

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

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

COMMENTS OF THE GSM ASSOCIATION

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SUMMARY

The GSM Association (“GSMA”) is an international organization that represents the interests of the worldwide mobile communications industry. Spanning 219 countries, the GSMA unites nearly 800 of the world’s mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organizations.

The GSMA supports an open Internet that enables consumers and business customers to access the lawful content and services of their choice, in ways that provide them with the best possible experiences, in keeping with the unique network management demands of wireless networks. Although GSMA shares the Federal Communications Commission’s (“FCC” or “Commission”) belief in the importance of preserving the essential character of the Internet, the proposed rules would be unnecessary and, in fact, counterproductive. Due to the competitive nature of the wireless industry and its demonstrated commitment to the principles of openness, new regulations are not required to achieve the FCC’s objectives. To the contrary, a truly neutral approach to the Internet should not dictate or artificially help specific business models, rather it should afford all members of this ecosystem an equal opportunity to innovate and to create more value, while delivering the highest quality of services as dictated by consumer demand.

The FCC’s proposals could discourage investment and impede innovation in the mobile Internet both in the U.S. and globally. The proposed rules unfairly and unwisely restrict network operators while other entities that compete with them, such as application providers and others, remain unregulated. The Commission should take a more holistic approach that enables fair competition among all actors and enables experimentation and innovation. Ultimately it must be

customers, not regulators, network operators, or application developers, who decide which business models and services succeed.

Internationally, the FCC's proposals could have unintended and adverse political and social consequences. The Commission's actions regarding network neutrality are being closely monitored by regulators and governments abroad. The fact that the FCC's rules would not be addressing actual, current, "real world" problems, but rather focus on theoretical, potential problems may encourage other governments to more harshly regulate the Internet under the guise of promoting their own national interests.

Domestically, the proposed rules are ill-suited to the unique economic and technical realities of the United States mobile broadband ecosystem. U.S. consumers benefit from one of the most competitive and innovative wireless marketplaces in the world. Mobile network capacity is highly constrained, however, as it needs to operate within the limits imposed by finite spectrum capacity and network resources. As such, active management of traffic is essential to enable mobile operators to provide a wide range of high-quality, reliable services to all customers.

As a practical matter, many key specifics of the rules are highly problematic. For example, the proposed nondiscrimination rule is vastly overbroad and would promote inefficiency while freezing the development of innovative new business models and eliminating many common practices that consumers have come to expect. Similarly, the proposed definition of reasonable network management does not sufficiently allow positive carrier behaviors and could ultimately prevent many pro-competitive and consumer friendly practices.

Additionally, it is unlikely that the Commission could craft an adequate definition of "managed services" that allows for the development of innovative services and business models

because it is impossible to predict today the many ways IP-based networks may improve efficiency and productivity tomorrow. In order to meet the diverse expectations of their customers and to ensure the efficient use of network resources, operators must have the flexibility to manage and differentiate services on their networks.

Finally, the proposed transparency rule has an inappropriately broad sweep. Although the GSMA supports transparency to consumers regarding services and pricing, transparency obligations must be balanced with the need for carriers to be able to modify their traffic management techniques in an ongoing fashion because of the dynamic challenges presented by new mobile devices and their corresponding demand and security characteristics.

The FCC's laudatory intentions notwithstanding, the proposed rules would not be an effective means of preserving Internet openness. In light of the potentially negative social, economic, and technical consequences of the proposed rules, both domestically and internationally, as well as the lack of evidence of market failure, the Commission should not adopt the proposed regulations.

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COMMENTS OF THE GSM ASSOCIATION

I. INTRODUCTION

The GSM Association (“GSMA”) hereby submits comments on the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.¹ GSMA represents the interests of the worldwide mobile communications industry. Spanning 219 countries, GSMA unites nearly 800 of the world’s mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organizations. GSMA’s members represent more than four billion mobile wireless connections using virtually all types of wireless technologies. GSMA is focused on innovating, incubating, and creating new opportunities for people around the world to benefit from mobile communications. GSMA offers these comments on the Federal Communications Commission’s (“FCC” or “Commission”) Open Internet NPRM to provide the international perspective of its diverse members on the FCC’s proposed rules, and the impact these rules may have on global wireless development and deployment.

¹ Preserving the Open Internet; Broadband Industry Practices; *Notice of Proposed Rulemaking*; GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd 13064 (rel. Oct. 22, 2009) (“Open Internet NPRM”).

The Internet is a powerful engine for creativity, innovation, and economic growth that stimulates and enriches societies around the world. The Internet's uses, ranging from communication to entertainment to commerce, are as varied and individual as the citizens and organizations that access it. To accommodate this variety of usage scenarios, today's mobile network operators offer consumers and businesses a wide choice of Internet-related services and options to suit their particular needs and interests, in a highly competitive and dynamic international marketplace. The GSMA supports an open Internet that enables consumers and business customers to access the lawful content and services of their choice, in ways that provide them with the best possible experiences, in keeping with the unique network management demands of wireless networks.

Due to the competitive wireless industry's demonstrated commitment to the principles of openness, no new regulation is required to achieve the FCC's objectives – consumers have demanded it and wireless carriers are supplying it. Throughout its development, the GSM standard itself has been an exemplar of openness, as its SIM card-based protocol has always resulted in a *de facto* “open handset” market. Although the GSM Association is not limited to GSM-based carriers in its membership, all of its members appreciate the need for openness and interoperability. Indeed, a key part of the GSM Association's mission is to enable users to “readily and affordably connect to and use the services they desire, anywhere, anytime.”²

The Commission's focus in this proceeding should be on consumers. The extraordinary success of the wireless industry is dramatic and tangible evidence of its expertise in satisfying consumers with low cost, innovative products and services. Especially in light of its position as an international role model for regulators around the globe, the FCC should not impose

² See GSM Association, “Vision ~ GSM World” <http://www.gsmworld.com/about-us/vision.htm> (last visited Dec. 10, 2009).

regulations on the wireless industry such as those proposed in the NRPM that will unduly restrain network operators, particularly when future success depends upon developing new and innovative economic and technical models. A truly neutral approach to the Internet should not dictate or “lock in” specific business models, rather it should afford all members of this ecosystem an equal opportunity to innovate and to create more value, while delivering the highest quality of services that are responsive to consumer demands.

