Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2016 Biennial Review of Telecommunications Regulations	)	WT Docket No. 16-138, WC Docket No. 16-132, IB Docket No. 16-131, PS Docket No. 16-128.

To: Wireless Telecommunications Bureau
Wireline Bureau
International Bureau
Public Safety & Homeland Security Bureau

COMMENTS OF CTIA

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CTIA[1] submits these comments in response to the Public Notice seeking input on the 2016 Biennial Review of Telecommunications Regulations.[2] CTIA urges the Commission to take a renewed look at the thriving competition in the mobile wireless marketplace and welcomes a rigorous Section 11 Biennial Review that will eliminate unnecessary rules that harm wireless consumers.

I. INTRODUCTION AND SUMMARY.

Regulations imposed on competitive markets have numerous harmful effects. They impose costs and burdens on providers that divert resources away from new or lower cost

[1] CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] *Commission Seeks Public Comment in 2016 Biennial Review of Telecommunications Regulations*, Public Notice, FCC 16-149 (rel. Nov. 3, 2016) ("*2016 Biennial Review Public Notice*").

products and services, impairing competition; restrict innovation to the detriment of consumers; and often skew and distort competition by imposing compliance burdens only on some competitors. This Biennial Review provides an ideal opportunity for the Commission to return to the governing principle of limiting regulation of the CMRS industry only where necessary because competition is insufficient to protect consumers. In these comments, CTIA respectfully urges the Commission to:

- Rely on market forces rather than the imposition of vague and burdensome "open Internet" rules.
- Reexamine the disparity created by the recent *Broadband Privacy Order* that imposes rules on broadband providers that do not reflect longstanding privacy practices, and that differ from obligations already imposed by the Federal Trade Commission.
- Repeal numerous outdated rules that do not protect consumers or competition, impose unwarranted compliance costs and burdens, and/or unjustifiably subject competing CMRS providers to varying requirements.

Section 11 of the Communications Act of 1934, as amended, *requires* the Commission to repeal or modify rules imposed on providers of a telecommunications service that "are no longer necessary in the public interest as the result of meaningful economic competition among providers of such service."[3] The robust competition that has long characterized the mobile wireless market continues to intensify as providers vie to win and retain subscribers, offering them more choices among devices, products and services than ever before. It is time for the Commission to rectify its competitive analysis of the mobile wireless services marketplace and to recognize the existence of "meaningful" competition that benefits consumers and lessens the

[3] 47 U.S.C. § 161.

need for regulations. It is time to conduct a rigorous Section 11 Biennial Review and eliminate unnecessary rules that harm wireless consumers.

CTIA urges the Commission to complete this biennial review on a faster track than proposed in the Public Notice announcing the review.[4] That document stated that the Bureaus would issue reports identifying rules that they determine to be no longer necessary up to four months after the comment period – or as late as May 2017.[5] Rulemakings to implement the reports would not even begin for another five months, *i.e.*, in October, meaning that any rule changes will not occur until well into 2018 – when another biennial review must start. This schedule does not effectuate Congress' directive that the Commission make these determinations "in every even-numbered year."[6] Commissioner Pai observed that the Commission "should be prompt and bold in conducting these biennial reviews, not tardy and timid," and Commissioner O'Rielly added, "[w]e owe the American people, and their duly elected representatives, nothing less."[7] CTIA thus urges the Commission to accelerate the Biennial Review schedule.

II. THE MOBILE WIRELESS MARKETPLACE IS ROBUST AND THRIVING, AND IT IS TIME FOR THE COMMISSION TO ACKNOWLEDGE THE CONSUMER BENEFITS OF "MEANINGFUL" AND "EFFECTIVE" WIRELESS COMPETITION.

By any metric—deployment, adoption, data usage, network investment, app development, or functionality—mobile wireless competition in the United States is delivering for

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[4] *2016 Biennial Review Public Notice*.
[5] *Id*. at 2.
[6] 47 U.S.C. § 161.
[7] *2016 Biennial Review Public Notice* at 13 (Statement of Commissioner Ajit Pai); *id*. at 14 (Statement of Commissioner Michael O'Rielly).

consumers. According to the Commission's own *19th Mobile Competition Report*,[8] the U.S. mobile wireless marketplace is characterized by the following:

