

December 11, 2014

VIA ECFS

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

Re: **Protecting and Promoting the Open Internet, GN Docket No. 14-28, Framework for
Broadband Internet Service, GN Docket No. 10-127**

Dear Ms. Dortch:

On behalf of Vonage Holdings Corp. (“Vonage”), we write to support the Commission’s efforts to reinstate legally sustainable and effective rules to protect the Open Internet, in particular with respect to the use of the Internet on mobile devices. Vonage urges the Commission to ground its Open Internet rules on solid legal footing — namely Title II of the Communications Act. Vonage similarly urges the Commission to use Title II only to the extent necessary to support the adoption of Open Internet rules and forbear from the rest of Title II¹ in order to, with the exception of Open Internet rules, preserve the status quo in the market for broadband and edge services.

While Vonage urges the Commission to use its broad Title II authority to re-institute the Open Internet Rules it adopted in 2010, it recommends one important change: that the Commission should apply the same rules to fixed and mobile broadband. CTIA, however, argues that Section 332 of the Communications Act bars the FCC from using Title II authority to apply Open Internet rules to mobile broadband because the Commission has previously recognized that mobile broadband is a Private Mobile Radio Service (“PMRS”) and Section 332(c)(2) provides that the Commission shall not treat PMRS as a common carrier service.²

¹ See Vonage Comments at 45-46 (arguing that only Sections 201, 202, and 208 are necessary to support Open Internet Rules).

² Letter from Scott Bergmann, CTIA to Marlene H. Dortch, FCC, at p. 1 (Oct. 17, 2014).

Contrary to CTIA's claims, the Commission has ample discretion to modify its regulatory treatment of mobile broadband under the Act and its own rules. First, CTIA is simply incorrect that Section 332 bars reclassification of mobile broadband,³ as the Commission has ample discretion to revise the statutory interpretation set forth in the *Wireless Broadband Order*⁴ and hold that mobile broadband service is Commercial Mobile Radio Service ("CMRS") and not PMRS. The Act does not bar treating CMRS as a common carrier service. Second, mobile broadband, if it is not CMRS, is at least the functional equivalent of CMRS and does not meet the definition of PMRS.⁵ Because the Commission has not previously addressed the functional equivalency issue, it can now hold that mobile broadband is the functional equivalent of CMRS consistent with its broad powers under Title III and the standard the Commission established when it first implemented Section 332 in the *CMRS Second Report and Order*.⁶ Vonage thus agrees with the New America Foundation, that the Commission has the legal authority to apply robust and effective Open Internet rules equally to both fixed and mobile broadband services.⁷

Chairman Wheeler understands that, in contrast to 2010 when the Commission gave mobile wireless users less protection than users of fixed broadband, today "consumers increasingly rely on mobile broadband as an important pathway to access the Internet."⁸ The Commission thus understands that this is one of many "significant changes in the mobile marketplace since 2010" and as a result the Commission will have to consider "whether the old assumptions upon which the 2010 rules were based match new realities."⁹

President Obama also understands the significance of protecting Internet Openness for mobile users, urging the Commission to adopt rules that "reflect the way people use the Internet today,

³ *Id.*

⁴ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007). ("*Wireless Broadband Order*").

⁵ *See* 47 U.S.C. § 332(d)(3) (defining private mobile service "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."); 47 U.S.C. § 332(c)(3) (a "person engaged in the provision of ... private mobile service, shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act.").

⁶ *Implementation of the Section 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411 (1994) ("*CMRS Second Report and Order*").

⁷ *See* Letter from Michael Calabrese, Director Wireless Future Project, Open technology Institute, New America Foundation to Marlene H. Dortch, FCC (filed Nov. 10, 2014).

⁸ Prepared Remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show, Las Vegas, NV, September 9, 2014 at p. 4.

⁹ *Id.*

which increasingly means on a mobile device.”¹⁰ The President believes that the Commission should make its Open Internet rules “fully applicable to mobile broadband as well, while recognizing the special challenges that come with managing wireless networks.”¹¹

Vonage agrees. In its Comments and Reply comments in response to the Commission’s Notice of Proposed Rulemaking,¹² Vonage explained its view that the assumptions on which the 2010 Order was based, in particular the assumption that mobile broadband consumers do not need the same level of protection for an Open Internet as fixed broadband customers could not be squared with current realities.¹³ The changes in the market for mobile broadband and that the increased consumer reliance on mobile broadband since the 2010 *Open Internet Order*¹⁴ mean that mobile and fixed broadband should be subject to the same Open Internet rules and based on the Commission’s legal authority under Title II of the Communications Act.¹⁵

Thus, the Commission can and should adopt Open Internet rules that will fully protect mobile broadband users.

