January 27, 2015

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

Re: *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28
Framework for Broadband Internet Service, GN Docket Nos. 10-127

Dear Ms. Dortch:

New America's Open Technology Institute ("OTI") has filed extensive comments, reply comments and ex parte filings in the above-referenced dockets in support of a common regulatory framework that reclassifies both fixed and mobile broadband Internet access services as "telecommunications services" equally subject to basic Title II consumer protection regulation.[1] OTI has emphasized, along with numerous other parties, that a divergent regulatory framework for mobile and fixed broadband Internet access services would fail to protect consumers, undermine competition, and is not necessary in light of the Commission's legal authority to maintain regulatory parity. Within a few years the majority of total Internet traffic will be wireless and on mobile devices, with consumers toggling back and forth between mobile carrier networks and Wi-Fi offload connections.[2] In this wireless future, only a common regulatory framework will best serve the public interest.

[1] *See* Comments of Open Technology Institute at New America and Benton Foundation, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 at 27-62 (July 17, 2014) ("OTI Comments"); Reply Comments of Open Technology Institute at New America, *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28, 10-127 at 22-41 (Sept. 15, 2014) ("OTI Reply Comments").
[2] Cisco's current VNI forecast projects that mobile data traffic in the U.S. will grow three times faster than fixed traffic over the next several years and that by 2018 roughly 50 percent of all IP traffic will be delivered via mobile cellular networks or Wi-Fi. Cisco, "VNI Forecast Highlights," available at: http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (accessed January 27, 2015).

Several recent filings by CTIA, Verizon and AT&T reiterate their opinion that even if the Commission reclassifies both fixed and mobile broadband Internet access services as telecommunications services, "Congress intended only mobile offerings that mimic traditional telephone service to be subject to common carrier treatment."[3] All other mobile services, now and in the future, "including mobile broadband, are 'private' offerings, for which Section 332 expressly prohibits common carrier treatment."

To the contrary, as OTI, Public Knowledge (PK), Center for Democracy & Technology and other parties have explained in previous filings, Congress clearly did not intend to forever limit the definition of commercial mobile services (CMRS) – and the "light touch" consumer protections mandated by Section 332(c) – to mobile telephone services.[4] The Congressional intent underlying Section 332 emphasized regulatory parity and focused specifically on distinguishing common carrier from "private" mobile services. In furtherance of this purpose, Congress gave the Commission express authority in Section 332 both to define the terms "interconnected with the public switched network" and to determine, in the alternative, if a service is the "functional equivalent" of a CMRS. We will return to the Congressional purpose of Section 332 – but first it's necessary to determine the implications of reclassifying broadband Internet access services.

If the Commission Reclassifies Broadband Internet Access it Must Resolve the Same Statutory Contradiction it did in the 2007 Wireless Declaratory Ruling

AT&T's Letter begins by reciting the D.C. Circuit's observation that as currently classified, "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers."[5] With respect to the 2010 *Open Internet Order*, the D.C. Circuit was obviously correct: Since the Commission had uniformly classified broadband Internet access (fixed and mobile) as an "information service," Section 3 of the Act states that a service provider can be regulated as a

[3] Letter from Scott Bergmann, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 at 1 (filed Dec. 22, 2014) ("CTIA Letter"). *Accord* Letter from William Johnson, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 at 1 (filed Dec. 22, 2014) ("Verizon Letter"); Letter from Gary Phillips, AT&T Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 at 1 (filed Jan. 8, 2015) ("AT&T Letter").

[4] *See* Letter from Michael Calabrese, OTI, Erik Stallman, CDT, and Harold Feld, PK, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Dec. 11, 2014); *See* Letter from Laura Moy and Kate Forscey, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Dec. 19, 2014); Letter from Michael Calabrese, New America's Open Technology Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 10, 2014).

[5] *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); *see Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (same).

common carrier "only to the extent that it is engaged in providing *telecommunications service*."[6] And since the Commission had not found that mobile broadband was either "interconnected with the public switched network,"[7] or the "functional equivalent of a commercial mobile service,"[8] the agency was neither required (under Section 332(c)(1)(A)) nor even permitted to regulate this "private" service (PMRS) as a common carrier under Title II.

