://www.t-mobile.com/bring-your-own-phone.html> (last visited July 14, 2014); T-Mobile, *Unlock your mobile wireless device*, <http://support.t-mobile.com/docs/DOC-1588> (last modified May 1, 2014).

²⁶ See T-Mobile, *Bring your own device*, <http://www.t-mobile.com/bring-your-own-phone.html> (last visited July 14, 2014); T-Mobile, *Unlock your mobile wireless device*, <http://support.t-mobile.com/docs/DOC-1588> (last modified May 1, 2014).

B. Any New Mobile No-Blocking Rule Must Be Limited to the Confines of the 2010 Rule.

In 2010, the Commission deemed it best in the mobile context to limit a no-blocking rule to lawful websites and applications that compete with a provider's voice or video telephony services, subject to reasonable network management.²⁷ This decision was based on “the operational constraints that affect mobile broadband services, the rapidly evolving nature of the mobile broadband technologies, and the generally greater amount of consumer choice for mobile broadband services than for fixed.”²⁸

If the Commission adopts a new mobile no-blocking rule in this proceeding, it should apply the same limitations here, and for the same reasons. Given the high level of flexibility wireless providers require to address network challenges, it makes sense to regulate lightly, and to focus any restrictions on the areas where wireless providers will most frequently face direct competition – *i.e.*, voice and video telephony services. It would not serve the public interest to expand the rule's scope to include access to all applications that compete with the mobile broadband Internet access provider's other services. Indeed, it is unclear how a provider would ascertain whether a particular application, new to its network, “competes” with its services. This approach would be unnecessarily broad, would impose substantial costs, and would generate unnecessary compliance costs.

The Commission should be especially wary of a rule that would bar mobile ISPs from blocking *any* content or applications. Wireless broadband providers need flexibility to address network security and reliability risks, as well as other threats to public safety and the consumer experience. As the Commission has found, “wireless providers have legitimate technical reasons

²⁷ *Open Internet Order*, 25 FCC Rcd at 17956-57, 17959-60, ¶¶ 94-95, 99.

²⁸ *Open Internet NPRM*, 29 FCC Rcd at 5594 ¶ 91.

to restrict particular non-carrier devices and applications on their networks, specifically to ensure the safety and integrity of their networks.”²⁹ A mandate requiring operators to permit all devices or applications on their networks would limit operators’ flexibility to address risks that could result in network security and reliability degradation. As Chairman Wheeler has said, underscoring President Obama’s focus on cybersecurity, “[T]he security of broadband networks is of the utmost significance.”³⁰ When communications networks are at risk, it is not responsible to wait until an application has degraded the network to act. Providers need flexibility to foreclose use of suspicious applications until they are tested or verified; providers must also be able to limit use of potentially disruptive applications until they can devise ways to support new features without causing collateral damage to other applications and services. A strict no-blocking rule could chill providers’ ability to take the steps necessary to protect our nation’s communications infrastructure.

Moreover, while a “reasonable network management” exception is of course necessary if the Commission adopts a new mobile no-blocking or nondiscrimination rule, such an exception would not be sufficient to allay the problems faced by mobile broadband providers: A regime that created a *prima facie* violation whenever mobile providers acted in their customers’ interests would chill customer-friendly management greatly.

²⁹ *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15368-69 (2007) (700 MHz C Block open access requirements).

³⁰ Tom Wheeler, Chairman, FCC, Remarks at the National Cable and Telecommunications Association Annual Conference (Apr. 30, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf (“The more we learn about the challenges of cybersecurity and the costs of failure, the more apparent the importance of addressing it with best efforts ...”).

Furthermore, there is no reason to subject mobile ISPs to the standards governing fixed ISPs where they are marketed as a substitute for fixed services.³¹ As described at length above, the strong policy rationale for subjecting mobile broadband service to a less demanding regime than fixed broadband service is grounded in (1) the competition and innovation that characterize the mobile broadband marketplace and (2) the unique spectrum constraints and network-management needs of mobile broadband providers. Neither of these factors is affected at all by how a service is marketed. Mobile wireless services warrant a lighter touch irrespective of how they are advertised or to whom they are sold.

C. There is No Basis for Imposing a “Minimal Level of Service” Approach on Mobile Wireless

The Commission’s further proposal to impose a “minimum level of service” threshold to effectuate its no-blocking rule³² fails to recognize the inherently variable nature of mobile broadband service and the extent to which fluctuations in available per-user network resources are beyond the mobile ISP’s own control (both detailed above). These circumstances render the constant provision of a minimal level of service to all edge providers technically impossible. While the NPRM “recognize[s] that from time to time a provider may be unable to provide such a minimum level of access temporarily for a variety of reasons,”³³ even this language fails to appreciate the second-by-second fluctuations that govern mobile wireless networks.