- ***Deployment***
  - More than 99.7 percent of U.S. census blocks are covered by at least one LTE provider; 98.8 percent are covered by at least two LTE providers; and 95.9 percent are covered by three or more LTE providers.[9]
  - More than 99.9 percent of U.S. census blocks are covered by at least one mobile wireless provider; 99.7 percent are covered by at least two mobile wireless providers; and 97.9 percent are covered by more than three mobile wireless providers.[10]

- ***Adoption***
  - The number of mobile wireless connections grew by approximately five percent during 2015 to reach approximately 374 million by year-end.[11]
  - Approximately 80 percent of mobile users had a smartphone in Q1 2016, and the smartphone penetration rate among new mobile phone purchases was approximately 90 percent.[12] Furthermore, 43.7 percent of U.S. adults now rely strictly on wireless phones.[13]

- ***Data Usage***
  - The average monthly data usage per smartphone in 2015 was 2.9 gigabytes per month, increasing approximately 114 percent since 2014.[14] This compares to 2.0 gigabytes per month in Western Europe, 1.2 gigabytes per month in Latin America, and 1.0 gigabyte per month in the Asia Pacific region.[15] Total wireless data traffic in the U.S. amounted to 9.65 trillion megabytes for 2015.[16]

- ***Network Investment***
  - Over the past six years, wireless service providers in the United States have made capital investments of approximately $177 billion; AT&T, Sprint,

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[8] *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*, Nineteenth Report, DA 16-1061, 31 FCC Rcd 10534 (WTB 2016) ("*19th Mobile Competition Report*").
[9] *Id*. at 10564 ¶ 39, Chart III.A.2.
[10] *Id*. at 10562 ¶ 37, Chart III.A.1.
[11] *Id*. at 10541 ¶ 12.
[12] *Id*. at 10618 ¶ 121.
[13] *Id*. at 10626 ¶ 134, Chart VII.D.1.
[14] *Id*. at 10622 ¶ 126.
[15] *See Ericsson Mobility Report*, Nov. 2015 at 2, *available at* http://www.ericsson.com/res/docs/2015/mobility-report/ericsson-mobility-report-nov-2015.pdf.
[16] *19th Mobile Competition Report* at 10622 ¶ 126.

T-Mobile, and Verizon Wireless spent a combined $30.3 billion in 2015.[17] In contrast, the most recent available figures for other "networked" industries such as the natural gas distribution, air transportation, and rail transportation industries average about $18.5 billion a year in capital investment.[18]

- ***App Development***
  - As of June 2016, Google Play offered 2.2 million apps, and Apple App Store offered an additional 2 million apps.[19]

- ***Functionality***
  - "Mobile technology has changed when, where, and how consumers access information and entertainment. Consumers are increasingly using smartphones for getting directions, listening to online music services such as Pandora or Spotify, and watching movies or participating in video calls."[20]
  - The deployment of 5G technologies is poised to add even more functionality to wireless connectivity.

As the Commission's own findings demonstrate, competition is driving investment and innovation throughout the wireless industry, inuring to the benefit of U.S. consumers. There can be no question that there is "meaningful"[21] competition among CMRS providers (and that the marketplace has "effective competition"[22]). As such, the Commission is obligated to use this Biennial Review proceeding to weed out rules that "are no longer necessary in the public interest."[23]

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[17] *Id*. at 10552 ¶ 23.
[18] *See* U.S. Census Annual Capital Expenditures Survey (2014), *available at* http://www.census.gov/data/tables/2014/econ/aces/2014-aces-summary.html (revealing the following investment figures: natural gas distribution = $18.7 billion; air transportation = $18.5 billion; rail transportation = $18.5 billion).
[19] *19th Mobile Competition Report* at 10620 ¶ 124.
[20] *Id*. (citations omitted).
[21] 47 U.S.C. § 161.
[22] *Id.* § 332(c)(1)(C).
[23] *Id.* § 161.

III. RECENT COMMISSION ACTIONS FAIL TO ACCOUNT FOR THE COMPETITIVE NATURE OF THE MOBILE WIRELESS MARKETPLACE AND IMPOSE RULES THAT DISRUPT INNOVATION AND GROWTH AT THE EXPENSE OF CONSUMERS.

As the Commission and others have recognized, regulation is, at its best, an imperfect substitute for competition.[24] No matter how well-intentioned and well-crafted, regulation invariably imposes significant administrative costs, and typically fails to keep pace with fast-moving market and technological developments.[25] This is especially problematic in a highly innovative sector such as mobile communications. For these reasons, and given the extensive competition detailed above, the Commission should reexamine its highly prescriptive "open Internet" rules and instead rely on market forces to promote consumer interests in the mobile marketplace.