Moreover, as the Commission explained in its 2007 *Wireless Declaratory Ruling*, so long as mobile broadband Internet access is classified as an "information service," including it within the definition of CMRS would create a statutory contradiction.[9] This is true because while Section 3 of the Act *prohibits* common carrier treatment of an information service, Section 332(c)(1)(A) *requires* common carrier treatment of a wireless service that satisfies the definition of "commercial mobile service."[10] Thus, as both the D.C. Circuit and the Commission have found, the information service and Private Mobile Service (PMRS) classifications must go hand in hand to avoid a "contradiction in the statutory framework arising from classifying mobile wireless broadband Internet access service" as an information service but not as PMRS.[11]

Of course, the analysis above changes completely if the Commission correctly and uniformly reclassifies broadband Internet access as a "telecommunications service." We therefore begin, as the Commission must, with the classification of the service itself. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*."[12] Either broadband Internet access services are "telecommunications services" or they are not, regardless whether the delivery platform is wireline or wireless, fixed or mobile. Both meet the statutory definition precisely. The Commission has no rational basis for classifying *wireline* broadband Internet access as a telecommunications service and functionally identical *wireless* broadband Internet access as an information service. As OTI and several other commenters have explained at length, a divergent regulatory framework for so-called "fixed" and so-called "mobile" broadband Internet access would be particularly untenable because the distinctions between these services are rapidly

[6] 47 U.S.C. § 153(44) (emphasis added).
[7] 47 U.S.C. § 332(d)(2).
[8] 47 U.S.C. § 332(d)(3).
[9] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 at ¶¶ 19-20 (2007) ("*Wireless Declaratory Order*").
[10] *Id.* at ¶ 50.
[11] *Id.* at ¶ 49. The 2007 *Wireless Declaratory Ruling* 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.
[12] 47 U.S.C. § 153(46) (emphasis added).

blurring as the nation moves rapidly toward small cells and heterogeneous networks that offer combinations of fixed line and wireless Internet access.[13]

If the Commission is consistent in reclassifying broadband Internet access services as a telecommunications service, then Section 3 of the Act requires that any such provider "shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications service."[14] A result of this reclassification is that the Commission must next address the same statutory conflict, concerning Section 332, that it resolved in the 2007 *Wireless Declaratory Order*. The Commission explained then that "Congress noted that the definition of 'telecommunications service' was intended to include commercial mobile service."[15] In other words, if mobile broadband is a "telecommunications service," then it must also be CMRS or a statutory contradiction results. 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).[16]

As it did in its *Wireless Declaratory Order*, the Commission can avoid this statutory contradiction – and maintain consistent regulatory treatment – by using its express authority under Section 332 to recognize that mobile broadband Internet access is an "interconnected service" under Section 332(d)(1) and/or the "functional equivalent of a commercial mobile service" under Section 332(d)(3). By giving the Commission express authority to make each of these determinations with respect to future services, Congress built into Section 332 the mechanism for maintaining harmony between the requirements of that section and Section 3. Accordingly, the 2007 *Order* properly placed great emphasis on a policy of technological neutrality and regulatory parity, applying one consistent framework for all broadband services:

> ***[O]ur interpretation of the definition [of CMRS] supports the Congressional goal*** of promoting broadband deployment and encouraging competition . . . ***by ensuring regulatory parity among all broadband Internet access services*** . . . Classifying all wireless broadband Internet access services as non-CMRS information services will result in a uniform, technology neutral regulatory scheme . . . regardless of whether providers are using mobile, portable, or fixed technologies, or a combination of those technologies.[17]

[13] *See* OTI Comments at 42-44; OTI Reply Comments at 37-38.
[14] 47 U.S.C. § 153(44).
[15] *Wireless Declaratory Order* 22 FCC Rcd. at 5916 ¶ 40, citing H.R. Conference Report 104-458.
[16] *Id.* at ¶ 50.
[17] *Wireless Declaratory Order*, 22 FCC Rcd. at 5921 ¶ 55 (emphasis added).

Assuming that the Commission reclassifies fixed broadband Internet access service as a telecommunications service under Title II, these same policy considerations now drive its designation of mobile Internet access as CMRS in the opposite direction.[18]

The Congressional Purpose Underlying Section 332 was to Ensure that any Common Carrier Service Would Receive the Basic Consumer Protections Required of CMRS

Congress, in Section 332(d), explicitly delegated to the Commission the authority to determine what services qualify as an "interconnected service," or as the "functional equivalent of a commercial mobile service." Although the mobile carrier filings noted above (CTIA, Verizon, AT&T) cling to the claim that Congress in 1993 intended to forever limit the consumer protections associated with designation as CMRS to mobile services directly interconnected with the public switched *telephone* network, both Congressional purpose and the plain language of Section 332 belie their claims.

First, as OTI and Public Knowledge have explained previous *ex parte* filings,[19] in Section 332(d)(2) Congress expressly provided that ***the phrase "interconnected with the public switched network" is 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.'"[20]

Despite this clear statutory language giving the Commission the discretion to define "interconnected with the public switched network," the mobile carrier interests argue Congress intended to limit the meaning of PSN specifically to a traditional circuit switched telephone network – therefore precluding any updated or evolving interpretation by the Commission. If Congress wanted to forever limit CMRS to services directly interconnected to the traditional telephone network, why did the Conference Committee decide to add language authorizing the Commission to define the terms? Congress could have referred specifically to the "telephone" network (or at least used the word "telephone") if it intended to strictly limit the future services that the Commission might designate as CMRS – but instead it cast the provision more broadly.