Throughput rates can vary greatly from moment to moment, as can jitter, latency, and other relevant factors, leading a provider to dip below requisite service levels multiple times per minute even while providing the user a high-quality experience overall. Factors that impact data

³¹ See *Open Internet NPRM*, 29 FCC Rcd at 55 ¶ 106.

³² *Id.* at 5596 ¶ 97.

³³ *Id.* at 5597 ¶ 101.

rates, such as building or terrain blockage, are also often outside of the carrier’s control. When users congregate and overwhelm a cell site’s capacity, network operators may need to apportion network resources in ways that serve the collective needs of consumers, even while limiting access to certain content or applications. And in some cases, weather events or other circumstances may simply preclude provision of the mandatory level of service. In all of these cases, enforcement of a prescribed minimal level of service is unworkable to start with and would arbitrarily punish mobile broadband providers, their customers, or both. There is no need to employ such mechanisms when market forces are providing strong incentives for mobile network operators to provide their customers with quality service and access to the content and applications they desire.

Resort to a “reasonable person” standard based on the level of service that “satisfies the reasonable expectations of a typical end user” would provide no relief from these problems and would be unworkable.³⁴ A “reasonable person” has no basis for understanding the complex technical aspects of mobile network management, and this standard therefore would fail to account for the specific challenges of wireless networks in general, differences among wireless networks, and evolving technology.

IV. THE COMMISSION SHOULD NOT APPLY A REVISED NON-DISCRIMINATION REQUIREMENT TO MOBILE WIRELESS.

In 2010, the Commission chose not to apply its nondiscrimination requirement to mobile broadband providers,³⁵ “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

³⁴ *Id.* at 5598 ¶ 104.

³⁵ *See Open Internet Order*, 25 FCC Rcd at 17958 ¶ 96.

management for mobile broadband services.”³⁶ The NPRM contemplates a successor to the vacated non-discrimination requirement, but tentatively concludes that the Commission should likewise decline to apply that new requirement to mobile broadband services.³⁷ It should adopt this conclusion. To be sure, mobile broadband providers can and must be expected to behave reasonably in the marketplace. There is, however, no need for a mobile-broadband-specific requirement to this effect, just as there is no need for requirements of this sort in other competitive industries. In market after market, providers act reasonably because they otherwise would lose their customers and face legal consequences stemming from generally applicable mandates applying to all businesses. The same is true – and will continue to be true – in the mobile broadband ecosystem. Mobile providers wishing to recoup their (quite substantial) costs will continue to need to make their services attractive to the widest possible base of customers, and unreasonable conduct – including deals that reduce the bandwidth available to carry the vast majority of services and content that those users demand – would disserve this necessary objective. Moreover, there already exist substantial legal barriers against unreasonable conduct by mobile providers. For example, federal and state antitrust laws expressly protect against anticompetitive practices, and state attorneys general are empowered to enforce unfair business practices acts that provide even more protection for consumers.

Under these circumstances, applying a re-christened non-discrimination requirement to mobile broadband providers would affirmatively harm consumer interests. For reasons discussed above, mobile wireless providers must be able to quickly adapt to technological developments and the fast-paced evolution of the wireless marketplace. For example, they may need to take

³⁶ *Open Internet NPRM*, 29 FCC Rcd at 5609 ¶ 140.

³⁷ *Id.* at 5583, 5609 ¶¶ 62, 140.

actions with respect to certain traffic on a real-time basis to address unusually high usage levels at a particular site, such as the scene of a concert or traffic jam or protest. A provider seeking to alleviate strains on network resources needs to know that its actions will not later be deemed “unreasonable,” subjecting it to financial and other penalties, based on standards developed and applied after-the-fact. Providers subject to such risks will shy from managing their networks in the best interests of their customers, worried about such *post hoc* penalties.

V. THE COMMISSION SHOULD NOT RECLASSIFY BROADBAND SERVICE AS INCLUDING A DISTINCT TELECOMMUNICATIONS COMPONENT SUBJECT TO TITLE II OF THE ACT.

The Commission should not “revisit [its] classification of broadband Internet access service as an information service” and/or “separately identify and classify as a telecommunications service a service that ‘broadband providers . . . furnish to edge providers.’”³⁸ There is no factual basis for classifying broadband Internet access as including a distinct telecommunications service component subject to Title II. Moreover, such reclassification would visit tremendous harms on the broadband ecosystem and on consumers.