II. THE EMERGENCE OF THE INTERNET AND THE MOBILE PHONE WERE TRANSFORMATIONAL EVENTS THAT ARE NOW COMBINING TO CREATE THE POTENTIAL FOR ENORMOUS BENEFITS FOR CONSUMERS WORLDWIDE

The GSMA shares the Commission’s vision that the rise of the Internet was a transformational event with profound global implications.³ As the Commission correctly recognizes, the Internet has revolutionized the way business is conducted and individuals interact with each other and society as a whole.⁴ The GSMA sees the emergence of the mobile phone as another transformational event with equally profound implications. Mobile telephony has been on the forefront of a new age of connectivity, and advanced handsets have already become essential tools to professionals and consumers alike.

These technologies are converging in the mobile Internet, which has the potential to create new digital markets and wealth, enable new business models and encourage new forms of social and political organization. If investment and innovation are properly supported, the mobile Internet will empower billions of new users who would not otherwise have the opportunity to use the Internet in the U.S. and around the world. A recent survey of Internet

³ See Open Internet NPRM at 13065, ¶ 1 (discussing how the Internet “has transformed [the U.S.] economy, culture, and democracy.”)

⁴ *Id.*

experts predicted that by 2020 mobile phones will be the primary means of Internet access around the world, and the only means for a majority of people.⁵

Mobile broadband is better suited than fixed-line options to the special resource and infrastructure challenges of deployment in developing nations,⁶ and thus any new Internet regulations must be considered in light of their potential impacts in these regions. The effects of mobile broadband deployment in these areas will be particularly significant in terms of both economic and social/political advancement. The most active growth in mobile broadband use will be in developing countries without existing fixed broadband services. For example, Ovum anticipates that 40% of total mobile broadband laptop users will come from the Asia-Pacific region in 2014.⁷ It is estimated that bringing mobile broadband to developing economies could potentially increase GDP by \$300-420 billion and create more than 10-14 million jobs, as well as having a significant impact on overall societal welfare.⁸

Network operators will need to develop new techniques to manage the strains on network capacity that will be imposed by increased mobile broadband adoption. Although the mobile Internet is nascent, wireless carriers are already seeing the impact of its emergence on their networks. Network operators in the U.S. and abroad are experiencing dramatic increases in network usage, driven by data traffic from mobile broadband capable devices. In the U.S.,

⁵ Janna Quitney Anderson & Lee Rainie, Pew Internet and American Life Project, *The Future of the Internet III* 5 (2008).

⁶ *Id.*

⁷ Steven Hartley & Michele Mackenzie, Ovum, "Mobile Broadband To Be Worth \$137 Billion By 2014" <http://www.gsmworld.com/documents/08052009110918.pdf> (last visited Dec. 8, 2009).

⁸ Sören Buttkereit et al., McKinsey & Company, *Mobile Broadband for the Masses: Regulatory Levers to Make it Happen* (2009) available at <http://www.gsmworld.com/documents/25032009113456.pdf>.

AT&T has seen a 5000% growth in data usage over the past three years.⁹ For an international perspective, 30% of Vodafone's European customers use their mobile devices regularly to access the Internet.¹⁰ The company's data traffic volume has increased by 300% in the last two years and over two-thirds of the traffic carried on its networks is data.¹¹ Looking forward, Cisco predicts that by 2013 total mobile data traffic will be 66 times 2008 levels, mobile data traffic will reach over 2 exabytes per month and that mobile broadband capable laptops will drive over 80 percent of global mobile traffic.¹² Carriers are constantly challenged by the unforeseeable nature of changes in the demand characteristics being placed on their networks. Wireless network operators, facing these increases in the context of a spectrum-constrained network environment, will require significant regulatory flexibility in designing technical and contractual means to manage the new demands on their networks.

III. THE FCC'S PROPOSALS COULD DISCOURAGE INVESTMENT AND IMPEDE THE INNOVATION REQUIRED TO REALIZE THE FULL POTENTIAL OF MOBILE INTERNET IN THE U.S. AND GLOBALLY.

It is a commonly accepted notion that technology changes at a rate far faster than regulation can keep up, and this is particularly true in the mobile context. At the time of

⁹ Kristin Rinne, Senior Vice President Architecture and Planning, AT&T, Remarks at the Wireless Broadband Workshop at 5-6, 40 (Aug. 13, 2009) (transcript available at http://www.broadband.gov/docs/ws_06_tech_wireless_transcript.pdf). Similarly, T-Mobile USA reports that users of its G1 advanced handset use 50 times the data of the average T-Mobile customer. *Ex Parte* Letter from Kathleen O'Brien Ham, T-Mobile USA, to Marlene H. Dortch, Federal Communications Commission, GN Docket No. 09-51, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-265, WT Docket No. 00-193, WC Docket No. 05-25, at 9 (filed Aug. 6, 2009)

¹⁰ Michel Combes, Chief Executive Officer, Europe Region, Vodafone, "Building a Truly Sustainable Internet," remarks at iDATE conference (Nov. 18, 2009).