The broad and forward-looking Congressional purpose behind the 1993 amendments to Section 332 is far more evident in the statements of the House and Senate authors, former Rep. Edward Markey and former Sen. Daniel Inouye. Like the statutory language and the Conference Report, they in no way suggest that CMRS should be limited to the existing switched circuit

[18] 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.
[19] *See* OTI and PK filings, *supra* note 3.
[20] H.R. Rep. 103-213, 103d Cong., 1st Sess., at 496 (1993) ("Conference Report").

telephone service. Instead they both look forward with an emphasis on the Commission's authority to preserve the consumer protections of common carriage regulation as the nation transitions into more varied and advanced PCS services.

Introducing the Licensing Improvement Act of 1993 – and supporting its inclusion in the Omnibus Budget and Reform Act of 1993 (OBRA) – Rep. Markey stated, in part:

> A fundamental regulatory step that this legislation takes is to ***preserve the core principle of common carriage as we move into a new world of services such as PCS***. I have grave concerns that the temptation to put new services under the heading of private carrier [PMRS] is so great that the FCC and the States will lose their ability to impose the lightest of regulations on these services. . . . ***The risk of labeling all services private is that the key principles of nondiscrimination***, no alien ownership, and even minimal State regulation ***would be swept away***.
>
> ***The fact that this legislation ensures PCS, the next generation of communications, will be treated as a common carrier is an important win for consumers*** and for State regulators and for those who seek to carry those core notions of nondiscrimination and common carriage into the future.[21]

Senator Inouye, a lead co-sponsor, made similar remarks in support of including the amendments to Section 332 in the 1993 OBRA:

> ***The FCC is given the authority to determine who will be included in the definition*** of a commercial mobile service provider. . . .
>
> The FCC is about to issue licenses for personal communications services [PCS] in the next year. ***I believe these new services should be regulated under the same framework as the cellular services***. The regulatory parity provisions ensure that all mobile service carriers . . . are ***treated as common carriers***.[22]

Notably, the similar language introduced in the House and in the Senate was amended in Conference Committee primarily to give the Commission additional express authority, as noted above, to define "interconnected with the public switched network" and also to determine whether services in the future are the "functional equivalent" of CMRS.

[21] House Floor Statement of Statement of Rep. Markey, Congressional Record, Volume 139 at H3286-87 (May 27, 1993) (emphasis added).
[22] Senate Floor Statement of Sen. Inouye, Omnibus Budget Reconciliation Act, Congressional Record, Volume 139 at S7857, S7950 (June 24, 1993) (emphasis added).

Consistent with this Congressional intent – and with the broad authority Section 332 confers on the Commission – in 1994 the FCC implemented the law by declaring that *all* PCS services would be "presumptively CMRS."[23] The *1994 CMRS Order* "conclude[s] that . . . designating broadband and narrowband PCS as presumptively CMRS will advance all of our goals and Congress's intent in enacting the Budget Act [1993 OBRA]."[24] Every indication from the *1994 CMRS Order* points to a Commission intent on interpreting the definition of CMRS and "functional equivalence" to CMRS broadly based on its evaluation of the statutory language.[25] The *Order* recounts that the Commission "defines PCS broadly,"[26] explaining:

> By classifying many mobile services as commercial, ***we have taken a strong step toward guaranteeing that all consumers will have non-discriminatory access to these services***.
>
> . . . [W]e believe that ***the family of personal communications services holds the potential of revolutionizing the way in which Americans communicate*** with each other. In this Order, we establish the regulatory framework for the development of PCS principally as broadly available CMRS offerings.[27]

Surely, in proclaiming that PCS would "revolutionize" how Americans communicate and its mandate to guarantee non-discriminatory access, the Commission wasn't assuming that Congress intended to limit common carrier consumer protections for all time to telephone services. Indeed, **the *1994 CMRS Order* explicitly rejected proposals that it should define the statutory term "public switched network" as equivalent to "public switched *telephone* network"** – rejecting precisely the same assertion that CTIA, Verizon and AT&T insist the Commission should revisit here. Although the Commission acknowledged that it "has frequently used the term 'public switched telephone network' (PSTN) to refer to the local exchange and interexchange common carrier switched network," it nevertheless concluded that in implementing Section 332 it would take a broader, future-looking approach:

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[23] Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *2nd Report and Order*, 9 FCC Rcd 1411 at ¶¶ 118, 120 (1994) ("*1994 CMRS Order*").

