November 10, 2014

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

Re: Section 332 and Common Carrier Treatment of Mobile Broadband ISPs
Protecting and Promoting the Open Internet, GN Docket Nos. 14-28, 10-127

Dear Ms. Dortch:

OTI's comments and reply comments have described at length major changes in the broadband ecosystem over the past five years that make it increasingly incoherent and unworkable to maintain two separate regulatory frameworks for fixed and mobile Internet access.[1] Since 2010 the mass adoption of mobile computing devices (e.g., smartphones, tablets), the nationwide deployment of relatively high-speed 4G/LTE networks, the massive offloading of a majority of mobile device data traffic over unlicensed Wi-Fi/wireline connections, the resulting rapid convergence of mobile and wireline networks, and new technology that facilitates consumers switching back and forth seamlessly between truly mobile (carrier) and nomadic (wireline via Wi-Fi) networks, all support a common regulatory framework. And today President Obama, in calling for the FCC to reclassify broadband as a Title II "telecommunications service," also acknowledged the need for a common regulatory framework between mobile and wireline networks.[2]

[1] Comments of Open Technology Institute at the New America Foundation and Benton Foundation, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (July 17, 2014), at 27-62. Reply Comments of Open Technology Institute at New America, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Sept. 15, 2014), at 22-41.
[2] "Net Neutrality: President Obama's Plan for a Free and Open Internet," Whitehouse.gov, Nov. 10, 2014. The President's written statement reads: "The rules also have to reflect the way people use the Internet

The mobile industry, notably Verizon and CTIA, argue that even if mobile broadband Internet access is reclassified as a telecommunications service, it is "statutorily immune from Title II common-carriage regulation."[3] Section 332(c)(1) of the Communications Act requires common carrier regulation of "commercial mobile services" (CMRS), while Section 332(c)(2) precludes treating a "private mobile service" (PMRS) "as a common carrier for any purpose under this [Act]."[4] Verizon and CTIA insist that mobile broadband Internet access does not meet the statutory definition of CMRS and is therefore immune from common carrier regulation.[5] Mobile providers argue that Congress intended to forever limit the services defined as CMRS to services "interconnected with the public switched network (as such terms are determined by regulation by the Commission)"[6] and limited to interconnection with the "public switched *telephone* network."[7]

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 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. The Verizon and CTIA arguments misinterpret both the statute and the legislative history in at least three ways that all support the Commission's authority to regulate mobile broadband Internet access services as CMRS.

First, and most importantly, Congress expressly authorized the Commission to determine if wireless services are "***the functional equivalent of a commercial mobile service, as specified by***

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today, which increasingly means on a mobile device. I believe the FCC should make these rules fully applicable to mobile broadband as well, while recognizing the special challenges that come with managing wireless networks."

[3] *Ex Parte* Comments of Verizon, "Title II Reclassification and Variations on that Theme: A Legal Analysis," *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Oct. 29, 2014)("Verizon Legal Analysis"), at 13. *See also* Reply Comments of CTIA—The Wireless Association, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (Sept. 15, 2014)("CTIA Reply Comments"), at 42-43.

[4] 47 U.S.C. § 332(c)(1)-(2).

[5] *See, e.g.*, CTIA Reply Comments at 41.

[6] 47 U.S.C. § 332(8)(d)(2). Section 332(8)(d) provides, in part:

> For purposes of this section-
> (1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;
> (2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section.

[7] Verizon Legal Analysis at 13 (emphasis in original).

regulation by the Commission."[8] 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.[9] The Conference Report explained its decision to amend the original House and Senate definitions of PMRS by adding the "functional equivalent" language as follows:

> 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.[10]

As noted above, there can be little doubt that today – and more so in the near future – 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 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"[11] of the Internet, as well as all other users of the "public switched *telephone* network" through the use of VoIP applications that interconnect with the telephone system and NANP.

In addition, mobile *phone* providers, such as Verizon, are increasingly integrating their traditional CMRS telephone service with Internet access. As Voice over LTE (VoLTE) routes most voice traffic over the Internet, the convergence of the phone service with Internet access will be complete, at least from the consumer's perspective. Subscribers will connect with all other subscribers – whether using the NANP, or using the public IP addressing system – through the broadband Internet access service.

In other words, mobile broadband is "the functional equivalent" of CMRS (as an "interconnected" and "public switched network," using IP addressing) and, in addition, is literally interconnected with the traditional PSTN. On a mobile broadband connection, a consumer today can call any telephone number using the NANP. It shouldn't matter that a bit of software enables this interconnection (a VoIP or VoLTE application) any more than the fact that a handset or switching protocols in the carrier network have always been required to connect a mobile telephone call.

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[8] 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."
[9] *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").
[10] *Ibid.*
[11] Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶ 45 (2007) ("Wireless Declaratory Order").

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. It would not be promulgating a new rule and therefore no further notice or comment is required. As Public Knowledge recently observed, just as the Commission originally found without notice or comment that mobile broadband did not meet the CMRS definition in its 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."[12] 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.[13]

Second, 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.'"[14]

Third, 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)."[15] 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

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[12] 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.

[13] *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).

[14] 1993 Conference Report at 496.

[15] *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.

the future. The House version used the term "public switched *telephone* network."[16] 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 . . . ."[17]

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."[18] 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 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."[19] 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 three statutory points 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). It is important to recall that in 1993, Internet access was via dial-up modems and phone lines, which at that time considered foundational elements for what the Clinton Administration called the emerging "information superhighway."

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.

Finally, if the Commission does reclassify broadband Internet access services as telecommunications, an interpretive ruling that finds mobile broadband is the "functional equivalent of a commercial mobile service" under Section 332 would also remedy the potential statutory contradiction that the Commission identified in its 2007 Wireless Declaratory Order.

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[16] 1993 Conference Report at 495.
[17] *Id.* at 496.
[18] 47 C.F.R. § 20.3.
[19] Comments of Vonage, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 (July 15, 2014), at 43-44.

The Order explained that "Congress noted that the definition of 'telecommunications service' was intended to include commercial mobile service."[20] 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).[21]

In its forthcoming Open Internet order, the Commission can avoid this potential 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.[22]

Respectfully submitted,

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[20] Wireless Declaratory Order at ¶ 40, citing H.R. Conference Report 104-458.
[21] *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.
[22] *Id.* at ¶ 49. *See also* Marvin Ammori *Ex Parte*, at 1.