

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

In the Matter of)
)
Amendment of Part 20 of the Commission's) WT Docket No. _____
Rules and Regulations to Require Certain)
Providers of Commercial Mobile Radio)
Services to Unlock Wireless Devices Upon Request)

PETITION FOR RULEMAKING OF THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Pursuant to Section 1.401 of the Commission's rules, the National Telecommunications and Information Administration (NTIA) respectfully petitions the Federal Communications Commission to commence a rulemaking to add a new section to Part 20 of the Commission's rules and regulations.¹ The rule sought by this petition would require a provider of certain commercial mobile services, upon request, to unlock any wireless device furnished by that provider, so that the requesting person may use that device in conjunction with another lawfully obtained commercial mobile service. By giving consumers greater freedom to choose among alternative mobile service providers and use wireless devices that they lawfully acquire from others, the proposed rule would both increase competition in the mobile services market and enhance consumer welfare. Consequently, its adoption would plainly promote the public interest.

¹ 47 C.F.R. § 1.401(a) (2012).

I. STATEMENT OF INTEREST

NTIA is the President's principal adviser on domestic and international telecommunications and information policy. NTIA is further charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies "[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets."² From its inception in 1978, NTIA has consistently supported pro-competitive, pro-consumer telecommunications policies, and has frequently participated in Commission proceedings to achieve their adoption.

Furthermore, NTIA has developed particular expertise on the issue of wireless device unlocking, as it has been following the issue from the perspective of consumers and competition since 2005. Following the 1998 passage of the Digital Millennium Copyright Act (DMCA), the Librarian of Congress (Librarian) has conducted a proceeding every three years to determine exemptions to the prohibition against circumvention of technological measures used to protect copyrighted works.³ The DMCA requires the Librarian to consult with NTIA during these proceedings.⁴ During the last three proceedings, starting in 2005, the Librarian received

² 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I) (2012).

³ 17 U.S.C. § 1201(a)(1)(C). The Librarian issued exemptions to the prohibition in 2000, 2003, 2006, 2010, and 2012. *See Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works*, U.S. Copyright Office, available at <http://www.copyright.gov/1201/> (last visited Sept. 9, 2013).

⁴ 17 U.S.C. § 1201(a)(1)(C). This section sets forth the required consultative process which is that "each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding."

petitions to exempt unlocking of mobile phones from the prohibition.⁵ The Librarian granted the requests for exemption in 2006 and 2010.⁶ In 2012, NTIA recommended that the Librarian grant the exemption for unlocking mobile phones, as well as other wireless devices such as tablets.⁷ Contrary to NTIA's recommendation, the Librarian denied this request, granting an exemption only for unlocking mobile phones purchased before January 2013, effectively making unlocking of new wireless devices a violation of copyright law.⁸ Thereafter, the White House received a petition signed by over 114,000 individuals asking the White House to reverse the Librarian's decision.⁹ The White House responded by asking NTIA to work with the Commission toward a

⁵ See e.g., Comments of Jonathan R. Newman, Vice President, The Wireless Alliance, LLC, Before the Library of Congress Copyright Office Notice of Inquiry In re Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11, available at http://www.copyright.gov/1201/2006/comments/granick_wirelessalliance.pdf.

⁶ In 2006, the exemption read: "Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,476 (Nov. 27, 2006), available at <http://www.copyright.gov/fedreg/2006/71fr68472.html>. See also Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,830 (July 27, 2010), available at <http://www.copyright.gov/fedreg/2010/75fr43825.pdf>.

⁷ Letter from the National Telecommunications and Information Administration to Maria Pallante, Register of Copyrights, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2011-7 16 (Sept. 21, 2012), available at http://www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf.

⁸ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,264-66 (Oct. 26, 2012) (codified at 37 C.F.R. § 201.40).