¹¹ *Id.*

¹² Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update," Cisco Systems, Inc. at 1-2 (Jan. 2009), *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf.

adopting the original four principles of the *Internet Policy Statement*,¹³ today's "3G" wireless networks were in their infancy, and there were no iPhones, Droids, Pres, Storms or other radically different handset computers, let alone the hundreds of thousands of "apps" that now generate such a significant portion of mobile network traffic. The United States, which is an innovation-driven economy, thrives on this constant change, however the Commission's proposed rules threaten to freeze into place the business models of yesterday, rather than encouraging experimentation and investment for tomorrow.

As CTIA has reported elsewhere, the impact of the wireless industry on the U.S. economy is difficult to overstate.¹⁴ Indeed, wireless carriers directly employ more than 268 thousand people, and more than 2.4 million jobs are either directly or indirectly dependent on the U.S. wireless industry.¹⁵ The wireless industry is a large part of the overall U.S. economy, having delivered nearly \$100 billion in "value added" contributions to the U.S. Gross Domestic Product in 2007.¹⁶ In the current environment of economic uncertainty, the wireless industry has continued to make substantial capital investments and to drive economic activity. The ability of the wireless industry to recover these costs and earn a return on these investments will be key to maintaining this growth in jobs and economic activity. Investment and innovation in the Internet

¹³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Policy Statement*, 20 FCC Rcd 14986, 14987–88, para. 4 (2005).

¹⁴ See Comments of CTIA—The Wireless Association, GN Docket Nos. 09-51, 09-157 at 8-11 (filed Sept. 30, 2009).

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 9-10.

and wireless phone markets have given consumers unprecedented levels of choice. However, this tradition of innovation and the corresponding investments could be undermined by the imposition of unnecessary regulations.

Future generation mobile networks, which will offer a true broadband experience, represent new facilities-based competitors to existing fixed broadband services, further serving a Commission goal of expanding consumer choice. This potential may never be realized, however, if new regulations make it difficult to secure the required financing for next generation network construction. The current, lightly-regulated business environment has led to significant investment in next generation wireless deployments (2G to 3G to now 4G) being planned and deployed in the U.S. and around the world at a remarkable pace. For example, LTE is currently being deployed globally, with US carriers in the vanguard.¹⁷ Such advances require substantial

¹⁷ See Reply Comments of Verizon and Verizon Wireless at 7, GN Docket No. 09-51 (filed July 21, 2009) (detailing Verizon Wireless plans to deploy LTE in up to 30 markets in 2010, with availability to 285 million consumers by the end of 2013); Press Release, AT&T, “AT&T to Make Faster 3G Technology Available in Six Major Cities This Year” (Sept. 9, 2009) *available at* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=27068> (indicating that AT&T plans to conduct field trials of LTE in 2010, with deployment planned in 2011); Press Release, MetroPCS, “Unlimited Wireless Carrier MetroPCS Announces Vendors for 2010 4G LTE Launch” (Sept. 15, 2009) *available at* <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1331809> (discussing anticipated LTE deployment in 2010); *see also* Press Release, Telefónica, “Telefónica Drives Fourth Generation Mobile Technology By Commissioning Six Advanced Pilot Trials” (Sept. 30, 2009) *available at* http://pressoffice.telefonica.com/documentos/nprensa/Piloto_LTE_EN.pdf (discussing LTE trials planned in Spain, the United Kingdom, the Czech Republic, Germany, Brazil and Argentina); Natalie Apostolou and Robert Clark, “CSL Poised to Win LTE Trial Race,” *Telecomasia.net* (Nov. 19, 2009), www.telecomasia.net/content/csl-poised-win-lte-trial-race/ (discussing planned LTE trials in China and potential for LTE deployment elsewhere in Asia); Press Release, SingTel, “SingTel Group to Conduct LTE Trials in Asia and Australia” (Nov. 18, 2009) *available at* <http://info.singtel.com/node/6600> (discussing LTE trials in Australia, Indonesia, the Philippines and Singapore); Press Release, Huawei, “Huawei Deploys World’s First TD-LTE Trial Network for 2010 Shanghai World Expo” (Nov. 13, 2009) *available at* <http://www.huawei.com/news/view.do?id=11106&cid=42> (discussing LTE trial network planned for Shanghai in 2010); Press Release, TeliaSonera AB, “TeliaSonera first in the world with 4G

capital investment, however, and if the U.S., with its dominant consumer market and role in development, is seen as adopting a more restrictive regulatory stance, a ripple effect could run through international mobile development, retarding innovation and investment on a global scale.

Innovative business offerings and opportunities to spread costs may be required for wireless network operators to fund their next generation deployments while keeping prices affordable for subscribers. The Internet value chain includes networks, search engines, application developers, content creators, and more, who all contribute vital aspects of the overall Internet experience for consumers. The Internet must remain neutral in the sense that all players should have an equal opportunity to innovate and uncover the willingness to pay for the value they contribute. Ultimately it must be customers, not regulators, network operators, or application developers, who decide which models succeed.

The FCC's proposed rules unfairly and unwisely restrict network operators even though application providers and others – who may be able to provide many of the same types of services – remain unregulated. Such a result would be not only anti-competitive, but also would threaten to chill innovation and forestall the development of new business models that are consumer-friendly and market-oriented. Although consumers have demonstrated a willingness to pay for premium online content, there is a vast untapped pool of economic interests that may be willing to engage in innovative business arrangements that could provide consumers with high quality content and services at reduced prices. The proposed rules would prevent network operators from exploring these sorts of opportunities and spreading the enormous costs of their

services” (Dec.14, 2009) *available at* <http://www.teliasonera.com/press/pressreleases/item.page?prs.itemId=463244>; *see also* GSA, “GSM/3G stats,” <http://www.gsacom.com/news/statistics.php4> (last visited Jan. 11, 2010) (counting 51 LTE network commitments around the world).

networks. The result will be more expensive, less consumer-oriented content and service offerings by network providers. Furthermore, the broad rules and case-by-case adjudications will themselves discourage investment and create costly litigation.

