

October 17, 2014

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet* (GN Dkt. No. 14-28);
Framework for Broadband Internet Service (GN Dkt. No. 10-137)

Dear Ms. Dortch:

On Wednesday, October 15, 2014, representatives of CTIA – The Wireless Association® (“CTIA”) met with Jonathan Sallet, Stephanie Weiner, Marcus Maher, and Andrew Erber of the Office of General Counsel and Matthew DelNero of the Wireline Competition Bureau to discuss the above-mentioned matters. Present on behalf of CTIA were Brad Gillen, Christopher Guttman-McCabe, and Scott Bergmann of CTIA, Bryan Tramont and Russell Hanser of Wilkinson Barker Knauer, LLP, and Michael Kellogg of Kellogg Huber Hansen Todd Evans & Figel PLLC. During the meeting, CTIA explained that any decision to “reclassify” mobile broadband as including a distinct telecommunications service component and to subject that component to common carrier requirements would be unlawful and present substantial litigation risks. These fundamental legal, network, and market differences underscore the need for a mobile-specific approach.

Section 332 Bars Reclassification of Mobile Broadband. The Communications Act of 1934, as amended (the “Act”),¹ precludes the Commission from subjecting mobile broadband services to common carrier treatment, even above and beyond the barriers that the Act presents with respect to fixed broadband offerings. Section 332(c)(2) of the Act provides that the Commission “shall not” treat any PMRS provider “as a common carrier for any purpose.”² As the Commission and the courts have recognized, mobile broadband service is PMRS. Section 332(d)(3) defines PMRS as “any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.”³

Mobile broadband is neither commercial mobile service (“CMRS”) nor its functional equivalent. Section 332(d)(1) defines commercial mobile service as an “interconnected service” made available for profit to a substantial portion of the public,⁴ and defines

¹ 47 U.S.C. § 151 *et seq.*

² *Id.* § 332(c)(2).

³ *Id.* § 332(d)(3).

⁴ *Id.* § 332(d)(1).

“interconnected service” to mean “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....”⁵ The Conference Report accompanying this provision makes clear that Congress intended the term “public switched network” to be interchangeable with the term “public switched telephone network” (“PSTN”): The Report characterized the language used in the bill as limiting the CMRS label to offerings that were “interconnected with the Public switched telephone network.”⁶ Consistent with Congress’s intentions, the Commission’s regulations define the term “public switched network” to mean “[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, or mobile service providers, that uses the North American Numbering Plan in connection with the provision of switched services.”⁷ As the Commission has held, mobile broadband service does not use the North American Numbering Plan to access the Internet, “limit[ing] subscribers’ ability to communicate to or receive messages from *all* other users in the public switched network,”⁸ and thus is not CMRS.⁹ The D.C. Circuit has twice agreed, holding that Section 332(c)(2) constitutes a “statutory exclusion of mobile-internet providers from common carrier status”¹⁰ and that “treatment of mobile broadband providers as common carriers would violate section 332.”¹¹ Moreover, the Commission lacks any basis for amending its definition of “interconnected service,” both because Congress meant to require interconnection with the PSTN and because the *Notice* in the instant proceedings did not raise this issue.

Likewise, mobile broadband is not the “functional equivalent” of CMRS. The Commission has never “specified by regulation”¹² that mobile broadband is the functional equivalent to CMRS. Nor could it: “Congress’s purpose,” the Commission has concluded, was to treat as CMRS “a[n]y mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network.”¹³ That is, Congress intended the hallmark of CMRS to be the provision of interconnected service through use of the PSTN.¹⁴ No service lacking this essential attribute could amount to a CMRS equivalent.¹⁵

⁵ *Id.* § 332(d)(2).

⁶ 139 C.R.H. 5792 at 495 (Aug. 3, 1993).

⁷ 47 C.F.R. § 20.3.

⁸ Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 ¶ 45 (2007) (emphasis in original) (“*Wireless Broadband Order*”).

⁹ *Id.* (emphasis in original).

¹⁰ *Cellco P’Ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (“*Cellco*”).

¹¹ *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (“*Verizon*”).

¹² 47 U.S.C. § 332(d)(3).

¹³ *Wireless Broadband Order*, 22 FCC Rcd 5901 ¶ 45.

¹⁴ See generally *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1437 ¶ 60 (1994) (“*CMRS Second Report and Order*”) (“We agree ... that use of the North American Numbering Plan by carriers providing or obtaining access to the public switched network is a *key element* in defining the network because participation in the North American Numbering Plan provides the participant with ubiquitous access to all other

There Is No Basis For Reversing the “Information Service” Classification of Mobile Broadband Offerings. Even apart from the Section 332(c)(2) issue, the record does not support a holding that mobile broadband services include distinct “telecommunications service” and “information service” components. As the Supreme Court explained in *Brand X*, the classification of broadband service rests first and foremost “on the factual particulars of how Internet technology works and how it is provided.”¹⁶ Since the 1998 *Report to Congress*, the Commission consistently has held that broadband Internet access is an integrated information service.¹⁷ In 2007, it held that “[w]ireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications,” and therefore “meets the statutory definition of an information service under the Act.”¹⁸