⁹ *We Petition the Obama Administration to: Make Unlocking Cell Phones Legal*, We the People (Jan. 24, 2013), available at <https://petitions.whitehouse.gov/petition/make-unlocking-cell->

permanent regulatory solution to the issue.¹⁰ With this petition, NTIA proposes such a permanent fix as an alternative to relying upon the Section 1201 proceeding, which effectively leaves consumers with uncertainty every three years.

II. THE COMMISSION SHOULD AMEND ITS RULES TO REQUIRE COMMERCIAL MOBILE SERVICE PROVIDERS TO UNLOCK WIRELESS DEVICES UPON REQUEST.

NTIA requests that the Commission amend Part 20 of its rules to add a requirement that mobile service providers unlock wireless devices upon request. At a minimum, the rule should include the following new provision:

§ 20.____ Unlocking of Wireless Devices.

(a) *Scope of Obligation.* Upon the request of a customer or a successor, a provider of commercial mobile radio service or commercial mobile data service shall, without fee, unlock any wireless device furnished to that customer or successor by the provider, an affiliate, or an authorized agent.

(b) A provider of commercial mobile radio service or commercial mobile data service may comply with subsection (a) by providing authorization and sufficient information, software, or other tools to another provider of commercial mobile radio service or commercial mobile data service, so that the other provider, an affiliate, or an authorized agent can perform the unlocking sought by the customer or successor.

(c) *Definitions.*

(1) The term “customer” means any person who, at the time that person makes a request to a provider under section (a):

(i) is in good standing under an existing service agreement with that provider with regard to the wireless device; or

[phones-legal/1g9KhZG7](https://www.fcc.gov/phones-legal/1g9KhZG7).

¹⁰ R. David Edelman, *It’s Time to Legalize Cell Phone Unlocking*, We the People (March 4, 2013), available at <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking>.

(ii) has fulfilled the terms of a service agreement with that provider with regard to the wireless device, including, where applicable, payment of any fees or penalties for premature termination of that agreement.

(2) The term “successor” means any person who lawfully obtained the wireless device from:

(i) a customer, as defined in this section; or

(ii) an entity operating under section 501(c)(3) of the Internal Revenue Code that receives donated wireless devices and distributes them to individuals without cost.

(3) The term “wireless device” means any device that enables a person to access and utilize a commercial mobile radio service or a commercial mobile data service.

A broad unlocking rule would enhance user choice within service areas. As competition in wireless markets increases, consumers will likely see a continually changing menu of rates, terms, and conditions from rival providers. To the extent that an unlocked device enables a consumer to move more freely among providers, the proposed unlocking rule would further the ability to select the provider that best suits the consumer’s needs. As long as a consumer continues to adhere to any existing service agreement – or pays the specified fees or penalties for prematurely terminating that agreement – the unlocking rule’s benefit for consumers does not unduly burden the original providers. Further, a greater ability to experiment with other service providers would likely increase overall competition in a locality.

The proposed rule would also aid consumers who travel outside their usual service areas. Wireless users may travel to areas unserved by their primary providers, and in such cases, they may be able to use unlocked (and technically compatible) devices to seek service from local providers more cheaply than from their primary providers.¹¹ As long as the user continues to

¹¹ NTIA recognizes that unlocking a wireless device may not, by itself, guarantee that the device will function adequately, or at all, on another mobile service provider’s network, although manufacturers increasingly are producing devices capable of operating on a wider range of

pay any recurring charges owed to the primary provider, a supplemental arrangement with another provider would not unreasonably harm the primary provider.¹²

The proposed rule would also permit, under certain conditions, persons other than existing or former subscribers to request a covered provider to unlock a wireless device. It is not uncommon for subscribers to transfer their wireless devices – especially older devices – to third parties if they are permitted to unlock them.¹³ A lawful recipient of a wireless device should be able to benefit from the proposed unlocking requirement. As long as the original customer has complied with any contractual service obligations, and the mobile service provider does not have reasonable evidence that the wireless device was obtained unlawfully, the provider should unlock the device.

frequencies and networks. *See, e.g.*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, *Fifteenth Report*, 26 FCC Rcd. 9664, 9816 ¶ 256 (2011) (*Fifteenth Report*). Should the Commission adopt an unlocking rule, it should caution consumers that, before they terminate service with their existing provider, they should consult with their new providers to determine whether and to what extent a consumer’s wireless device is compatible with the service provided by the new network.

