

December 11, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Oral *Ex Parte* Presentation

Protecting and Promoting the Open Internet, GN Docket Nos. 14-28, 10-127

Dear Ms. Dortch:

On December 9, 2014 Harold Feld of Public Knowledge (PK), Michael Calabrese of the New America Foundation's Open Technology Institute (OTI), and Erik Stallman of the Center for Democracy & Technology (CDT) met, concerning the above-referenced proceeding, with Stephanie Weiner of the Office of General Counsel, along with Roger Sherman, Jim Schlichting, Joel Taubenblatt, Jennifer Salhus, Dan Ball, Michael Janson and Peter Trachtenberg of the Wireless Telecommunications Bureau.

The public interest advocates discussed several issues related to the Commission's clear legal authority to adopt a common regulatory framework for network neutrality that reclassifies both fixed and mobile broadband Internet access services as telecommunications under Title II and in harmony with the Section 332 prohibition against treating "private mobile radio services" as common carriers. The advocates stated that whether the Commission decides to update its own 20-year-old definitions to reflect current realities, or to determine that mobile broadband is now the "functional equivalent" of a CMRS – or both – each path reinforces the other and both findings would be justified and long overdue.

The question of whether to reclassify mobile broadband as a Commercial Mobile Radio Service ("CMRS"), or the functional equivalent of CMRS, was adequately noticed.

The Commission provided adequate notice in the 2014 *Open Internet NPRM*¹ that it could reclassify mobile broadband as a Title II CMRS service, or the functional equivalent of CMRS. The Commission explicitly recounted the history of classification across services, including

¹ Protecting and Promoting the Open Internet, Docket No. 14-28, *Notice of Proposed Rulemaking* (Rel. May 15, 2014) ("*Open Internet NPRM*").

wireless services.² The Commission reviewed the history of its 2010 *Framework NOI*, observed that the Commission “asked whether it should similarly alter its approach to wireless broadband, noting that Section 332 requires that wireless services that meet the definition of ‘commercial mobile service’ be regulated as common carriers,” and sought “further comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof).”³ The Commission then explicitly asked whether this reclassification would serve the open Internet and what rules the Commission should adopt pursuant to such reclassification.⁴

As if all this were not enough, the Commission in the next paragraph asked: “For mobile broadband Internet access service, does that service fit the definition of ‘commercial mobile radio service’” and cited to both 47 U.S.C. 332 generally and the Commission’s definition of “commercial mobile radio service” in 47 C.F.R. 20.3 specifically.⁵ Rule 20.3 defines “commercial mobile radio service” as follows:

Commercial mobile radio service. A mobile service that is:

- (a)(1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain;
 - (2) An interconnected service; and
 - (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or
- (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.**⁶

In short, the Commission plainly gave notice that it would revisit its classification decision for mobile broadband and would reconsider whether to reclassify mobile broadband as either a commercial mobile radio service, or the functional equivalent of a commercial mobile radio service. Indeed, as explained further below, because of the potential statutory contradiction that would occur if mobile broadband was reclassified as a “telecommunications service” *without* revisiting its status as CMRS under Section 332, it is not plausible to argue that the *Open Internet NPRM* intended to ignore the issue.

Nor can carriers (either wireless or wireline) claim any undue reliance issue. Carriers have been on notice since the Commission released the *Framework NOI* in May 2010. After more than four years of advance warning that this day might come, carriers cannot now claim that they are taken unawares or did not have the opportunity to adequately consider the possibility when making their investments.

² *Id.* at ¶149 & n.298.

³ *Id.* at ¶149 (citing Framework for Broadband Internet Service, GN Docket No. 10-127, *Notice of Inquiry*, 25 FCC Rcd. 7866 (2010) (“*Framework NOI*”).

⁴ *Id.*

⁵ *Id.* at ¶150 & n.307.

⁶ 47 C.F.R. 20.3 (emphasis added).

The Commission can update the existing definition of “interconnected” to reflect changes in technology and networks that no longer rely solely on North American Numbering Plan (“NANP”) Numbers.