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[24] *See, e.g.*, Ajit Pai, Commissioner, Federal Communications Commission, *Wrecking the Internet to Save it? The FCC's Net Neutrality Rule*, Prepared Remarks Before the United States House of Representatives, Committee on the Judiciary, at 4 (Mar. 25, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332696A1.pdf ("As Justice Breyer has written, 'Regulation is viewed as a substitute for competition, to be used only as a weapon of last resort – as a heroic cure reserved for a serious disease.'").

[25] *See, e.g.*, Michael Powell, Commissioner, Federal Communications Commission, Prepared Remarks Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (June 10, 1998), https://transition.fcc.gov/Speeches/Powell/Statements/stmkp813.html (stating, "even if policymakers do nothing, technical innovation and competition will march on, though perhaps hobbled by existing regulatory regimes"); Kevin Martin, Commissioner, Federal Communications Commission, Prepared Remarks Before the North Carolina Electronics and Information Technologies Association's Top Tech 2003: NC Innovation/Global Opportunities, at 3 (May 14, 2003), https://apps.fcc.gov/edocs_public/attachmatch/DOC-234905A1.pdf ("we as regulators must remain aware of how quickly markets in this sector can change. When necessary, we must be ready to evaluate both the marketplace and their existing regulations on a regular basis to ensure that existing rules and policies continue to achieve their intended objective in the most effective and efficient manner possible. If and when existing rules or policies fail this test, regulators should act quickly to determine whether those rules should be altered or repealed."); Kathleen Abernathy, Commissioner, Federal Communications Commission, *Keeping Pace With Technology*, Prepared Remarks at the NAB Radio Show, Seattle Washington, at 1, 2(Sept. 13, 2002), https://transition.fcc.gov/Speeches/Abernathy/2002/spkqa222.pdf ("One of the biggest challenges that I face as a regulator is ensuring that our rules keep pace with technological advancements and the changing competitive landscape. We need to ensure that FCC rules adequately reflect the current marketplace – not one that existed five, ten or even twenty-five years ago. … One way we do this is through our biennial review process.").

The Commission has, unfortunately, opted for top-down, command-and-control mandates. The results have been to undercut rather than promote innovation and to chill the development of new business models that would advance consumers' interests. One prominent example is the Commission's reclassification of mobile broadband Internet access as a "telecommunications service" and the imposition of vague, burdensome, and unnecessary "open Internet" mandates.[26]

After proposing to retain the preexisting "information service" classification and the *2010 Open Internet Order*'s light touch with respect to mobile broadband,[27] the FCC reversed course in 2015, subjecting mobile broadband to (among other things) extremely malleable and inherently unclear requirements under the Act's core common carrier provisions and the equally ambiguous general conduct standard.[28] The *2015 Open Internet Order* expanded the previous transparency rule, imposing new onerous burdens despite no evidence that the existing rules had failed to serve the interests of mobile broadband consumers or edge providers. The Commission

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[26] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*2015 Open Internet Order*").

[27] *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("*2010 Open Internet Order*"), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[28] *2015 Open Internet Order*, 30 FCC Rcd at 5659-60, ¶¶ 133-137. CTIA continues to oppose the reclassification of mobile broadband Internet access as a telecommunications service. This result is doubly forbidden – once by the Act's definitions of the terms "telecommunications service" and "information service" and again by Section 332's distinction between common-carrier commercial mobile services and non-common-carrier private mobile services. *See* 47 U.S.C. § 153(24), (53); *id.* § 332(c)(1), (c)(2); *id.* § 332(d) (defining terms). CTIA is currently seeking review of the Commission's determinations in this regard before the en banc D.C. Circuit. *See* Petitioner CTIA's Petition for Rehearing En Banc, *U.S. Telecom Ass'n. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Given the *2015 Open Internet Order*'s claim that at least some regulations imposed therein are independently supported by the Commission's powers under Section 706 of the Telecommunications Act of 1996, *see, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5603 ¶ 5, the Commission should repeal any such rules pursuant to this biennial evaluation even if the classification of mobile broadband services is overturned.