¹² It is possible that the proposed unlocking rule could increase the incidence of customers requesting mobile service providers to unlock a device in order to obtain service from a second provider, and then refusing to fulfill the terms of an ongoing service agreement with the first provider. The Commission may wish to request comments on whether providers’ existing collection mechanisms are sufficient to protect them in such situations (much as those mechanisms safeguard providers against other customers who default on their service agreements).

¹³ For example, on June 6, 2013 Steven Berry, CEO of the Competitive Carriers Association testified before the House Committee on the Judiciary that “unlocking provides increased device donation opportunities for soldiers, battered women’s shelters, and low-income, under-privileged, and disabled communities.” *Unlocking Consumer Choice and Wireless Competition Act: Hearing on H.R. 1123 Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of Steven Berry, President and CEO, Competitive Carriers Association), available at <http://judiciary.house.gov/hearings/113th/06062013/Berry%2006062013.pdf>.

The proposed unlocking rule should apply to a wide range of devices, including smartphones and tablets, to best serve consumers and competition. The rapid evolution of services occurring in telecommunications generally is also changing mobile equipment markets. The day is long past when wireless devices are used primarily for voice communications. Today's devices also provide users with instantaneous access to location-based services, video, social networks, and an ever-growing number of other applications.¹⁴ These fundamental changes in the capabilities of end-user devices have, in turn, altered consumers' choices about the devices they use. In February 2012, for example, nearly one-half of all U.S. wireless subscribers had a multifunctional smartphone, and more than two-thirds of the people who acquired a new mobile device in the preceding three months opted for a smartphone.¹⁵ Further, over a third of American adults owned a tablet computer by May 2013.¹⁶ In this dynamic environment, consumers should have the freedom to choose the devices that best serve their needs and, under appropriate circumstances, to migrate those devices among their chosen service

¹⁴ For example, in 2008, the reported number of mobile applications (apps) was approximately 8,000. The 100,000-apps milestone was passed in December 2009 and, as of December 2011, the number of apps exceeded one million. See Shelly Freierman, *One Million Apps, and Counting*, N. Y. TIMES, Dec. 11, 2011, available at <http://www.nytimes.com/2011/12/12/technology/one-million-apps-and-counting.html>; see also Sonja Hickey, *2012 Prediction: Number of Mobile Apps Increases by Factor of 10*, APMDIGEST, Jan. 5, 2012, available at <http://apmdigest.com/2012-prediction-number-of-mobile-apps-increases-by-factor-of-10> (noting that the number of applications available across all four major smartphone platforms (iOS, Android, BlackBerry, and Windows), as of December 5, 2011, is 987,863. That's an estimate of 2,000 applications being released daily).

¹⁵ *Smartphones Account for Half of All Mobile Phones, Dominate New Phone Purchases in the US*, NIELSEN NEWSWIRE (Mar. 29, 2012), available at <http://www.nielsen.com/us/en/newswire/2012/smartphones-account-for-half-of-all-mobile-phones-dominate-new-phone-purchases-in-the-us.html>.