To the extent that the Commission is going to continue to investigate and act in this area, it must take a more holistic approach that doesn't favor or disfavor particular groups. Instead, the Commission should seek to ensure that there is a level playing field that enables fair competition among all actors and enables experimentation and innovation regarding technology, business models, and service offerings. The FCC's existing broadband principles are designed to protect and guarantee consumers the benefits of competition among Internet companies. It is unclear why the Commission has now moved away from this consumer focus towards proposing a set of rules that are instead designed to the advantage of certain Internet companies over others.

IV. THE FCC'S PROPOSALS TO ADOPT NETWORK NEUTRALITY REGULATIONS COULD HAVE UNINTENDED AND ADVERSE INTERNATIONAL CONSEQUENCES

The Internet has flourished outside the scope of national regulation in countries around the world. The Organization for Economic Co-operation and Development (OECD) reports that telecommunication investment in its member countries reached \$185 billion in 2007 and that telecommunications companies are commonly among the largest private investors in their respective economies.¹⁸ Mobile and broadband have been the two major growth areas in telecommunication services in recent years, as together they have accounted for 74% of all communications subscriptions in 2007.¹⁹ To illustrate the success of broadband deployment,

¹⁸ See Organisation for Economic Co-operation and Development, *OECD Communications Outlook 2009* 13 (revised Aug. 2009), available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309031E.PDF>.

¹⁹ *Id.* at 14.

OECD notes that in 2007 dial-up connections only accounted for 10% of all fixed Internet connections in member countries.²⁰ There are over 330 mobile broadband networks across nearly 140 different countries planned or in service utilizing HSDPA, HSUPA, HSPA+, or LTE platforms.²¹

The FCC has been a trendsetter in global communications policy and the United States is widely recognized as a global leader in wireless innovation.²² As such, the Commission's actions regarding network neutrality are being closely monitored by regulators and governments internationally. The focus on this proceeding is even greater than normal, due to the historical policy of the United States to encourage innovation and development in Internet services through light touch regulation and market-based policies.²³ The U.S. Coordinator for International Communications and Information Policy recently noted:

[T]he Network Neutrality proceeding has attracted extensive attention around the world. I think it is fair to say that the level of international interest is very nearly universal. In some countries it is being interpreted as an initiative by the United States to regulate the Internet. And we are concerned that in some countries it may be used as a justification for blocking access for purposes of

²⁰ *Id.*

²¹ GSMA, "Networks ~ GSM World" http://www.gsmworld.com/our-work/mobile_broadband/networks.aspx (last visited Dec. 10, 2009).

²² *See, e.g.*, Leonard Waverman et al., Connectivity Scorecard 2009, at 12, 17 (ranking the United States first for connectivity among innovation driven economies in 2008 and 2009); *available at* <http://www.connectivityscorecard.org/images/uploads/media/TheConnectivityReport2009.pdf>; Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 09-51 (May 12, 2009), *available at* http://files.ctia.org/pdf/filings/US_Wireless_Industry_and_the_World_Ex_Parte.pdf.

²³ *See* Open Internet NPRM at 13082, ¶ 47 ("[I]t has long been U.S. policy to promote an Internet that is both open and *unregulated*." (emphasis added); 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

preventing unwelcome political, social, or cultural information from being disseminated to their citizens.²⁴

The fact that the FCC's rules would not be addressing actual, current, "real world" problems, but rather focus on theoretical, potential problems may encourage other governments to regulate more harshly the Internet under the guise of promoting their own national interests. The FCC's leadership to encourage deregulation, especially regarding wireless services, has brought tremendous benefits to billions of people around the world. It would be a mistake of historic proportions if the FCC were to cede that global leadership

Unfortunately, the NPRM does not sufficiently consider or address the international implications and potential risks of new U.S. Internet regulations. The issues associated with network neutrality have already been the subject of vigorous debate and decisions by other governments,²⁵ many of whom have elected to pursue more measured approaches than the one being considered by the Commission. For example, the European Union ("EU") recently approved a "telecoms reform" package that notably does not adopt any new nondiscrimination rules, instead leaving the field open for national regulators, and choosing to rely on existing powers and a pledge of continued vigilance in monitoring developments in this area.²⁶ In its

²⁴ See, e.g., *International Innovation and Broadband*, Remarks of Ambassador Philip L. Verveer, U.S. Coordinator for International Communications and Information Policy, at House of Sweden, Washington, D.C. (Dec. 3, 2009) *available at* <http://www.state.gov/e/eeb/rls/rm/2009/133802.htm>.

²⁵ For example, network neutrality issues have been discussed recently both at International Telecommunication Union and United Nations Internet Governance Forum conferences. See, e.g., Julius Genachowski, Chairman, Federal Communications Commission, "ICT: Global Opportunities and Challenges," Prepared Remarks at International Telecommunication Union Global Symposium for Regulators (Nov. 10, 2009) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294594A1.pdf; Internet Governance Forum, Sharm el-Sheikh, 15-18 November 2009, "Highlights: Wednesday, 18 November 2009" http://www.intgovforum.org/cms/2009/sharm_el_Sheikh/IGF-Highlights-091118.pdf (last visited Dec. 9, 2009).

²⁶ *Id.*

“New Competition Promotion Program 2010,” Japan addressed network neutrality from a market competition perspective, encouraging the development of voluntary industry guidelines and new methods of identifying concentrations of market power, rather than a top down “ex ante” government regulation of network management techniques.²⁷ Recently, Hong Kong regulators investigated the network neutrality approaches of other countries before determining that, due to facilities-based competition, their existing telecommunications and competition laws were sufficient to address any potential network neutrality concerns.²⁸ In light of these careful international approaches to the same issues, it would be especially harmful for the Commission to aggressively regulate broadband network providers.