[24] *Ibid.*

[25] *See id.* at ¶ 76 ("**Congress intended to narrow the scope of the definition for private mobile radio service** by adding language stating that a mobile service would be considered private if it is not the functional equivalent of a commercial mobile radio service") (emphasis added); *see also id.* at ¶ 78 (recounting history and concluding that "if the service amounts to the 'functional equivalent' of a service that is classified
as CMRS, it should be regulated as CMRS").

[26] *Id*. at ¶ 118, citing Broadband PCS Order, 8 FCC Rcd at 7712, ¶ 23 and Narrowband PCS Order, 8 FCC Rcd at 7164, ¶ 13.

[27] *Id*. at ¶¶ 27-28.

> Some parties argue that there is no indication that Congress intended to broaden the scope of the term "public switched network." Others, however, urge the Commission to adopt a more forward looking definition that acknowledges that ***the future of telecommunications will encompass many service providers using various technologies to create a "network of networks***."
>
> …
>
> We agree with commenters who argue that the network should not be defined in [such] a static way. We believe that ***this interpretation is also more consistent with the use of the 'public switched network,' rather than the more technologically based term 'public switched telephone network.' The network is continuously growing and changing*** because of new technology and increasing demand.[28]

The *Order* goes on to state that although use of the North American Numbering Plan (NANP) "is a key element" in determining whether a service is sufficiently interconnected to the PSN to be considered CMRS, it is indicative but not a litmus test. The *Order* stated that another key criterion is the network's "switching capability" to the extent that it serves to connect all users to each other in furtherance of universal service.[29]

At the time, the primary distinction between CMRS and PMRS was between "commercial" services that were broadly offered to the public – and facilitated universal interconnection – and services that were "private" in the sense that they were closed to the general public and facilitated specific communications needs. The classic examples of PMRS are traditional radio dispatch systems, such as push-to-talk taxicab or workplace networks. Of course, today there is no networked service more open, interconnected and universally offered than broadband Internet access services, whether fixed or mobile.

In its 2007 *Wireless Declaratory Ruling*, the Commission acknowledged that by using the phrase "interconnected service" to define CMRS, "Congress's purpose . . . was to 'ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carrier offering . . .'".[30] As we have argued previously, [31] and further below, the Commission in its 2007 avoided a statutory contradiction by declining to find that mobile broadband Internet access offered the "capability" to "interconnect[] with the public switched network." But since 2007 mobile data plan offerings have evolved, particularly from the consumer's perspective, such that integrated VoIP and VoLTE provide every subscriber with the capability to

[28] *Id*. at ¶ 59. (emphasis added). Ironically, the commenters cited in support of the broader, future-looking interpretation of PSN as potentially a "network of networks" included Bell Atlantic and NYNEX.
[29] *Id*. at ¶ 60.
[30] *Wireless Declaratory Ruling* at ¶ 44, quoting the *1994 CMRS Order* at ¶ 54.
[31] *See* Letter of OTI/PK/CDT, *supra* note 3, at 4.

interconnect with anyone on the traditional PSTN.[32] In addition, since Section 332 does not limit the Commission's definition of "public switched network" to one that uses the NANP, an updated interpretation could add the rather self-evident notion that in 2014 (unlike 1993) the Internet and its IP addressing system is now a network that gives subscribers the ability to communicate with all other users including, increasingly, for telephony.

Even if CTIA, Verizon and AT&T are correct that Congress in 1993 employed the term PSN with the telephone network in mind, Congress provided the Commission express authority to give meaning to "interconnected with the public switched network" so that it can avoid contradicting both Section 3 and the Congressional purpose to preserve common carrier consumer protections for non-private telecommunications services. This outcome – avoiding a contradiction in the statute and with Congressional purpose – is directly supported by fundamental canons of construction and the broader structure and context of the Communications Act. "[L]ike every Act of Congress," the Act "should not be read as a series of unrelated and isolated provisions," but rather as a "symmetrical and coherent regulatory scheme,"[33] in which all parts fit together as a "harmonious whole."[34] CTIA's proposed reading flouts that basic principle. If the Commission finds that broadband Internet access is a telecommunications service, then designating it as CMRS and extending core common carrier consumer protections is most in keeping with Congressional intent. That conclusion becomes inescapable when the relevant text is considered "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"[35]

It is also useful to recall that by declaring that all PCS services would be "presumptively CMRS," the *1994 CMRS Order* ensured that as technology advanced, the mobile carriers' CMRS offerings would later include Internet access services.[36] If not for the imperative of regulatory parity following the *Cable Modem Order* and the Supreme Court's *Brand X* decision, mobile broadband Internet access may have continued to evolve as a bundled part of a CMRS carrier offering with the basic common carrier consumer protections of Section 332(c)(1)(A).