A. There Is No Factual Basis for Reclassifying Broadband Internet Access or Any Subpart Thereof, Or For Relying on Title II as a Source of “Backdrop” Authority.

Advocates of the “Title II” approach sometimes seem to overlook one key fact: It is Congress, not the Commission, that decides how to classify services in the first instance. Congress has established the definitions that govern the agency’s regulation of broadband Internet access. Specifically, it defined the term “information service” to mean “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

³⁸*Id.* at 5612-13 ¶ 148 (quoting *Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014)) (alterations in original).

making available information via telecommunications....”³⁹ In contrast, “telecommunications” means “the transmission, between or among points specified by the user, of information of the user’s choosing, *without change in the form or content of the information as sent and received,*”⁴⁰ and “telecommunications service” refers to the provision of “telecommunications” “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”⁴¹ The task before the Commission is not to determine what regulations it wishes to adopt and then to select a definition according to that preference, but rather to assess which of Congress’s definitions best describes broadband Internet service and then to regulate accordingly.

As the Commission has held on multiple occasions, broadband Internet access is best understood as an integrated information service. Although broadband involves transmission – “telecommunications” – that transmission is inextricably intertwined with processing capabilities such that the broadband service is itself “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Thus, in 1998, under Chairman Kennard, the Commission determined that ISPs “combine computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services,”⁴² and that these “Internet access services are appropriately classed as information, rather than telecommunications, services.”⁴³ In the decade that followed, the Commission officially held as much with respect to

³⁹ 47 U.S.C. § 153(24).

⁴⁰ *Id.* § 153(50) (emphasis added).

⁴¹ *Id.* § 153(53).

⁴² *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11531 ¶ 63 (1998).

⁴³ *Id.* at 11536 ¶ 73.

cable, wireline, powerline, and wireless broadband platforms,⁴⁴ and the Supreme Court upheld this view.⁴⁵

In recent years, mobile broadband offerings have become more, not less, integrated. As bandwidth demand has skyrocketed and cyber threats have multiplied, wireless ISPs have had to interlink the transmission and processing components of their offerings ever more tightly, in order to facilitate real-time network management and security protocols. For example, the transition to LTE and, more generally, to IP-based mobile networks exposes mobile networks to new and rapidly evolving security threats that can attack through devices, the radio access network, backhaul, or external third-party networks. Such threats require the use of network intelligence and visibility into real-time traffic patterns to improve detection of malicious attacks and accidental traffic floods, as well as scalable, distributed, and automated security tools for discovery and remediation of problems. These tools tightly integrate processing and transmission functions. Thus, there is no basis on which the Commission could hold that broadband Internet access includes a distinct telecommunications service component.

These facts also preclude the Commission from classifying broadband providers' service to edge providers as a distinct "telecommunications service" offering.⁴⁶ The service that

⁴⁴ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *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); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

⁴⁵ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

⁴⁶ *Open Internet NPRM*, 29 FCC Rcd at 5614-15 ¶¶ 151-52.

broadband providers offer to end users encompasses not only the transmission of end-user-generated information to third parties, but also the end user’s receipt of such information from edge providers and other users. The delivery of edge-provider content to the user itself combines transmission with processing. For example, the broadband provider must ensure that the content being delivered is in fact the content the end user requested and that it is being sent to the correct port on the end user’s device. Further, if the broadband provider is viewed as providing a “service” to the edge provider, then that “service” clearly includes delivery of information generated by the user – for example, the clicks and keystrokes that are used to open a hyperlink, begin a download, or request other content. That activity, when provided to the content provider, is clearly “the offering of a capability for ... acquiring, ... processing, retrieving, utilizing, or making available information via telecommunications” – *i.e.*, an information service.⁴⁷ Thus, even if it could plausibly be viewed as distinct from the service offered to the end user, the “service” that a broadband provider provides to an edge provider is also an integrated information service.⁴⁸

Finally, the central importance of factual issues to broadband’s classification also underscores why the Commission may not “proceed under section 706 but use Title II as a ‘backstop authority.’”⁴⁹ If the Commission were to reaffirm that broadband Internet access is an

⁴⁷ 47 U.S.C. § 153(24).

⁴⁸ In addition to the above, classifying the service offered by broadband providers to edge providers as a “telecommunications service” would have the perverse effect of *requiring* edge providers to pay broadband providers for this service, because a telecommunications service, by definition, must be provided “for a fee.” *Id.* § 153(53).