¹⁶ *Tablet Ownership 2013*, Pew Internet & American Life Project (June 10, 2013), available at <http://pewinternet.org/Reports/2013/Tablet-Ownership-2013.aspx>.

providers. For that reason, the proposed rule avoids increasingly outmoded terms such as “handsets” and “wireless phones” in favor of a broader term – wireless devices – that includes any consumer device that can be used with a commercial mobile radio or data service.¹⁷

The rule proposed above does not seek to address all questions that the Commission may want to consider in context of unlocking. We urge the Commission to seek comment on related issues, including the following:

- The period of time within which a mobile service provider must act on a customer’s request to unlock a device.
- Whether it may be appropriate for the Commission to exempt devices originally sold years before the date of this petition, because mobile service providers may not have foreseen a regulatory need to retain unlocking codes or mechanisms for very old devices (although NTIA believes that consumers should be able to have older wireless devices unlocked).
- Whether consumers would benefit from a requirement that a mobile service provider to which a consumer seeks to switch service be able to obtain the needed unlocking codes and authorization from the prior provider.
- Whether consumers would benefit from a requirement that service providers post or make available their unlocking policies in a particular manner or location, and what such a requirement should entail.

¹⁷ The terms “commercial mobile radio service” and “commercial mobile data service” used in the proposed rule above are defined in section 20.3 of the Commission’s rules. 47 C.F.R. § 20.3 (2012). *See also* 47 U.S.C. §§ 332(d)(1)–(2) (2012) (defining “commercial mobile radio service”).

- Whether there are any special considerations or protections appropriate for members of the military or Foreign Service and their families.
- Whether any particular guidance is needed to guard against the theft and later use or resale of wireless devices.
- Whether exclusive dealing arrangements between device manufacturers and service providers (which may be enforced by device locking) warrant any special consideration.
- Whether the market for devices sold for use with prepaid service warrants any special consideration (although NTIA supports the unlocking of such devices).

III. WIRELESS DEVICE UNLOCKING IS IN THE PUBLIC INTEREST.

Adoption of the proposed rule would be in the public interest because locked wireless devices hinder users' ability to fully use those devices, and create undesirable barriers to competition among mobile service providers. In addition to continually expanding the capabilities of the devices they produce, manufacturers of wireless equipment are now designing devices that can operate on a wide range of wireless networks.¹⁸ Mobile devices today are routinely advertised as functioning around the world, and manufacturers are able to produce single devices capable of operating on a wide and global range of different networks, using

¹⁸ For example, certain Apple iPhone 4S models are capable of operating on six different frequency bands (not including a seventh band for Wi-Fi networks) and can communicate with both GSM and CDMA-based 3G networks. *See iPhone 4S Tech Specs*, Apple, available at <http://www.apple.com/iphone/iphone-4s/specs.html> (last visited Sept. 9, 2013). The Motorola Droid Razr HD is similarly capable of functioning on numerous networks worldwide. *See Droid Razr HD*, Motorola, available at http://www.motorola.com/us/consumers/DROID-RAZR-HD-BY-MOTOROLA/m-DROID-RAZR-HD,en_US,pd.html?selectedTab=tab-2&cgid=mobile-phones#tab (last visited Sept. 9, 2013).

chipsets that can accommodate many frequency bands and that can process signals using different networking standards.¹⁹ While the wide range of frequencies being used to build 4G LTE networks around the world challenges efforts to create universally compatible devices, wireless technology companies are in the process of developing equipment that will enable a single device to function on more than one LTE network, much as many current devices can function on the vast majority of 3G networks.²⁰

Given the fact that many wireless devices are or will be capable of functioning on networks other than the ones for which they are originally sold, the proposed rule would benefit consumers by enabling them to use their devices on any technically compatible wireless networks.²¹ Locked devices that are otherwise compatible with other networks have in the past forced consumers to acquire new wireless devices when they switch operators, unnecessarily increasing the cost of the new service.²² This not only harms consumers, but also creates an artificial barrier within the market that limits device portability, hindering competition among

¹⁹ See Press Release, Qualcomm, Inc., Qualcomm Third Generation LTE Chipset Are First to Support HSPA+ Release 10, LTE Advanced with LTE Carrier Aggregation (Feb. 27, 2012), available at <http://www.qualcomm.com/media/releases/2012/02/27/qualcomm-third-generation-lte-chipsets-are-first-support-hspa-release-10>.