If anything, the transmission and processing functions of mobile broadband have become more integrated since 2007. As Drs. Jeffrey Reed and Nishith Tripathi explain in a paper submitted by CTIA, “[t]he nodes of the entire wireless network infrastructure work together to present a single unified view of the network to the subscriber’s device and to provide service-specific QoS for a user’s services according to the 3GPP LTE framework,” and “[a]ll the network components need to do specific processing, which often needs to be customized for a given service, to provide seamless and satisfactory experience of a variety of services for the user.”¹⁹ Moreover, mobile broadband has only become more integrated over time, as “[a]s technologies and networks have evolved,” because “subscribers are increasingly using advanced networks for multiple simultaneous data services,” necessitating “[e]xtensive and complex processing in the mobile broadband network....”²⁰ Drs. Reed and Tripathi show that this tight integration between transmission and processing is essential whether the user is browsing a website, engaged in mobile video conferencing, or undertaking any of the myriad

participants in the Plan.”) (emphasis added)); *id.* at 1447 ¶ 79 (“[W]e anticipate that very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service.”).

¹⁵ In defining “interconnected service” and “public switched network” for purposes of Section 332 in the *Wireless Broadband Order*, the Commission stated that “by using the phrase ‘interconnected service,’ Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network.” *Wireless Broadband Order* at ¶ 44.

¹⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (“*Brand X*”).

¹⁷ See, e.g., *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11539 ¶ 79, 11540 ¶ 81 (1998); *Wireless Broadband Order*.

¹⁸ *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 26.

¹⁹ Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, *Net Neutrality and Technical Challenges of Mobile Broadband Networks* at 31, attached to Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Sept. 4, 2014) (“Reed Tripathi”).

²⁰ *Id.*

other activities made possible by mobile broadband. Thus, the factual premises that previously led the Commission to classify mobile broadband Internet access offerings as integrated information services compel the same result even more so today.

CTIA also explained that reclassification would be especially vulnerable on appeal in light of the Supreme Court's 2009 decision in *FCC v. Fox Television Stations, Inc.*²¹ That decision held that an agency must "provide a more detailed justification" for changing course "than what would suffice for a new policy created on a blank slate" (1) when "its new policy rests upon factual findings that contradict those which underlay its prior policy" and (2) "when its prior policy has engendered serious reliance interests that must be taken into account." In those cases, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."²² Any decision to reclassify mobile broadband service would implicate both of these circumstances, because it would (1) reflect new factual premises contradicting previous premises and (2) disrupt established reliance interests. Indeed, the Commission expressly invited the reliance at issue here: When the it classified mobile broadband as an integrated information service more than seven years ago, it explained that "[t]hrough this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services."²³ The record shows that as a result, America's wireless companies "invested hundreds of billions of dollars in their networks in reasonable reliance on their Title I status."²⁴

Reclassification Would Present a Much Higher Litigation Risk than An Approach Relying on Section 706. In light of the above (among other factors), the Commission would stand on much firmer legal ground if it did not reclassify broadband services and instead relied on its authority under Section 706 of the Telecommunications Act of 1996 ("Section 706")²⁵ than if it reversed numerous decisions and found that broadband access offerings included a distinct telecommunications service component. The *Verizon* decision provided the Commission a roadmap for how use Section 706 to apply meaningful open Internet rules without venturing into forbidden common carriage requirements. Section 706(a) "gives the Commission authority to promulgate ... those regulations that it establishes will fulfill" the statutory goal of encouraging the reasonable and timely deployment of advanced telecommunications capabilities,²⁶ while Section 706(b) gives the FCC authority to "take steps to accelerate broadband deployment."²⁷ As *Cellco* highlights, and as *Verizon* confirms, the Commission

²¹ 556 U.S. 502 (2009).

²² *Id.* at 515.

²³ *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 27.

²⁴ TechFreedom Comments at 95; *see also* T-Mobile Comments at 12 (describing the "billions of dollars [mobile broadband providers] have invested in their networks"); GSMA Comments at 9 (same); Mobile Future Comments at 14 (same); AT&T Comments at 8 (same); Verizon Comments at 39 (same); *see also* TechFreedom Comments at 62 (noting that reclassification "might be considered a regulatory taking" given the hundreds of billions of dollars invested in mobile data networks "on the understanding that these were not common carrier services").

²⁵ 47 U.S.C. § 1302.

²⁶ *Verizon*, 740 F.3d at 640.

²⁷ *Id.* at 641.

can impose substantive requirements on providers of information services, so long as it affords providers the opportunity to engage in individualized bargaining and to offer differentiated products.

Moreover, while parties advocating reclassification may threaten litigation if the Commission refuses to reverse course, such challenges would be easily thwarted, given that the Supreme Court has already found the Commission's current approach reasonable, and that (as discussed above) factual developments since that holding have rendered the Commission's framework more clearly correct, not less. In contrast, a decision reversing the Commission's long-standing approach and treating broadband offerings as telecommunications services would be indefensible on the facts and likely would fail to satisfy the demands of the *Fox* decision. Even if the reclassification itself survived review, there is a substantial risk that a court could overturn some or all of the Commission's attendant forbearance decisions, badly disrupting the regime the Commission meant to effectuate.

Given these risks, the Commission should decline to reclassify broadband Internet services, and should instead adopt a regulatory framework grounded in its Section 706 powers. This remains the best legal path to preserving an open Internet.

/s/ Scott Bergmann

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cc: Jonathan Sallet
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