also refused to hold that "zero rating" programs were permissible under the new rules,[29] leaving mobile providers at sea in deciding whether or how they may offer plans that are increasingly popular among consumers. This ambiguity, coupled with the Wireless Telecommunications Bureau's inquiries into several specific zero-rating plans, are especially unfortunate given strong evidence of the benefits associated with "free data" offerings. For example, a study released by the Multicultural Media, Telecom and Internet Council ("MMTC") cited "the very real benefits of free data," urging the Commission to "allow this kind of innovation and experimentation to continue without unnecessary interference."[30] MMTC found that zero-rating practices could help close the digital divide "by enhancing the value proposition for non-adopters,"[31] bolster usage by helping people of color and low-income households save on their monthly bills,[32] promote innovative practices and business models,[33] and empower consumers.[34] In a study authored by Dr. Jeffrey Eisenach, NERA Economic Consulting concluded that the zero-rating programs found in the market "generate economic and social benefits," and concerns that zero rating could foreclose competition or limit freedom of expression "lack[] both theoretical and empirical support."[35]

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[29] *2015 Open Internet Order*, 30 FCC Rcd at 5666-68 ¶¶ 151-152 ("we will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary.").
[30] *Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector*, Multicultural Media, Telecom and Internet Council, at 2-3 (May 2016), http://mmtconline.org/WhitePapers-/MMTC_Zero_Rating_Impact_on_Consumers_May2016.pdf.
[31] *Id.* at 10.
[32] *See id.* at 10-11.
[33] *See id.* at 11-13.
[34] *See id.* at 14.
[35] Jeffrey A. Eisenach, Ph.D., NERA Economic Consulting, *The Economics of Zero Rating*, at 9 (Mar. 2015), http://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf.

The recent *Broadband Privacy Order* also reflects an unfortunate resort to stringent mandates where a level regulatory playing field would better serve consumers' interests.[36] That decision applied rules on broadband providers that are out of step with longstanding privacy practices, and that differ in key respects from the obligations imposed by the Federal Trade Commission on their content-provider competitors in the online advertising space.[37] The disparity, if left standing, would create consumer confusion, higher costs and less innovation. A less prescriptive approach would have allowed broadband providers to formulate their information-sharing policies based on the actual demands of customers and the time-tested principles established by the FTC, rather than on regulators' predictions regarding what customers need and want. Therefore, CTIA asks the Commission to reexamine the imposition of disparate rules on different types of broadband providers that deviate from longstanding privacy practices and that differ from current FTC requirements.

IV. THE COMMISSION SHOULD REPEAL OUTDATED RULES THAT FAIL TO REFLECT THE ROBUSTLY COMPETITIVE MOBILE WIRELESS MARKETPLACE.

It has been many years since the Commission conducted a thorough review of all of its CMRS rules, and the wireless industry has changed dramatically since that time, warranting a comprehensive, searching evaluation. A number of rules are clearly outdated; they date from the early years of wireless regulation where there were few competitors, but today serve no meaningful purpose. Others should be repealed or modified because they were adopted for the earliest wireless services but were not extended to later services, and impose unnecessary regulatory disparity on similarly situated providers. Outside of spectrum-related rules such as

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[36] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, FCC 16-148 (rel. Nov. 2, 2016).
[37] *See generally id*.

power limits, a CMRS licensee's regulatory obligations should not turn on the spectrum band it uses. CTIA therefore asks the Commission to repeal or modify the following rules that are unnecessary to protect consumers or competition, impose unwarranted compliance costs and burdens, and/or unjustifiably subject competing CMRS providers to different requirements:

Wireless Telecommunications Bureau (WT Docket No. 16-138)

- **Sections 1.9000-1.9060.** There are 16 discrete spectrum leasing rules occupying more than 20 pages in the Code of Federal Regulations. The Commission established distinct application and processing procedures for various types of leases, so that which rules apply depends on the length of the lease term and the contractual provisions of the lease agreement. The rules also impose detailed "contractual requirements" specifying provisions that each type of lease must contain. *See, e.g.*, Section 1.9040.[38] These extensive rules burden providers, forcing them to navigate the many, varying requirements in negotiating their lease agreements, and then prepare and prosecute detailed applications for Commission approval. The 16 rules should be condensed into a simple rule that requires prior notification to the Commission of a spectrum lease.
- **Section 20.20.** This rule required an incumbent LEC to offer CMRS only through a separate affiliate. Although the Commission acted in 2001 to "sunset" this rule as of January 1, 2002, the rule remains in the Code of Federal Regulations. It should be removed.
- **Section 22.301.** This rule requires cellular and other Part 22 licensees to make their licenses available to FCC inspectors. With electronic licensing, there is no longer any rationale for requiring a licensee to have all of its paper licenses available to show to an inspector. Moreover, this rule applies only to cellular licensees; there is no analogous rule for other CMRS providers. Given that there is no justification for this asymmetrical rule, it should be repealed.
- **Section 22.305.** This rule also applies only to cellular and other Part 22 licensees, and requires them to maintain copies of paper licenses at a station's control point. Like 22.301, this rule no longer a valid purpose and imposes costs on cellular licensees that are not imposed on those licensees' competitors.
- **Section 22.325.** Under this rule, a cellular or other Part 22 licensee must designate an employee who is responsible for operation and has the ability to shut down service at any time. Again, this rule is unique to Part 22 and should be removed as another example of unnecessary, costly, and asymmetrical regulation.
- **Sections 22.935, 22.936, 22.939, and 22.940.** These four lengthy rules establish the comparative renewal process for cellular and other Part 22 licensees. They are unique to these licensees. For newer CMRS services that use the AWS-1, AWS-3 and 700 MHz bands, the Commission determined that there should be no comparative renewal process.