²⁰ See Jon Brodtkin, *Qualcomm's global LTE chip could help end iPhone fragmentation*, ARS TECHNICA (Feb. 22, 2013, 10:55 a.m.), available at <http://arstechnica.com/gadgets/2013/02/qualcomms-global-lte-chip-could-help-end-iphone-fragmentation/>.

²¹ NTIA acknowledges that there are issues other than unlocking that remain unresolved regarding compatibility and interoperability of wireless devices with various wireless networks, some of which the Commission and the community are currently working to address. See e.g., Promoting Interoperability in the 700 MHz Commercial Spectrum, *Notice of Proposed Rulemaking*, 27 FCC Rcd. 3521 (Mar. 21, 2012). Therefore, simply unlocking a mobile device will not in all cases ensure compatibility with another mobile service provider's network.

²² See *Fifteenth Report*, *supra* note 11, 26 FCC Rcd. at 9815 ¶ 255.

providers. Enabling consumers to switch between operators without losing their investment in wireless devices would enhance competition which, in turn, should produce more service innovation, lower prices, and more consumer-friendly terms and conditions.

Locked wireless devices also hinder the market for used or previously deactivated devices. Original device owners may give their old equipment to family members or friends, donate used devices to charities, or sell them on a secondary market.²³ Device owners may also terminate subscriptions, paying an early termination fee when applicable, and later attempt to subscribe to a different network using their existing equipment for reasons including cost and service availability. In all of these contemplated situations, locked devices harm consumers by preventing them from maximizing the utility of their devices and from choosing among competing networks that offer different pricing and service levels.

Mobile service operators may discuss the practice of keeping devices locked in connection with the bundling of customer equipment with mobile services – in which mobile subscribers purchase devices at a discount in return for signing a service contract typically lasting two years.²⁴ NTIA recognizes the benefits of such bundling for many consumers and does not by its proposed rule intend to disturb this business model. Operators can protect that business model, however, without refusing to unlock wireless devices upon request. Operators

²³ For example, on July 31, 2013, NTIA staff conducted a search on eBay.com using the search terms “cell phones” and “smart phones” to determine the number of phones available for sale. This search resulted in 73,905 devices available for sale. NTIA notes that the total number of devices for sale varies day to day.

²⁴ For example, AT&T advertises subsidized handset prices on its web site with the caveat that a “2-year contract with qualifying voice and data plan [is] required.” *See Shop smart*, AT&T, available at <http://www.att.com/shop/> (last visited Sept. 9, 2013).

can – as they currently do – effectively prevent consumers from subverting that model through long-term service contracts, enforced by penalties or fees for early termination.

Current operator practices confirm the view that prevalent business models will still succeed despite the unlocking of wireless devices. For example, as a condition on its license for the 700 MHz C-Block, Verizon Wireless cannot, among other things, lock any devices it sells for use with its C-Block network.²⁵ Nonetheless, Verizon continues to bundle service and equipment.²⁶ AT&T recently reiterated its policy of unlocking handsets on request under certain circumstances, even though it also bundles equipment and services.²⁷ On the other hand, the fact that some operators unlock only certain devices, and then only on varying conditions, suggests that locking practices are not always used to protect bundled service arrangements.²⁸ Because an inability to unlock wireless devices hinders consumers' ability to choose among mobile services, erects barriers to competition, and is not essential to protect reasonable operator business practices, adoption of the proposed rule would promote the public interest.

²⁵ 47 C.F.R. § 27.16(e). *See also* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report & Order*, 22 FCC Rcd. 15,289, 15,370-71 ¶ 222 (Aug. 10, 2007) (*700 MHz Report and Order*).

²⁶ For example, Verizon's online store advertises smartphones at a discounted rate when purchased with a two-year contract. *See Smartphones*, Verizon Wireless, *available at* <http://www.verizonwireless.com/b2c/device/smartphone> (last visited Sept. 9, 2013).