In Section 332(d)(2) Congress expressly provided that ***the terms “interconnected service” and “interconnected with the public switched network” are to be “defined by regulation by the Commission.”*** The Conference Report adopted the Senate definitions and noted that unlike the House version, “the Senate definition expressly recognizes the Commission’s authority to define the terms used in defining ‘commercial mobile service.’”⁷

Congress implicitly reinforced the Commission’s discretion to update the statutory definition of “interconnected with the public switched network” ***by expressly deleting the word “telephone” from Section 332’s references to “public switched network.”*** Contrary to CTIA’s assertion in at least one *ex parte* filing, the 1993 Conference Report does not suggest that “the term ‘public switched network’ [is] interchangeable with the term ‘public switched telephone network’ (PSTN).”⁸ Quite the opposite is true. The Conference Report suggests that Congress was anticipating *advanced* networks that would also provide data and Internet access services and wanted to give the expert agency discretion to update the definitions and classifications in the future. The House version used the term “public switched *telephone* network.”⁹ However, as noted above, the Conference adopted the Senate version, which deleted the word “telephone.” The Conference Report states that “[t]he Senate Amendment defines ‘interconnected service’ as a service that is interconnected with the public switched network”¹⁰

When it implemented the 1993 law, the Commission defined the term “public switched network” to mean “[a]ny common carrier switched network . . . that uses the North American Numbering Plan in connection with the provision of switched services.”¹¹ This is true as far as it goes – and continues to be relevant to the plain old telephone service. Nonetheless, it does not preclude the Commission from using its statutory authority under Section 332(d)(2) to expand on

⁷ 1993 Conference Report at 496.

⁸ *Ex Parte* Letter for Meeting with Jonathan Sallet, et al., CTIA, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Oct. 17, 2014), at 2. Verizon makes precisely the same claim in its recent legal white paper, incorrectly stating that the Conference Report, at 496, specifically references the “public switched *telephone* network.” See Verizon Legal Analysis at 13 (emphasis in original). As explained just below, the Conference adopted the Senate Amendment, which drops the word “telephone” from “public switched network.” See 1993 Conference Report at 496. Verizon then erroneously claims that the House language (which was dropped in Conference) derived from Rep. Rick Boucher’s H.R. 1312, “The Local Exchange Infrastructure Modernization Act,” which Boucher said at the time was “designed to ensure the broad availability of an advanced *telephone* network.” Verizon Legal Analysis at 14 [citation omitted]. However, Rep. Boucher’s H.R. 1312 was strictly a wireline bill containing no provision or language that presages or tracks any provision or language in Section 332.

⁹ 1993 Conference Report at 495.

¹⁰ *Id.* at 496.

¹¹ 47 C.F.R. § 20.3.

the definition to reflect current realities. As at least one commenter has proposed, the Commission can choose to update its regulatory definition of “interconnected service” to “include Internet Protocol addresses as an alternative numbering scheme.”¹² As noted above, since the statute does not limit the Commission’s definition of “public switched network” to one that uses the NANP, an update could add the rather self-evident notion that in 2014 (unlike 1993) the Internet and its IP addressing system is now the predominant network that gives subscribers the ability to communicate with all other users including, increasingly, for telephony.

The changes made by the 1993 Conference Report, noted above, all indicate Congressional intent to give the Commission considerable discretion to define, assess and update the meaning of “commercial mobile service.” This is further reinforced by the fact that the authors of Section 332 were at the time thinking of the telephone system, and the optical fiber that could supersede it in the coming decades, as the platform for “advanced” networks that would also offer high-speed Internet access (and not just telephone service). In short, although mobile broadband Internet access was unknown at the time, Congress in 1993 was keenly aware of the need to extend the utility of the “public switched network” beyond telephony to high-speed Internet access, which accounts for the several changes in the 1993 Conference Report that expanded the discretion of the Commission to define, assess and update the appropriate classification of wireless networks.