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[32] *See* Letter of Public Knowledge, *supra* note 3, at 8-12 (explaining that since 2007 changes in the mobile marketplace and in the increasingly interconnected nature of the telephone network and Internet access support a finding that wireless broadband Internet access is interconnected with the PSN).
[33] Gustafson v. Alloyd Co., 513 U.S. 561, 569-570 (1995).
[34] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citation omitted).
[35] Abramski v. United States, 134 S. Ct. 2259, 2267 (2014) (quoting Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013)). *See also* Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350, 1357 (2012) (a single phrase in isolation ignores this "fundamental canon of statutory construction," quoting Davis v. Michigan Dep't of the Treasury, 489 U.S. 803, 809 (1989)).
[36] The Commission's description of Broadband PCS notes that "[t]he most common use of Broadband PCS spectrum is mobile voice and data services, including cell phone, text messaging, and Internet." FCC Encyclopedia, "Broadband Personal Communications Service (PCS)," available at https://www.fcc.gov/encyclopedia/broadband-personal-communications-service-pcs (accessed January 26, 2015)

The Commission Should Reverse its Outdated 2007 Determination of What Constitutes 'Capability' and Find that Mobile Broadband is 'Interconnected with the Public Switched Network'

In 2007, the FCC issued a declaratory ruling finding that (a) mobile broadband was an information service, and (b) was not a CMRS service.[37] The *Wireless Declaratory Order* did not address the question of functional equivalence. In their recent filings, the carrier interests have asserted that the Commission cannot regulate mobile broadband as a common carrier because it determined, in the 2007 *Wireless Declaratory Order*, that two prerequisites are absent: First, mobile broadband service "in and of itself does not provide the capability to communicate with all users of the public switched network;" and, second, mobile broadband does not directly provide "interconnection with the traditional local exchange or interexchange switched network" using NANP.[38] [We assume in this section, as the Commission did in the 2007 *Order*, that "PSN" refers narrowly to the circuit-switched *telephone* network.]

Whether or not today's mobile broadband data networks are "interconnected with the public switched [telephone] network" within the meaning of Section 20.3 depends in essence on whether the Commission finds, as it must, that unlike 1994 and 2007, mobile broadband networks give consumers the "capability" to communicate to or receive communications from all other users of the Internet *and* all other users of the traditional circuit-switched telephone network through applications (VoIP and VoLTE) that interconnect with the telephone system using NANP. As OTI and other parties have explained at length in previous *ex parte* filings, the Commission should reverse its 2007 determination concerning the "capability" of mobile broadband service to interconnect with the PSN for two reasons. First, the distinction the Commission drew with regard to what constitutes the "capability" to reach the PSN 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.[39]

As an initial matter, we note that the carrier interests attach great significance to the Commission's statement in the *1994 CMRS Order* that use of the NANP is "a key element in defining the network because participation in the [NANP] provides the participant with ubiquitous access to all other participants in the Plan."[40] In 1994, use of NANP would certainly be indicative of a common carrier mobile network – and yet the Commission hedged its language, stating it is "a key element" and not dispositive. More important is the stated rationale: use of NANP "provides the participant with ubiquitous access to all other participants in the plan," which speaks to the Congressional goals of universality and regulatory parity for common

[37] *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*").
[38] CTIA Letter at 3-4.
[39] *See* Letter of OTI/PK/CDT, *supra* note 3, at 4-6; Letter of Public Knowledge, *supra* note 3, at 8-13.
[40] CTIA Letter at 3, citing *1994 CMRS Order*, *supra* note 24, at ¶ 60.

carriers. As noted above, the *1994 CMRS Order* also identified the network's "switching capability" as another key element to the extent that serves to connect all users to each other in furtherance of universal service:

> We find that ***another important element is switching capability***, which the term 'public *switched* network' implies. ***This includes any common carrier switching capability, not only a local exchange carrier's switching capability***. Thus, we believe that this approach to the public switched network is consistent with creating a system of universal service where all people in the United States can use the network to communicate with each other.[41]

Today, mobile broadband networks provide subscribers with ubiquitous access to all other users of the Internet (via IP addressing) *and* with the capability to have ubiquitous access to all other users of the traditional telephone network (via both VoIP and VoLTE).