²⁷ *See Unlock your AT&T wireless phone or tablet*, AT&T, *available at* <http://www.att.com/esupport/article.jsp?sid=KB414532> (last visited Sept. 9, 2013).

²⁸ *See Fifteenth Report*, *supra* note 11, 26 FCC Rcd. at 9815-16 ¶ 255.

IV. TITLE III OF THE COMMUNICATIONS ACT OF 1934 PROVIDES THE COMMISSION THE AUTHORITY TO ADOPT A WIRELESS DEVICE UNLOCKING RULE.

“As a general matter the Commission has the authority to establish license conditions and operational obligations . . . if the condition or obligation will further the goals of the Communications Act without contradicting any basic parameters of [the Commission’s] authority.”²⁹ This is the conclusion the Commission reached in a similar situation in the 700 MHz proceeding, in which the Commission imposed upon firms as a condition of their C-Block license a prohibition against “disable[ing] features or functionality in handsets where such action is not related to reasonable network management and protection, or compliance with applicable regulatory requirements. For example, providers may not ‘lock’ handsets to prevent their transfer from one system to another.”³⁰

In support of the prohibition against locking of devices that use the C-Block, the Commission cites to Title III of the Communications Act (Act) – which defines the Commission’s authority to issue radio licenses and to regulate providers of radio communications – as endowing the Commission with “expansive powers” and a “comprehensive mandate to ‘encourage the larger and more effective use of radio in the public interest.’”³¹ More

²⁹ 700 MHz Report and Order, *supra* note 25, at 15,365 ¶ 207.

³⁰ *Id.* at 15,370-71 ¶ 222.

³¹ *See id.*, at 15,365 ¶ 207 n.470. *See also United States v. Sw. Cable Co.*, 392 U.S. 157, 172-73 (1968); *NBC v. United States*, 319 U.S. 190, 219 (1943) (quoting 47 U.S.C. § 303(g)); *Cellco Partnership v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012). Section 332 of the Act provides that, to the extent a person is engaged in the provision of commercial mobile service, that person must be treated as a common carrier, subject to Title II of the Act. 47 U.S.C. § 332(c)(1)(A) (2013). The Commission therefore has supplementary authority to impose the proposed unlocking rules on commercial mobile radio service providers, as a means of enforcing their section 201

specifically, the Commission cites to section 303 of the Act, stating that if “the public convenience, interest, or necessity requires, [the Commission] shall . . . (r) . . . prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act.”³² The Commission further asserts that this locking, among other practices, based upon the record, “may be impeding the development and deployment of devices and applications that consumers want to use. Thus a requirement to allow consumer use of any such devices . . . promises to benefit consumers. This type of initiative – in terms of purpose, scope, and method of implementation – falls squarely within a number of the Commission’s statutory sources of authority.”³³ As in the 700 MHz proceeding, where the Commission has already concluded that it “falls squarely” within the Commission’s authority to impose unlocking of wireless devices upon wireless licensees, it can conclude likewise in this matter.

In addition to the authority asserted by the Commission in the 700 MHz proceeding, section 316 of the Act empowers the Commission to modify any radio license “either for a limited time or for the duration of the term therefor” if the public interest would be served

obligation to provide service on reasonable request on just and reasonable terms. *See* 47 U.S.C. §§ 201(a)-(b); *see also* § 332(c)(1)(A) (Commission may not forbear from applying section 201 to commercial mobile service providers).

³² 47 U.S.C. § 303; *see 700 MHz Report and Order, supra* note 25, at 15,365 ¶ 207 n.470.