Importantly, the FCC’s more active regulatory approach could open the door to international actions that impede a free and open Internet. As Commissioner McDowell has noted, there is a substantial danger that other countries will seek to use the Commission’s actions to justify their own, more aggressive Internet access restrictions designed to support less virtuous sovereign goals.²⁹ “After I spoke with regulators from other nations,” Commissioner McDowell indicated, “it became obvious to me that some countries are waiting for the U.S. to assert more

²⁷ See Ministry of Internal Affairs and Communications, Japan “New Competition Promotion Program 2010” 13-18 (rev. Oct. 23, 2007) http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Releases/Telecommunications/pdf/news071023_2_ap.pdf.

²⁸ Office of the Telecommunications Authority, Hong Kong “Regulatory Affairs Advisory Committee: Network Neutrality” RAAC Paper No. 2/2009 (March 26, 2009) http://www.ofa.gov.hk/en/ad-comm/raac/paper/raac02_2009.pdf.

²⁹ See Separate Statement of Commissioner Robert M. McDowell, Preserving the Open Internet; Broadband Industry Practices; *Notice of Proposed Rulemaking*; GN Docket No. 09-191, WC Docket No. 07-52, 24 FCC Rcd 13064, 13160 (rel. Oct. 22, 2009).

government authority over the Internet to help justify an increased state role over Internet management internationally.”³⁰

As the Commission is well aware, the need to protect the free flow of information online is a matter of bipartisan agreement,³¹ and concerns about other governments’ potential to restrict these freedoms are very real.³² It would be a tragic irony if new Commission regulations, which are said to protect expression and information flow, provided the justification for other nations to regulate the Internet in order to achieve more repressive social policies or advantage parochial economic interests. Indeed, the Commission’s own proposal to transform its existing broadband principles, which center around consumers, into rules that target one set of Internet competitors to the advantage of another set of Internet competitors could be interpreted to be less about safeguarding the free-flow of information and more about protecting national Internet champions.

V. THE PROPOSED RULES IGNORE MANY REALITIES OF NETWORK OPERATION AND WOULD PROVE TECHNOLOGICALLY AND ECONOMICALLY UNWORKABLE

The GSMA expects that other commenters will fully address in detail the technological, economic and practical challenges posed by the Commission’s proposed rules. Nonetheless, the

³⁰ *Id.*

³¹ Indeed, each Commissioner indicated support for this goal in his or her separate remarks upon the adoption of the NPRM. *See* Separate Statement of Chairman Julius Genachowski, Open Internet NPRM at 13155; Separate Statement of Commissioner Michael J. Copps, Open Internet NPRM at 13157; Separate Statement of Commissioner Robert M. McDowell, Open Internet NPRM at 13159; Separate Statement of Commissioner Mignon L. Clyburn, Open Internet NPRM at 13166; Separate Statement of Commissioner Meredith A. Baker, Open Internet NPRM at 13168.

³² *See, e.g.,* H.R.275 “Global Online Freedom Act of 2007” (documenting cases of government suppression of information flows over the Internet).

following highlights some of the main concerns of GSMA's members about the applicability of the proposed rules in the mobile Internet context.

A. The Mobile Internet, as Recognized in the Notice of Proposed Rulemaking, Raises Unique Considerations that Militate Against Imposing Network Neutrality Regulations

GSMA maintains that the application of the Open Internet rules to mobile broadband networks is inappropriate, and the Commission should thus exempt mobile network operators from the proposed rules. Proposed rule Section 8.3 defines "Broadband Internet access service" as "[a]ny communication service by wire or radio that provides broadband Internet access directly to the public."³³ The NPRM indicates that the principles proposed would apply to "all providers of Internet access service (other than via dial-up), regardless of the technology over which such service is delivered," and seeks comment on this approach.³⁴ However, as the Commission correctly recognized in the NPRM, "there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks."³⁵ Due to the unique economic and technical characteristics of the mobile broadband ecosystem in the United States, the proposed rules would be unnecessary, impractical and potentially harmful. Thus, if the Commission chooses to codify some form of the principles proposed in the NPRM, it should exempt mobile broadband networks from their reach.

As an initial matter, there is no evidence supporting a need for the Commission's proposed rules in the mobile broadband context. The marketplace for wireless services in the U.S., as in most places, is highly competitive and, as the Commission has recognized, the

³³ Open Internet NPRM, Appendix A at 13128.

³⁴ Open Internet NPRM at 13101, ¶ 91.

³⁵ Open Internet NPRM at 13119, ¶ 159.

industry warrants a light regulatory touch because of the unlikelihood of anticompetitive behavior.³⁶ American consumers have more choices among facilities-based wireless carriers than consumers in nearly any other country in the world, with over 90% of Americans having a choice of four or more such providers.³⁷ In such a highly competitive environment characterized by a plethora of consumer choices, the types of behavior that the Commission raises in the NPRM would be likely to reduce wireless carrier revenues as users changed providers, rather than increase carrier profits.

Beyond the economic argument as to why the proposed rules are unwarranted in the wireless context, there are key technical differences between mobile wireless and wireline networks demonstrating that the ability to freely manage network activity is essential to the efficient operation of a wireless network. As the Commission indicated in the NPRM, mobile operators require significant flexibility in network management as “the demands on capacity can vary widely depending on such factors as the number of users within that cell at any given time and the applications they are using.”³⁸ Thus, mobile network operators must be allowed to deal with constantly changing traffic patterns and congestion challenges in a dynamic way that is incompatible with the proposed rules.