The carrier interests also emphasize that the Commission has "routinely" used the term PSN interchangeably with PSTN.[42] However, as noted above, Section 332(d)(2) Congress expressly provided that ***"interconnected with the public switched network" is to be "defined by regulation by the Commission.***" Congress could have referred specifically to the "telephone" network if it intended to strictly limit the future services that the Commission might designate as CMRS – but instead it cast the provision more broadly. As Public Knowledge noted in a recent filing, the D.C. Circuit has advised that "statutes written in broad, sweeping language should be given broad sweeping application," and that only in a "very rare situation" can legislative history be "more probative than text."[43] Here the mobile carrier interests do not even rely on legislative history, but on the far less reliable evidence of consistency of regulatory interpretation.[44]

Moreover, as described above, the Commission in its *1994 CMRS Order* explicitly rejected proposals that it should define the statutory term "public switched network" as equivalent to the "static" and "technologically based term 'public switched *telephone* network.'" Consistent with Congressional intent, the Commission reasoned this would not account for the fact mobile networks will be "continuously growing and changing because of new technology and increasing demand."[45]

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[41] *1994 CMRS Order* at ¶ 54.
[42] CTIA Letter at 7 and note 2.
[43] Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Jan.15, 2015) ("Letter of Harold Feld"), citing Consumer Electronics Association v. FCC, 347 F.3d 291, 298 (D.C. Cir. 2003).
[44] *See* Office of Communications, Inc. of the United Church of Christ v. FCC, 327 F.3d 1222 (D.C. Cir. 2003).
[45] *1994 CMRS Order* at ¶ 59.

CTIA attempts to turn this argument on its head, opining that "[i]f Congress had intended to encompass Internet access services that are distinct from the PSTN within the definition of CMRS it could – and *would* – have done so."[46] However, as even CTIA acknowledged, the Commission stated in the 2007 *Wireless Declaratory Order* that "section 332 and our implementing rules [the *1994 CMRS Order*] did not contemplate wireless broadband Internet access service as provided today." Indeed, it's particularly telling that despite the fact that neither Congress nor the Commission (nor perhaps anyone in 1993) could envision broadband Internet service *over the airwaves*, Congress nonetheless spoke in broad terms and gave the Commission the clear authority to determine if future mobile services are not "private" offerings but sufficiently interconnected services that warrant common carrier consumer protections for the public.

CTIA and Verizon make an additional claim that in 2012 Congress demonstrated it perceives a distinction between the "public switched network" and the "public Internet" in the statutory provision authorizing the FirstNet public safety radio network.[47] That provision states that "[T]he nationwide public safety broadband network . . . shall provide connectivity between (i) the radio access network and (ii) the public Internet or the public switched network, or both." If this provision is relevant to the question at hand, it is because it demonstrates that Congress views mobile broadband networks as broadly interconnected, allowing all users to communicate to and receive communication from all other users through IP addressing ("the public Internet"), through NANP, or through both, since the Internet has the same capability to reach all users of the traditional telephone network. Moreover, the issue is not whether the Internet literally *is* the public switched telephone network – nobody has argued it is; the issue is whether, through interconnection, the Internet provides mobile users with the *capability* to communicate with other users of the traditional telephone network in addition to all other users of the Internet – which of course it does.[48]

Which brings us around again to the question of whether mobile broadband service provides subscribers with the "capability" to communicate to and receive communications from all other users of the PSN (again assuming, *arguendo*, that the one and only PSN is the circuit switched voice telephone network). The 2007 *Wireless Declaratory Order* resolved the statutory contradiction the Commission created when it reclassified all broadband Internet access as an "information service" by finding that mobile broadband does not give users this capability. As OTI, PK and others have demonstrated in previous filings, the Commission's 2007 finding – although consistent with classifying broadband Internet access as an information service – makes

[46] CTIA Letter at 10.
[47] *Id.* at 8, citing 47 U.S.C. § 1422(b)(1). *See also* Verizon Letter at 9.
[48] *See also* Letter of Harold Feld, *supra* note 43 at 2 (stating that if the provision is relevant, it demonstrates Congress views the Internet and PSN as having similar significance for interconnection and that they are increasingly merging together).

no sense today in light of the evolution of mobile network and devices with integrated VoIP and VoLTE applications that seamlessly interconnect with the PSN using NANP.

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.[49] 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.[50]

While this distinction was understandable in 2007, it makes no sense in relation to the capabilities of today's broadband networks and in light of current user expectation. The mobile network described by the Commission in 2007 was undeveloped and clearly distinct from the existing (and dominant) circuit switched network.[51] The 2007 *Order* did not contemplate today's reality, which is that virtually every mobile broadband user can reach any other NANP user through VoIP applications as well. Nor did it take into account today's marketplace, where mobile carriers are not offering Internet access as a separately-priced, add-on service, but rather "broadband data plans" that combine CMRS voice and Internet service into a single product that gives subscribers the capability to interconnect directly with NANP users through either VoIP or VoLTE applications.

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.[52] In 2007 no VoIP applications came integrated with widely available phones, which is commonplace today (e.g., FaceTime on the iPhone), nor were they so widely used. 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.