The Commission should reverse its 2007 determination of what constitutes “capability”

In 2007, the FCC issued a declaratory ruling finding that (a) mobile broadband was not an information service, and (b) was not a CMRS service.¹³ The *Wireless Declaratory Order* did not address the question of functional equivalence.

Assuming the Commission determines that broadband generally is a Title II service, the Commission would need to address the determination that mobile broadband was not CMRS. As discussed below, the Commission should reverse its previous definition for two reasons. First, the distinction the Commission drew with regard to what constitutes the “capability” to reach the network using NANP numbers is no longer valid. Second, the limitation of the definition of “interconnected” in Section 20.3 to NANP numbers no longer makes sense in the context of today’s networks.

As the *Wireless Declaratory Order* noted, a service is considered “interconnected” under the existing definition where the service “gives subscribers the *capability* to communicate to or

¹² Comments of Vonage, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (July 15, 2014), at 43-44.

¹³ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Declaratory Order*”).

receive communication from all other users on the public switched network.”¹⁴ In determining that broadband service did not provide this capability, the commission relied on two factors. First, the Commission noted the clear, strict separation between the physical public switched network and the mobile network.¹⁵ The Commission also noted that to reach NANP number users mobile broadband users “need to rely on another service or application, such as voice over Internet Protocol (VOIP), that rely in part on the underlying Internet access service” to reach NANP number users.¹⁶

While this distinction was understandable in 2007, it makes no sense in today’s network and in light of today’s user expectation. The mobile network described by the Commission in 2007 was undeveloped and clearly distinct from the existing (and dominant) circuit switched network.¹⁷ The 2007 Order does not even contemplate LTE, which now interconnects directly with NANP users through VoLTE, while today virtually every mobile broadband user can reach any other NANP user through VoIP applications as well.

As today’s smartphones rapidly replace the flip phones that were common in 2007, the distinction made by the Commission in the *Wireless Declaratory Order* between calls made with native dialing capacity and calls made via VoIP applications is increasingly inapt.¹⁸ In 2007 Skype, the most popular interconnected VoIP application, was actively blocked by mobile providers. No VoIP applications came bundled with available phones, which is commonplace today (e.g., FaceTime on the iPhone).

It also shouldn’t matter that a bit of software enables this interconnection (e.g., a VoIP or VoLTE application) any more than the fact that a handset or other CPE is required to connect a mobile or wireline telephone call. In the decades since *Carterfone*, wireline ISPs have provided a standardized interconnection for consumer telephone and Ethernet connections (e.g., RJ11 and

¹⁴ *Id.* at ¶43 (emphasis added).

¹⁵ *Id.* at n.118.

¹⁶ *Id.*

¹⁷ *Id.* at ¶¶12-15.

¹⁸ In its *Wireless Declaratory Order*, the Commission justified its finding in large part based on its observation that “[m]obile wireless broadband Internet access service in and of itself does not provide this capability to communicate with all users of the public switched network. . . . Instead, users of a mobile wireless broadband Internet access service need to rely on another service or application, such as certain voice over Internet Protocol (VoIP) services that rely in part on the underlying Internet access service, to make calls to, and receive calls from, ‘all other users on the public switched network.’” *Wireless Declaratory Order* at 22 FCC Rcd. 5917 ¶ 45. However, technology has changed and today’s mobile broadband user can choose between both integrated (e.g., FaceTime) and over-the-top applications (e.g., Skype) to make voice (and often video) calls using the NANP to any other user of the PSTN, even if the user is not connected to the Internet. Users “rely” on these ubiquitous and typically free applications no more so than a telephone subscriber relies on CPE and software to mediate a call over the ISP’s telephone line.

RJ45), but the subscribers almost universally must provide the additional CPE and application software that are necessary to actually make use of the “capability” to make telephone calls.