Mobile network capacity is highly constrained, as it needs to operate within the limits imposed by finite spectrum capacity and network resources. As numerous parties and the

³⁶ 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 Commercial Mobile Services, *Thirteenth Report*, 24 FCC Rcd 6185, 6189, ¶ 1 (Jan. 15, 2009) (finding that “U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace”).

³⁷ See Comments of CTIA—The Wireless Association, WT Docket No. 09-66 at 3 (filed June 15, 2009).

³⁸ Open Internet NPRM at 13123, ¶ 172.

Commissioners themselves have noted, current U.S. spectrum allocations are insufficient to support future mobile network usage demands.³⁹ Active management of traffic is essential to enable mobile operators to provide a wide range of high-quality, reliable services to all customers. Especially in light of the recognized need for additional commercial mobile spectrum to support future demands, the Commission should not restrict network operators' abilities to manage their existing resources in order to ensure an optimal experience for consumers.

In addition, the relationship between devices and the broadband network differs significantly between the mobile wireless and fixed wireline contexts, as the Commission recognized when it asked "to what extent the 'any device' rule should apply to mobile wireless broadband" networks.⁴⁰ In principle, mobile network operators support the premise that customers should be free to use the devices of their choice, subject to these meeting the appropriate technical interoperability requirements and not causing harmful effects to the network.

However, unlike devices in the wireline broadband context, mobile phones are part of the mobile Internet network. In the US, Commission rules are therefore clear that it is the network operator *licensee*, not the subscriber, who is authorized to operate transmitters in the licensed

³⁹ See, e.g., Data Sought on Uses of Spectrum, NBP Public Notice # 26, *Public Notice*, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2518 (rel. Dec. 2, 2009) (noting that "parties have expressed concern that the United States will not have spectrum sufficient to meet the demand for wireless broadband services in the near future"); Chairman Julius Genachowski, *Innovation in a Broadband World*, Prepared Remarks at the Innovation Economy Conference, Washington, D.C. at 8, Dec. 1, 2009 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294942A1.pdf ("In order to support the full flowering of innovation, and to keep the U.S. globally competitive, we will need to find ways to free up new spectrum for mobile broadband."); Commissioner Meredith Atwell Baker, *A Spectrum Management Framework*, Remarks at the Phoenix Center for Advanced Legal & Economic Public Policy Studies 2009 Annual U.S. Telecoms Symposium at 2, Dec. 3, 2009 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294998A1.pdf (noting that "[f]or mobile broadband to reach its full potential we are going to need more spectrum—lots more").

⁴⁰ Open Internet NPRM at 13122, ¶ 166.

spectrum, and that a subscriber's authority to operate a device stems directly from the "authorization held by the licensee providing service to them."⁴¹

Reducing network operator control over devices would reduce the efficiency of spectrum use and the level of coverage and quality of network service available to subscribers. Because they are core network devices, mobile handsets have the potential to create harmful interference and, unlike in the wireline context, could impact not only the user of the device, but also potentially other users on the network and users operating in other parts of the spectrum. For this reason, FCC rules impose upon wireless network operators the obligation to control devices on the network. Specifically, Section 22.927 provides that "[c]ellular system licensees are responsible for exercising effective control over mobile stations receiving service through their cellular systems."⁴² Network management in the wireless context thus includes device management, as both a technical and regulatory imperative.

B. The Proposed Definition of Nondiscrimination Is Unnecessary, Overly Broad, and Would Promote Inefficiency.

Proposed new rule Section 8.13 reads: "Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner."⁴³ The proposed nondiscrimination rule is unnecessary, vastly overbroad, and would promote inefficiency while freezing the development of innovative new business models and eliminating many common practices that consumers have come to expect. The NPRM indicates that the nondiscrimination rule means that broadband providers

⁴¹ See 47 C.F.R. §§ 1.903(c), 22.3(b); *see also* 47 C.F.R. § 1.903(a) (providing that "[s]tatements in the Wireless Radio Services must be used and operated only . . . with a valid authorization granted by the Commission.").

⁴² See 47 C.F.R. § 22.927.

⁴³ Open Internet NPRM, Appendix A at 13129.

cannot charge content, application, or service providers for enhanced or prioritized access to subscribers, although they can manage their networks to ensure quality of service, and can charge subscribers different amounts for different levels of service.⁴⁴ Although the NPRM indicates that this rule, combined with the reasonable network management exception, would be functionally the same as the Section 202(a) prohibition on “unjust or unreasonable discrimination,” the purported absolute prohibition on charging content, application and service providers with a limited exception is certain to be more restrictive than the more flexible and case specific Section 202(a) standard. Indeed, under Section 202(a), differential pricing is not necessarily unreasonably discriminatory.⁴⁵ Allowing, rather than restricting, the flexibility to offer differential pricing models is likely to lead to increased competition and innovation to the benefit of consumers.

As a threshold matter, it is unclear what problem this rule seeks to solve. If the concern is competitive or consumer harm, then that is what the rule should address. But, instead, a blanket nondiscrimination rule would bar potential new services that consumers may want, such as prioritization of their preferred data. Why should consumers be denied this choice by a regulatory rule that address no existing marketplace problem?

Indeed, the proposed nondiscrimination rule could be viewed, inappropriately, to apply beyond packet prioritization and degradation to the entire world of existing carrier behavior. Thus, any time carriers collaborate with content, application or service providers, or otherwise facilitate consumer access to specific content or services, the nondiscrimination rule could be called in to play. Ultimately, the rule is incompatible with the very nature of the modern mobile

⁴⁴ Open Internet NPRM at 13105, ¶ 106.

⁴⁵ *See Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

broadband market, in which carriers are more than mere network operators, but also compete for consumers by having a role in designing and providing consumer handsets and managing content delivery systems.