⁴⁹ *Open Internet NPRM*, 29 FCC Rcd at 5614 ¶ 150 (citing Letter from Rep. Henry Waxman, Ranking Member, H. Comm. on Energy & Commerce, to Hon. Thomas Wheeler, Chairman, FCC, at 2 (May 14, 2014), *available at*

integrated information service, and proceed under Section 706, it could not in the same order reach the contradictory conclusion that broadband is in fact the simultaneous provision of telecommunications and information services. The Commission is not entitled to reach inconsistent factual determinations in the same order. Yet that is exactly what it would need to do to establish “backdrop” Title II authority.

B. Application of Title II to Broadband Services Would Harm Mobile Internet and Undercut Consumer Interests.

The application of Title II’s requirements to mobile broadband services would be immensely harmful to the Internet ecosystem and to consumers. The Title II regime was created 80 years ago to address the specific problems arising from the narrowband telephone monopolies operated by the AT&T “Bell System” and independent incumbent carriers. Responding to a perceived “natural monopoly,” Congress imposed traditional public utility regulation designed to closely regulate the prices, terms, and conditions of service while preventing entry by rival providers. Title II is replete with artifacts of the monopoly telephone era, from its requirements regarding tariffing, rate prescriptions, operator services, and pay-per-call services to its arcane provisions governing franks and passes, depreciation rates, and obscene phone calls.⁵⁰ The mere mention of these provisions should demonstrate that Congress never believed that Title II would or should apply to a medium as distinct from telephony as today’s broadband Internet is.

Proponents of reclassification also claim that the Commission can render Title II suitable for broadband services by simply using its forbearance powers⁵¹ to rescind requirements that have no relevance to those offerings. But this “third way” approach would be disastrous for the

<http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf>.

⁵⁰ See 47 U.S.C. §§ 203, 210, 213, 223, 226, 228.

⁵¹ See *id.* § 160.

mobile Internet ecosystem. For starters, Title II advocates have pushed for expansive application of Title II's requirements that would undercut the purported benefit of the "third way."⁵² Even if the Commission could agree to apply a very limited set of Title II's requirements, those requirements would depress innovation and investment, stymieing consumer interests and crippling the broadband marketplace's development. Mobile broadband services have experienced the exponential growth detailed above precisely because providers have been allowed to innovate and offer services on the specific terms demanded by consumers – not the terms demanded by Title II's common carriage mandates. Whereas today's mobile ISPs enjoy flexibility to explore new and different business models, ISPs subject to Title II would labor under a regime that casts a deeply skeptical eye on product differentiation. Furthermore, while today's providers can offer creative pricing bundles to meet evolving needs, providers subject to Title II would be subject to *ex post* "just and reasonable" review of their offerings. And where today's broadband providers operate principally on a commercial basis, the Title II regime would invite persistent regulatory intervention and oversight, slowing or even preventing efforts to develop new offerings.

But even this discussion understates the harm that would flow from reclassification of broadband services, because it ignores the substantial uncertainty that would follow such action. Repudiation of the current approach in favor of the Title II framework would lead to years of litigation, as ISPs would surely challenge this unlawful result. Moreover, even if a reviewing

⁵² See, e.g., Comments of Public Knowledge, GN Docket No. 10-127, at 39-50 (July 15, 2010) (urging Commission to retain aspects of Sections 203, 211, 213, 214, 215, 218, 219, 220, and 257, among others, in addition to provisions Commission had proposed to leave in place); Comments of Free Press, GN Docket No. 10-127, at 67-74 (July 15, 2010) (urging Commission to preserve Sections 214, 251, 256, in addition to provisions Commission had proposed to leave in place).

court upheld reclassification, it could disagree with and vacate some or all of the Commission's attendant forbearance grants, leaving in place a regime resembling that which applies to monopoly telephone service. Further, whether or not a reviewing court leaves the Commission's framework intact, ISPs will always be subject to the possibility that a future Commission will seek to effectuate a different policy framework by "unforbearing" from the application of certain requirements.⁵³ All of these lingering risks would depress investment and innovation, undermining the interests of broadband consumers.

In light of the above, the Commission should conclusively repudiate any reliance on Title II as a basis for legal authority over broadband services, and should promptly close the *Framework for Broadband Internet Service* docket.⁵⁴

VI. THE COMMISSION SHOULD NOT ADOPT BROADBAND-SPECIFIC ENFORCEMENT MECHANISMS.

There is no need for special open Internet enforcement policies or procedures, either for the transparency rule or for any other rules that the Commission might adopt.⁵⁵

The Commission's three-pronged approach to enforcement – informal complaints, Commission-initiated investigations leading to potential forfeitures, and formal complaints – has served the Commission and the public interest well since the creation of the Enforcement Bureau 15 years ago. The Commission has taken aggressive enforcement steps where it deems such action warranted, in situations involving both competition⁵⁶ and consumer protection.⁵⁷ At the

⁵³ T-Mobile does not take a position here as to whether such "unforbearance" would be lawful.