The marketplace today is completely changed, and requires the Commission to reevaluate its previous conclusion. As the Commission has noted repeatedly, we are in the midst of a technological transition that has blurred the distinct lines between traditional circuit switched service and IP-based service.¹⁹

Similarly, whereas VoIP applications were once rare and clearly functionally distinct, they now come bundled with the primary operating systems available in every smartphone.²⁰ For the consumer, a “separate application” to use VOIP and reach NANP number users is indistinguishable from the rest of the CPE used to access the mobile carrier’s Title II CMRS service. Today, a consumer can bring not merely her own CPE, but her own phone number, to a carrier and receive Title II CMRS service. If a customer takes a handset associated with a phone number originally ported from a landline to a mobile carrier, and subscribes to that carrier’s mobile voice service, that mobile voice service remains Title II. The use of privately owned CPE and a NANP number obtained from elsewhere does not mean that the CMRS service is now a Title I information service.

From the consumer’s perspective, therefore, the distinction that the Commission found determinative in 2007 is non-existent – even nonsensical – in 2014. In light of these technological and marketplace developments, the Commission should reconsider and reverse its previous determination that mobile broadband service does not provide the capability to reach the PSN.

The Commission may find that mobile broadband is the functional equivalent of CMRS

Congress, in Section 332(d), explicitly left to the Commission’s discretion the determination and definition of what qualifies as an “interconnected service,” or as the “functional equivalent of a commercial mobile service.” Even in 1993, early in the era of dial-up Internet access, it would have been extraordinarily shortsighted if Congress had tied the Commission’s hands to

¹⁹ It is important to emphasize that a finding that wireless networks and wireline networks using NANP numbers and broadband access are far more interconnected for purposes of determining the definition of CMRS has nothing to do with whether such services are generally equivalent or economic substitutes. The sole question before the Commission is whether the distinctions relied upon to find that broadband service did not provide the mere *capability* to reach NANP number users are still today so clear and rigid that the networks should not be considered interconnected.

²⁰ Both Apple Facetime (bundled with IOS) and Google Chat (bundled with Android) are capable of providing interconnected VOIP service. Again, the question is not whether these VOIP services are themselves Title II services. Rather, the question is whether consumers understand that a subscription to the carrier’s mobile broadband service will give the subscriber the *capability* to reach NANP number users in the same way that subscription to the carrier’s mobile voice network does.

such a degree that only wireless services directly interconnected with the telephone system and using the North American Numbering Plan (NANP) could be regulated as a common carrier for any purpose. Fortunately, Congress was not so nearsighted.

Critically, Congress expressly authorized the Commission to determine if future wireless services are “*the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.*”²¹ This “functional equivalent” language was added in Conference, along with one example directing the Commission to consider whether the wireless service is offered broadly to the public over a broad geographic area.²² As the legislative history makes plain, Congress drafted the amendments to Section 332 in response to the Commission’s increasingly inconsistent regulatory treatment of emerging mobile services under the traditional *NARUC* test.²³ As the House Report explained:

Under current law, private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status. Functionally, these “private” carriers have become indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes.²⁴

The House Report further explained that it intended the amendments to Section 332 to resolve the inconsistent treatment while still retaining the traditional distinction between common carriers and exempt private carriers.²⁵ The initial House version therefore gave the Commission considerable flexibility to define what constituted CMRS service, but maintained a strict division between common carrier and private carrier services by defining PMRS as any mobile service that is not CMRS. The final language adopted in Conference left it to the Commission to determine if a service is “the functional equivalent” of CMRS.

There can be little doubt that today – and increasingly – mobile broadband Internet access service is “the functional equivalent” of what a “commercial mobile service” was in 1993. Like mobile voice, mobile broadband service is functionally an “interconnected service” that simply

²¹ 47 U.S.C. § 332(d)(3) (emphasis added). Section 332(d)(3) defines “private mobile service” as “any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”

²² See Conference Report, Omnibus Budget and Reconciliation Act of 1993, H.R. Rep. 103-213, 103d Congress, 1st Session (Aug. 4, 1993), at 496 (“1993 Conference Report”). The Conference Report stated:

Further, the definition of “private mobile service” is amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

²³ H.R. Rep. 103-111, 1993 U.S.C.C.A.N. 378 (“House Report”).

²⁴ *Id.* at 586-87 (footnotes omitted).