Many common network operator practices could be prohibited by such a rule, in ways that will reduce the overall utility of mobile devices and services without corresponding benefit to consumers. The expansive nondiscrimination rule is likely to discourage or even could prohibit voluntary, pro-consumer, and pro-competitive revenue sharing agreements between content providers and network operators. Such revenue sharing agreements have clear benefits to all parties, especially for consumers who benefit from lower prices and increased access to content. Additionally, the rule could be viewed as prohibiting the operation of carrier-run “app stores”. Simply by making some applications more readily available for download by including them in the app store, despite not actively blocking access to or degrading the functionality of other applications, a carrier could be viewed as running afoul of the nondiscrimination rule. Clearly, this would not be the end of app stores. Rather, these stores would be operated by noncarrier application developers and others not subject to the FCC’s rules, reducing competition and consumer choice and resulting in decreasing network operator revenues that will create pressure to raise access rates for subscribers.

The nondiscrimination rule is likely to have an even more dramatic effect on the way users interact with their mobile Internet devices. Users have come to expect that their iPhone, Droid, Pre, Blackberry, and other advanced handsets will have integrated email and web browsing applications. Yet under the proposed nondiscrimination rule, these expectations may go unsatisfied as carriers could be unable to “discriminate” against competing email and web clients by providing a proprietary application optimized for the specific handset model. In

addition to removing an increasingly important basis for competition between carriers, this application of the nondiscrimination rule would clearly reduce the overall utility of next generation mobile devices to consumers.

Ultimately, the proposed nondiscrimination rule could both have a negative impact on consumers and lead to more inefficient network usage. Under the proposed rule, all costs would need to be recovered from consumers and network operators may be unable to collaborate with other content, application, and service providers in order for these vendors to contribute to the costs of delivery of their products or services to consumers. Additionally, content, application, and service providers would have no incentive to consider the impact on network resources or the technical specifics of a handset when designing their product, as network operators would have no means to counteract or negotiate improvements to inefficient models.

C. The Proposed Definition of Reasonable Network Management is Under-Inclusive and Would Prohibit Many Pro-Competition and Consumer-Friendly Practices.

Each of the proposed rules is framed as being subject to “reasonable network management.” Under the proposed definition, which would be codified at Section 8.3 of the Commission’s rules, reasonable network management consists of “reasonable practices” employed by a carrier to “(i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and . . . other reasonable network management practices.”⁴⁶ Related to the foregoing discussion of the proposed nondiscrimination rule, the proposed definition of reasonable network management

⁴⁶ Open Internet NPRM Appendix A at 13128.

does not sufficiently embrace the realm of positive carrier behaviors and could ultimately prevent many pro-competitive and consumer friendly practices.

Although the Commission asserts that the proposed definition is open ended and will be subject to evolution, it is likely to have a palpable chilling effect on carriers, as well as network infrastructure developers, who are hesitant to make substantial investments in innovative network practices that may ultimately be stranded by a negative regulatory review or subject to costly litigation by competitors. In response to a question posed by the Commission, clearly there are many significant “socially beneficial forms of discrimination that would not fall within the category of reasonable network management” as defined in the NPRM.⁴⁷ The current definition would seem to prevent most forms of socially beneficial and pro-competitive application screening that goes beyond merely ensuring that applications are secure and legal.

For example, most U.S. mobile broadband service providers currently provide parental control features, ban adult content, and attempt to screen out offensive content as well. Apple, although not a network operator itself and thus not subject to the proposed rules, described in a recent letter to the FCC its application approval process for the popular iPhone App Store.⁴⁸ Apple explained that in addition to screening out applications that exhibit consumer privacy concerns or have technical bugs, “[s]ome types of content such as pornography are rejected outright from the App Store, while others, such as graphic combat scenes in action games may be approved but with an appropriate age rating.”⁴⁹

⁴⁷ Open Internet NPRM at 13107, ¶ 114.

⁴⁸ See “Apple Answers the FCC’s Questions” <http://www.apple.com/hotnews/apple-answers-fcc-questions/> (last visited Dec. 9, 2009).

⁴⁹ *Id.*

Application selection, screening, and delivery should be a means for carriers who are both network operators and service providers to compete and distinguish themselves, and this opportunity for value creation and customer service should not be reserved only to third parties. Some companies currently market child-friendly cell phones that more closely control the content and services available to users and block content deemed inappropriate for children.⁵⁰ Other carriers may choose to offer phones that favor applications customized for use by people with disabilities. This sort of service offering-based competition should not be eliminated by an overly broad and inflexible regulatory regime. Although the Commission suggests that carriers may submit their proposed practices for review prior to deployment,⁵¹ this does not cure the deficiencies in the crafting of the rule and is still likely to chill participation from carriers who may not wish to publicly disclose their competitive strategies.

D. A Single Definition of Managed Services Is Unlikely to Adequately Address Consumer Expectations and Cure the Proposed Rules' Other Flaws.

The Commission proposes to identify a separate category of “managed or specialized services” that would include various IP-based services offered by broadband service providers to retail and enterprise consumers over the same networks used for broadband Internet access services that may warrant a different policy approach.⁵² We agree that “managed or specialized services” can be generally defined as services provided by the network operator in parallel with public Internet access. However, there should be no limitation in the scope and nature of services that network operator may offer in parallel to Internet access. Besides, it should be

⁵⁰ See, e.g., Kajeet, “kajeet Mobile Web – New!” <http://blog.kajeet.com/2009/11/13/kajeet-mobile-web-new/> (last visited Dec. 9, 2009) (child friendly mobile carrier that offers mobile web enabled phones which include access to “a set of kid friendly sites selected by kajeet”).