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[49] *Id.* at n.118.
[50] *Id.*
[51] *Id.* at ¶¶12-15.
[52] 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, as well as text messaging, 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.

The carrier interests counter that regardless of how ubiquitous, integrated or easy VoIP calling or over-the-top texting may be today (e.g., FaceTime, Skype, What's App), mobile broadband "itself is not an interconnected service as the Commission has defined the term."[53] CTIA opines that although Internet access gives its subscribers the capability to trade stocks online, mobile broadband is not a financial service. But nobody has argued that a mobile ISP *is* a VoIP application provider. As the Commission acknowledged in the 2007 *Wireless Declaratory Order*, "Congress's purpose . . . was 'to ensure that a mobile service that gives its customers the *capability* to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering . . . ."[54] In 2015 (if not in 2007), there is no question that mobile broadband ISPs satisfy the interconnected service definition of Section 20.3: mobile broadband is an "interconnected service" because it "give[s] subscribers *the capability* to communicate to or receive communications from all other users on the public switched network."[55]

The Commission Should Find that Mobile Internet Access Service is also the 'Functional Equivalent' of CMRS

As discussed above, the legislative history of Section 332 – and the Commission's concurrent determination that future PCS services would be presumptively CMRS – demonstrates that Congress recognized that, as technology evolved, services that did not initially appear to be CMRS could evolve into common carrier (and no longer "private") mobile services. Accordingly, 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***."[56] This "functional equivalent" language was added in Conference, along with the express authority for the Commission to make future determinations.[57]

Although the *Wireless Declaratory Order* did not consider whether or not mobile broadband was the "functional equivalent" of CMRS in 2007, in 2015 both technological and marketplace realities suggest that it is. As OTI and other parties have explained in previous *ex parte* filings,

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[53] *See* CTIA Letter at 11, quoting *Wireless Declaratory Order* at ¶ 45.
[54] *Wireless Declaratory Order* at ¶ 44, quoting *1994 CMRS Order* at ¶ 54.
[55] *See* 47 C.F.R. § 20.3 (emphasis added).
[56] 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."
[57] *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.

just like mobile voice, mobile broadband service is functionally an "interconnected service" that simply uses a different, more global numbering system (IP addressing) that gives consumers the capability to communicate to or receive communications from all other users of the Internet, as well as all other users of the traditional circuit-switched telephone network through the use of VoIP applications that interconnect with the telephone system using NANP.[58] If the Commission reclassifies broadband Internet access as a "telecommunications service," this is tantamount to determining that the mobile version of this service is the "functional equivalent" of what Congress in 1993 intended to regulate as CMRS and *not* as a "private" service (PMRS) that is not offered to the general public.

That mobile broadband has evolved into the functional equivalent of CMRS is reinforced by the present reality that the service mobile carriers most commonly offer and sell to the general public today is a *broadband data service* that makes little if any distinction – in price, in the radio access network, or in terms of the user's experience – between voice, text and Internet access. Mobile broadband Internet access emerged on PCS spectrum as a CMRS offering and today more than ever it is both fully integrated with voice calling and is the functional equivalent of a common carrier service (CMRS).

The predominant mobile carrier offerings today meet this definition. The mobile carrier interests argue *as if* they still offer broadband Internet access and voice/telephone services separately. Unlike 2007, they do not. Currently the subscriptions most commonly advertised and sold to the general public by mobile carriers is a *broadband data service* that makes little if any distinction – in price, in the radio access network, or in terms of the user's experience – between voice, text and Internet access. In 2007, subscribers purchased buckets of voice calling minutes and had the option to purchase texting or rudimentary Internet access as an add-on service. Today each of the four national carriers exclusively sell smartphone plans that bundle voice and Internet access as applications – not as separately priced or optional "commercial" (voice and/or text) and "private" (Internet access) services.[59] From a consumer's perspective, it is a single

[58] *See* Letter of Michael Calabrese, New America's Open Technology Institute, to Marlene H. Dortch, GN Docket Nos. 14-28, 10-127, at 3-4 (filed Dec. 10, 2014); *see also* Letter of OTI/PK/CDT, *supra* note 3, at 6-8; Letter of Public Knowledge, *supra* note 3, at 14-16; Letter of Matthew F. Wood, Free Press, to Marlene H. Dortch, GN Docket Nos. 14-28, 10-127, at 2-3 (filed Dec. 17, 2014).