[38] 47 C.F.R. § 1.9040.

That rationale for that determination applies equally to Part 22 licensees. These rules should all be repealed.

- **Section 24.3.** In defining the permissible services PCS licensees can offer, this rule restricts a licensee's flexibility. It allows a PCS licensee to offer fixed services only if it also offers mobile services. In contrast, AWS-1, AWS-3 and 700 MHz licenses are free to offer only fixed services. When it authorized these services, the Commission found that allowing licensees maximum flexibility in the mix of services would promote competition. That finding was sound – and it warrants modifying Section 24.3 to allow PCS licensees the same flexibility to offer only fixed services.
- **Section 24.16.** While this rule adopts a simpler process for comparative renewal involving PCS licensees than the cellular rules do, it still imposes a burden on PCS licensees that their competitors operating AWS-1, AWS-3 or 700 MHz licensees do not bear. Like the Part 22 comparative renewal rules, Section 24.16 should be deleted.

Public Safety & Homeland Security Bureau (PS Docket No. 16-128)

- **Section 4.9(e).** This provision of the outage reporting rules requires CMRS carriers to file a report with the Commission within 120 minutes from discovery for every event that meets the definition of a reportable outage. This 120-minute deadline imposes substantial but unnecessary costs on wireless providers, which must staff their network operations centers to have the capability to immediately create and transmit these reports. While the current 120-minute NORS notifications of outages that affect "911 special facilities" may be warranted for CMRS providers, there is no reason why other outages must meet such a short timeline. The Commission does not take immediate action on these reports. Moreover, many CMRS providers participate in voluntarily providing detailed outage information to assist with situational awareness and network restoration through the Commission's Disaster Information Reporting System ("DIRS"). Thus, if the 120-minute deadline is retained for CMRS providers, the Commission should only apply it to outages that affect a 911 special facility.

International Bureau (IB Docket No. 16-131)

- **Section 43.61(b).** This rule requires CMRS providers to file annual reports detailing the revenues derived from international services (whether or not the CMRS provider provides those services itself or resells the service of another carrier), as well as the volume of international traffic. This rule is a vestige of the time when only a handful of companies offered international telecommunications services. Today, however, that market is robustly competitive; traditional telephone carriers vigorously compete with Skype and other Internet-based services. Moreover, these reports serve no apparent purpose, but impose costs on CMRS carriers by requiring them to maintain extensive network systems to track and record international revenue and traffic data. The rule should be eliminated.

- **Sections 63.09-63.24.** These extensive rules set forth the process for carriers to obtain and transfer authorizations under Section 214 of the Communications Act to provide international services. While the Commission long ago eliminated the obligation for CMRS providers to obtain Section 214 authorizations to provide domestic services as no longer necessary given the pro-competitive, deregulatory paradigm it adopted for CMRS, it has left in place the rules requiring international authorizations. But the intense competition that all CMRS providers face does not stop at the nation's borders. In fact, CMRS providers intensely compete for international traffic not only with each other but with Skype and other Internet-based providers, an additional source of competition that did not exist until recent years. The Section 214 rules are not necessary to ensure that CMRS providers comply with the foreign ownership requirements of Section 310(b) of the Act, because CMRS providers already must demonstrate that they comply before they can obtain spectrum licenses. These rules thus serve no useful purpose but impose costs on CMRS providers to comply with them. They should be modified to exempt CMRS providers from their reach.

V. CONCLUSION.

The Commission should promptly advance the 2016 Biennial Review proceeding and undo the rules identified above.

Respectfully submitted,

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