²⁵ *Id.* at 587.

uses a different, more global numbering system (IP addressing) “that gives its customers the capability to communicate to or receive communications from all other users”²⁶ of the Internet, as well as the capability to connect to all other users of the “public switched *telephone* network” through the use of VoIP applications that interconnect with the telephone system and NANP. Subscribers can connect with all other users using the public IP addressing system – and broadband users can also call any NANP telephone number they wish using their mobile broadband connection.

An additional virtue of this approach to updating the classification of mobile broadband Internet access is that the Commission’s decision would be an interpretive ruling that applies Section 332(d)(3) to determine if in 2014 mobile broadband is the “functional equivalent” of CMRS. As Public Knowledge has observed, just as the Commission originally found without notice or comment that mobile broadband did not meet the CMRS definition in the 2007 Wireless Declaratory Order, “to clarify the application of a statutory term is the essence of an ‘interpretive’ rather than a ‘legislative’ rule, requiring no notice or comment.”²⁷ Moreover, the NPRM in this proceeding did provide clear notice and request comment on the option of reclassifying mobile broadband Internet access services as a telecommunications service under Title II as well as legal authority under Title III.²⁸

Other policy reasons to reverse the FCC’s 2007 determination

If the Commission does reclassify broadband Internet access services as “telecommunications,” the Commission must also address the potential statutory contradiction that the Commission identified in its 2007 *Wireless Declaratory Order*. There, the Commission explained that “Congress noted that the definition of ‘telecommunications service’ was intended to include commercial mobile service.”²⁹ In other words, if mobile broadband is a “telecommunications service,” then it must also be CMRS or a statutory contradiction results. This is true because while Section 3 of the Act *requires* common carrier treatment of a telecommunications service, Section 332(c)(2) *prohibits* common carrier treatment unless the wireless service satisfies the definition of “commercial mobile service” in Section 332(d)(1).³⁰

²⁶ *Wireless Declaratory Order* at 22 FCC Rcd. 5901, 5917 ¶ 45.

²⁷ Notice of *Ex Parte* Communication, Public Knowledge, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Nov. 7, 2014), at 5.

²⁸ See *Ex Parte* Letter of Marvin Ammori, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Sept. 25, 2014) (“Marvin Ammori *Ex Parte*”), at 2-3, which includes several relevant excerpts from the NPRM, including specific references to Title III and to Section 332(c)(1).

²⁹ *Wireless Declaratory Order* 22 FCC Rcd. at 5916 ¶ 40, citing H.R. Conference Report 104-458.

³⁰ *Id.* at ¶ 50. The Order concluded that even if mobile broadband services were an “interconnected service” for purposes of Section 332, “we find it would be unreasonable to classify mobile wireless broadband Internet access service as commercial mobile service because that would result in an internal contradiction within the statutory scheme.” *Id.* at ¶ 41.

In its forthcoming Open Internet order, the Commission can avoid this statutory contradiction – and maintain consistent regulatory treatment – by reclassifying mobile broadband Internet access as a “telecommunications service” and also find it to be an “interconnected service” under Section 332(d)(1) and/or the “functional equivalent of a commercial mobile service” under Section 332(d)(3). As the *Wireless Declaratory Order* concluded, the telecommunications service and CMRS classifications can and must go hand in hand to avoid a “contradiction in the statutory framework arising from classifying mobile wireless broadband Internet access service” as a telecommunications service but not as a commercial mobile service.³¹

Finally, the *Wireless Declaratory Order* placed great emphasis on a policy of technological neutrality, applying one consistent framework for all broadband services.³² Assuming the Commission classifies wireline broadband Internet access service as a Title II service, this policy consideration now drives it in the opposite direction.³³

Respectfully submitted,

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³¹ *Id.* at ¶ 49. See also Marvin Ammori *Ex Parte*, at 1.

³² *Wireless Declaratory Order*, 22 FCC Rcd. at 5921 ¶ 55.

³³ While differences between wireline and wireless technologies may lead to differences in how Open Internet rules are applied, the legal framework and the rules themselves should be consistent.