[59] Like the other national carriers, for example, Verizon prominently markets smartphone *plans* that inseparably bundle broadband voice, texting and data (i.e., Internet access, although they don't call it that). From a consumer's perspective, there is only one integrated offering: mobile data plans, each of which is completely interconnected with the traditional public switched network using NANP, increasingly by both integrated VoIP and VoLTE applications. *See* Verizon website, "Plans and Services," available at http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans.html. *See also* AT&T Website, "Mobile Share Plans from AT&T" available at https://www.att.com/shop/wireless/plans/mobileshare.html (accessed January 26, 2015); T-Mobile Website, "Cell Phone Plans | Cheap Cell Phone Plans & Unlimited Data | T-Mobile" available at http://www.t-mobile.com/cell-phone-plans/individual.html#lplan_menu_1 (accessed January 26, 2015); Sprint Website, "Get the best Cell Phone Plans with Sprint" available at

broadband data plan that is widely offered to the public for a fee – a common carrier data plan offering that is clearly both directly interconnected with the PSN *and* the "functional equivalent" of CMRS.[60] This is uniformly the case for smartphones, which are now the single most common mobile device.[61] And although millions of Americans continue to rely on feature phones with limited broadband Internet capabilities (compared to smartphones), it is not easy to find a plan that offers voice minutes or texting separate from data.[62]

CTIA asserts that mobile broadband cannot possibly be the functional equivalent of CMRS because "Congress intended the hallmark of CMRS to be the provision of interconnected service through use of the PSTN [public switched *telephone* network]."[63] CTIA's argument is misplaced. First, as explained above, the Commission confirmed in the *1994 CMRS Order*, Congress intended the term PSN to be substantially broader and more future-looking than PSTN, a finding that justified the Commission's sweeping determination that all future mobile services deployed on PCS bands would be "presumptively CMRS."[64] Informing this finding was the Commission's observation – supported by the legislative history described above – that Congress's purpose was that Section 332 should "ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering . . . ."[65]

Second, and more importantly, Congress's purpose in amending Section 332 was not focused on the "functional equivalent" of the telephone system, but rather on regulatory parity and identifying *the functional equivalent of common carrier offerings* that justified at least the basic Title II consumer protections (Section 201, 202, 208). The thrust of the Conference Report, as

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https://www.sprint.com/landings/datashare/index.html?INTNAV=ATG:HE:DataShare (accessed January 26, 2015). Mobile broadband plans are typically priced by the gigabyte (the functional equivalent of the 2007 practice of pricing cellular service by the minute).

[60] An exception to this are the data only subscriptions that come bundled with non-phone devices, such as dongles for notebooks, tablets and mobile hotspot devices (e.g., a MiFi access point).

[61] According to recent findings by Pew Research, 58 percent of American adults have a smartphone. But this percentage jumps to 83 percent in the 18-29 year old demographic, showing that such integrated voice, text and data bundles for smartphones will only become more common for American consumers going forward. *See* Pew Research Center's Internet & American Life Project, "Mobile Technology Fact Sheet," available at http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (accessed January 27, 2015).

[62] For example, AT&T subscribers who wants a post-paid mobile plan using only a basic feature phone must still sign up for a plan that includes data as well as voice and text. *See* AT&T, "Mobile Share Plans from AT&T," available at https://www.att.com/shop/wireless/plans/mobileshare.html (accessed January 27, 2015). Mobile data is also included in the bundle for pre-paid plans on basic feature phones. *See* AT&T, "New GoPhone Plans with Unlimited Text to Mexico, Canada, 100 other Countries," available at https://www.att.com/shop/wireless/gophone-plans.html#fbid=OZXSH1dXUtv (accessed January 27, 2015).

[63] CTIA Letter at 15.

[64] *1994 CMRS Order* at ¶¶ 53, 59.

[65] *Id.* at ¶ 54.

well as of the bill's lead sponsors (quoted above), make this clear. As much as CTIA and the two dominant mobile carriers have attempted to reinterpret Section 332 as limiting the concept of a common carrier service to the traditional telephone network, it is clear in context that the broader, forward-looking purpose of both Congress and the FCC in 1993 and 1994, respectively, was to distinguish common carrier from truly "private" mobile offerings so that nondiscrimination and other basic consumer protections would apply to new and advanced service offerings.

Conclusion

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. If the Commission determines that broadband Internet access is properly classified as a "telecommunications service" and should be regulated as a common carrier service, then this is equally the case whether the provider is wireline or wireless, fixed or mobile. Since Section 3 of the Act requires that telecommunications services be regulated as common carriers, the Commission must resolve the same statutory contradiction that it did when it wrongly reclassified wireless broadband as an information service in 2007. The Commission has both the authority and the factual record it needs to avoid this statutory contradiction – and maintain consistent regulatory treatment – by concluding that mobile broadband Internet access is an "interconnected service" under Section 332(d)(1) and/or the "functional equivalent of a commercial mobile service" under Section 332(d)(3).

Respectfully submitted,

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