⁵¹ Open Internet NPRM at 13112, ¶ 134.

⁵² Open Internet NPRM at 13116, ¶ 148.

noted that Internet access itself may contain several data transmission qualities, and the possibility of different prices, which may fit the different needs of Internet services used by consumers.

Among the managed services contemplated by the Commission are IP-based voice, video, telemedicine, smart grid, and eLearning offerings.⁵³ The NPRM seeks comment on how to classify these services and what different rules should apply to their operations. GSMA asserts that it is unlikely that the Commission will be able to craft an adequate definition of “managed services” that allows for the development of innovative services and business models as it is impossible to predict today the ways IP-based networks may improve efficiency and productivity tomorrow.

In order to meet the diverse expectations of their customers and to ensure the efficient use of network resources, operators must have the flexibility to manage and differentiate services on their networks. Different services have different delivery requirements and mobile network operators in particular must be allowed to tailor delivery to the specific service in order to most efficiently use their limited capacities. For example, it appears reasonable that real-time services, such as video conferencing, should be prioritized over non-real-time services, such as web browsing, due to their very different usage scenarios. A video conference requires a constant and synchronous flow of traffic in two directions – a situation in which minor delays in packet transfer can make the service unusable. Alternatively, non-real-time services such as web browsing and traditional email transfers, involve far more intermittent traffic flows and are much more tolerant of minor delays. As real-time services, offered both by network operators and third parties, grow in popularity, consumer expectations and limited network capacity will

⁵³ *Id.* at 13116-17, ¶¶ 148-150.

demand an increasing level of service-specific network management from mobile network operators.

Adopting a definition of managed services based on the products and services available today will stifle innovation. As more new, increasingly sophisticated services are deployed over the same networks and offered in a bundle to consumers, the ability of operators to distinguish between different services and their requirements will be essential. This cannot be achieved through a one-size-fits-all solution. A limited definition of “managed services” combined with the restrictive nondiscrimination default rule will restrain innovation as network operators will be discouraged from experimenting with and investing in new services that rely upon specific network management regimes for their successful operation.

E. The Proposed Transparency Obligation Would Be Impossible To Meet In the Mobile Context.

The Commission proposes to adopt a sixth principle, to be codified at Section 8.15 of the Commission’s rules, which would command that “[s]ubject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.”⁵⁴ The GSMA supports transparency to consumers regarding services and pricing, in clear and workable approaches. It is important to remember that consumers currently have the ability to be informed about the speed and other technical characteristics of their broadband services, not only from carriers but also from other sources. There seems no doubt but that the proposed definition has an inappropriately broad sweep. This conclusion is underscored by the fact that, transparency obligations must be balanced with the need for carriers to be able to modify their traffic

⁵⁴ Open Internet NPRM, Appendix A at 13129.

management techniques in an ongoing fashion because of the dynamic challenges presented by new mobile devices and their corresponding demand characteristics.

As discussed above, capacity and congestion management is completely dynamic in the wireless context. Mobile network operators will choose to manage their networks in various ways, and the effectiveness of network management as it affects quality of service should continue to be a basis for competition between carriers. In addition, forced transparency with respect to the technical details of network management techniques may remove incentives to innovate and compete in quality of service, as each new development could be quickly adopted by competing carriers who did not have to invest resources in researching and developing such techniques. Also, it would be impossible for providers to comply with the proposed transparency rule unless there were constant real-time reporting, which in addition to divulging proprietary information and reducing the ability for carriers to compete based upon differences in service quality, would also be prohibitively expensive.

Finally, an overly ambitious transparency obligation could undermine network operators' abilities to protect their networks from security threats and could make the networks more vulnerable to hackers and other malicious actors. Industry participants at the Commission's September 30, 2009 National Broadband Plan public workshop on cyber security described the increasing frequency and sophistication of cybersecurity threats on wireless broadband networks as well as the constant and complex measures taken by network operators to protect their networks.⁵⁵ In addition to expected practices such as spam blocking, network operators employ innovative techniques, including monitoring of traffic patterns and tracking of trends on the

⁵⁵ See generally Remarks at the Cyber Security Workshop (Sept. 30, 2009) *transcript available at* http://www.broadband.gov/docs/ws_26_cyber_security.pdf (last visited Nov. 9, 2009).

network ports, in order to identify and eliminate cyber threats.⁵⁶ Transparency that is too granular about network management techniques could give hackers key strategic intelligence that could enable them to circumvent carrier-implemented security measures, resulting in unwanted or harmful traffic, or even network outages.

VI. CONCLUSION

As detailed above, the GSM Association and its member organizations support the free flow of information and lawful content over the Internet and believe that the Internet should be open and neutral such that all individuals, organizations, and businesses have an equal opportunity to participate in the Internet ecosystem. The FCC should not abandon the historically deregulatory path that it and the U.S. government has followed with respect to the Internet, as this approach has led to substantial innovation, investment, and a thriving online culture. By adopting the proposed rules, the Commission risks significant adverse international consequences including a chilling of international broadband innovation and investment, as well as an upsurge in socially, politically, and economically restrictive Internet regulation by other nations. Furthermore, especially with respect to mobile broadband networks, the proposed rules will not achieve their intended goals and will have anticompetitive and consumer unfriendly results. Especially in light of the absence of evidence of market failure and the special operational demands of mobile broadband networks, the FCC should not adopt the proposed rules.

⁵⁶ See John Nagengast, Executive Director, Strategic Initiatives, AT&T Government Solutions, Remarks at the Cyber Security Workshop at 19-20 (Sept. 30, 2009) *transcript available at* http://www.broadband.gov/docs/ws_26_cyber_security.pdf (last visited Nov. 9, 2009).

Respectfully Submitted,

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