³³ *See 700 MHz Report and Order, supra* note 25, at 15,365 ¶ 207. In footnote 471, the Commission cites to additional authority including section 303(b) of the Act, which authorizes the Commission, as the public interest requires, to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.” 47 U.S.C. § 303(b). The Commission also listed several other sections, such as 151, 154, and 157. NTIA believes that, together, it is clear that these sections provide adequate authority to the Commission to issue a rule requiring the unlocking of wireless devices in all instances.

thereby.³⁴ The latter provision permits the Commission to modify not only a single license, but also entire classes of licenses, such as licenses to provide commercial mobile radio and data services.³⁵

Though sweeping, the Commission’s Title III powers over radio licenses and licensees are not unlimited. None of the constraints that courts have recognized to date, however, would bar the Commission from issuing the proposed unlocking rule. For example, the Commission may not, pursuant to section 316, make “fundamental changes” to the terms of an existing license.³⁶ Nonetheless, courts have permitted the Commission to modify radio licenses to change a broadcast station’s channel of operation; to eliminate one of five frequencies assigned to the licensee; and to require licensees to offer a specified service – data roaming – on “commercially reasonable” terms.³⁷ Courts have thus approved license modifications that had more direct and substantial consequences for the affected licensees than the unlocking rule proposed herein, which would at most tangentially affect the services that mobile licensees offer or the terms on which they are offered.

³⁴ 47 U.S.C. § 316(a)(1) (2012).

³⁵ See *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001).

³⁶ See *id.* at 1141. In so holding, the *Community Television* court relied on *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 228 (1994), in which the Supreme Court concluded that the Commission’s power under section 203 to “modify” carrier tariffs does not include the authority to make “fundamental changes.” See also *Cellco Partnership v. FCC*, *supra* note 31, 700 F.3d at 544 (suggesting that section 316 does not permit the Commission to make “radical” changes to a radio license).

³⁷ *Cellco Partnership v. FCC*, *supra* note 31, 700 F.3d at 543-44; *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 44-46 (D.C. Cir. 2004); *Peoples Broad. Co. v. United States*, 209 F.2d 286, 287-88 (D.C. Cir. 1953).

The Commission also may not use its Title III authority to impose common carrier obligations on licensed providers of non-common carrier services, such as commercial mobile data services.³⁸ The U.S. Court of Appeals for the D.C. Circuit recently concluded, however, that the forgoing rule does not preclude the Commission from requiring providers of commercial mobile data services to offer roaming services to other data service providers on “commercially reasonable” terms. The court so held even though it recognized that the new obligations imposed were so similar to common carrier-type requirements that the Commission could apply them in a way that would “effectively ‘relegate[]’ mobile-data providers ‘to common carrier status.’”³⁹

An unlocking requirement would plainly not impose common carrier obligations on providers of commercial mobile radio and data services. In contrast to the data roaming rules affirmed in *Cellco Partnership v. FCC*, the proposed rule would neither restrict providers’ freedom to determine the mobile services they will offer to the public, nor interfere with their ability to establish rates, terms, and conditions for those services. Further, the limited obligation that the proposed rule would impose cannot be said to make any significant – let alone fundamental or radical – change to the affected firms’ licenses. Accordingly, the Commission has ample authority under Title III of the Act to adopt that rule.

³⁸ See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Commission may not rely on its Title I ancillary jurisdiction, coupled with its Title III power to protect and promote television broadcasting, to impose common carrier-like public access requirements on cable television systems); *Cellco Partnership*, *supra* note 31, 700 F.3d at 545 (noting Commission’s concession that it has no authority to treat mobile data service providers as common carriers). See also *Appropriate Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd. 5901, 5915-21 ¶¶ 37-56 (Mar. 23, 2007) (wireless internet service is an information service and not a commercial mobile service).

³⁹ *Cellco Partnership*, *supra* note 31, 700 F.3d at 548 (quoting *FCC v. Midwest Video*, *supra* note 38, 440 U.S. at 700-01).

IV. **CONCLUSION**

For the foregoing reasons, NTIA respectfully requests that the Commission institute a rulemaking to adopt the rule proposed herein.

Respectfully submitted,



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