⁵⁴ GN Docket No. 10-127.

⁵⁵ See *Open Internet NPRM*, 29 FCC Rcd at 5592-93, 5618-23 ¶¶ 87-88, 161-176.

⁵⁶ *Qwest Corp.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5169 (rel. Mar. 12, 2004) (\$9 million proposed forfeiture regarding local competition issues); *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 19923 (2002) (\$6 million forfeiture regarding local competition issues).

same time, the Commission has generally conducted its enforcement activities in a manner that has been fair to, and respected the due process rights of, all concerned. It has also, through the Enforcement Bureau's Market Disputes Resolution Division, provided the opportunity for informal mediation of disputes without formal Commission action.⁵⁸ This same three-pronged approach will serve the Commission's stated goals for open Internet enforcement: legal certainty, flexibility, and effective access to dispute mechanisms.⁵⁹ Accordingly, T-Mobile supports the Commission's tentative conclusion to follow this approach, as it did in the *Open Internet Order*.⁶⁰

The Commission should not depart from its well-tested enforcement approach without compelling evidence that it has failed or is insufficient. No such evidence exists here.⁶¹ In particular:

- There has been no showing of need for certification or reporting requirements,⁶² which inherently impose burdens. For example, it takes significant resources and

⁵⁷ *Advantage Telecommunications Corp.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 6843 (rel. May 9, 2013) (\$7.6 million proposed forfeiture regarding cramming, slamming, and truth-in-billing issues); *Sprint Corp. Compliance with the Commission's Company-Specific Do-Not-Call Rules*, Order, 29 FCC Rcd 4759 (EB 2014) (\$7.5 million Consent Decree regarding do-not-call issues); *Verizon Wireless Data Usage Charges*, Order, 25 FCC Rcd 15107 (EB 2010) (\$25 million consent decree regarding Section 201(b)/truth-in-billing issues).

⁵⁸ Both regulated entities and others of course can also seek Commission guidance through petitions for declaratory ruling.

⁵⁹ *Open Internet NPRM*, 29 FCC Rcd at 5619 ¶ 163.

⁶⁰ *Id.* at 5622 ¶ 172.

⁶¹ The two allegations that were mentioned in the *Open Internet NPRM*, see *Open Internet NPRM*, 29 FCC Rcd at 5575-76 ¶ 41, were resolved through market forces and through the Commission's existing enforcement mechanisms, and there is no reason to believe that those bulwarks cannot deter and/or address anti-consumer behavior going forward. AT&T changed its policy of not permitting video chat apps on its mobile network (which the Commission acknowledges was never found to be a violation of its open Internet principles) after receiving complaints from its customers. The Commission also reached a settlement with Verizon Wireless regarding the use of tethering apps on its smartphones.

⁶² See *id.* at 5592-93 ¶¶ 87-88.

time for carriers to undertake the annual recertification process regarding compliance with the CTIA's voluntary Consumer Code for Wireless Service, and certifications regarding the more complex and ever-changing details of each plan's features and the company's network management efforts would be substantially more complex, and again unneeded.

- There has been no showing of need for the Commission to lower evidentiary, pleading or burden standards in formal complaint proceedings.⁶³ The Commission should not sacrifice fairness simply to make it easier for a complainant to pursue what may or may not be a meritorious complaint.
- There has been no showing of need for an open Internet ombudsman to “act as a watchdog to protect and promote the interests of edge providers, especially smaller entities.”⁶⁴ Many edge providers are of course, multi-billion dollar entities that obviously need no special help. But there is also no need for a special expenditure of taxpayer dollars to promote the open Internet interests of smaller edge providers. Moreover, the role of Commission staff should be to promote the public interest in a fair and objective manner, not to promote or favor one side in inter-industry disputes. The Commission should be loath to take steps that could undermine the integrity (or the perceived integrity) of its processes.

Thus, while the Commission should maintain its three-pronged approach to enforcement, it should not adopt new procedures unique to the open Internet context.

⁶³ *See id.* at 5621 ¶¶ 169, 171.

⁶⁴ *See id.* ¶ 171.

CONCLUSION

For the reasons discussed above, the Commission should not apply additional open Internet mandates to mobile broadband service providers.

Respectfully submitted,

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July 18, 2014