The Commission Possesses Broad Power Under Title III To Require Mobile Wireless Broadband Providers To Comply With Its Open Internet Rules.

The Commission has explained that “section 301 provides the Commission authority to regulate ‘radio communications’ and ‘transmission of energy by radio.’”¹⁶ Pursuant to this broad authority the Commission may “establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the ‘public convenience, interest, or necessity’ and not inconsistent with other provisions of law.”¹⁷ Section 303 further allows the Commission to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each

¹⁰ Presidential Statement, November 10, 2014, available at <http://www.whitehouse.gov/net-neutrality#section-read-the-presidents-statement>.

¹¹ *Id.*

¹² *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014) (“*NPRM*”).

¹³ Reply Comments of Vonage Holdings Corp. at pp. 33-36 (filed Sep. 15, 2014) (“*Vonage Reply Comments*”); Comments of Vonage Holdings Corp. at pp. 30-33 (filed July 18, 2014) (“*Vonage Comments*”).

¹⁴ *Preserving the Open Internet, Broadband Industry Practices, Report and Order*, 25 FCC Rcd 17905 (2010) (“*Open Internet Order*”).

¹⁵ Vonage Reply Comments at p. 33; Vonage Comments at p. 30.

¹⁶ 47 U.S.C. § 301.

¹⁷ 47 U.S.C. § 303.

station within any class,” subject to the Commission’s traditional public interest standard.¹⁸ These authorities are independent of Section 332.

CTIA claims that despite this broad authority over radio communications and licenses, the Commission is locked into its Title I regime for mobile wireless because of the decision in the 2007 *Wireless Broadband Order* and the statutory and regulatory definitions implicated in that order. Vonage disagrees.

The FCC Can Modify its Rules to Determine that Mobile Broadband is an Interconnected Service

The Act defines CMRS as:

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.¹⁹

The Act further defines “interconnected service” as “service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission).”²⁰ The Commission’s rules, in turn, define “interconnected service” as one that

is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network.²¹

The Commission’s rules further define the “public switched network” as

Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.²²

¹⁸ *Id.*

¹⁹ 47 U.S.C. § 332(d)(1).

²⁰ 47 U.S.C. § 332(d)(2).

²¹ 47 C.F.R. § 20.3.

²² *Id.*

As CTIA explains, the Commission applied these definitions in the *Wireless Broadband Order* to classify mobile broadband, similar to its classification of fixed broadband in the *Cable Modem Declaratory Ruling*,²³ and the *Wireline Broadband Order*,²⁴ as an information service without a separate telecommunications service offering.²⁵

The *Wireless Broadband Order* found that “mobile wireless broadband” was not “commercial mobile service” under section 332 of the Act because at that time it did not perceive mobile broadband as an “interconnected service,” under the Act and the Commission’s rules.²⁶ The Commission recognized that although many applications such as voice and messaging use broadband Internet access and also use the public switched network and the NANP for telephone numbers, classification of mobile broadband as an interconnected service was inappropriate because, regardless of the applications used over the broadband connection, “wireless broadband Internet access service in and of itself does not provide this capability to communicate with all users of the public switched network.”²⁷ But the phrase “in and of itself” is nowhere to be found in Section 332(d) nor does it appear in the Commission’s rules defining interconnected service, or public switched network.

The Act’s definition of CMRS is not set in stone. The Commission has ample discretion to amend its rules and modify its interpretation of the provisions in the statute and its rules as long as it does so consistent with requirements of reasoned decision making.²⁸ For example, the Commission should amend its definition of “public switched network” to clarify that it also applies to broadband packet-based transmission services that provide the platform over which switched communications are carried even if the platform, “in and of itself”, does not use NANP numbering. Congress expressly gave the Commission such authority by making the definition of the terms “interconnected” and “public switched network” dependent on rules promulgated by the Commission.²⁹

²³ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”) *aff’d* *National Cable & Telecomms. Assoc. v. Brand X Internet Svcs.*, 545 U.S. 967 (2005) (“*Brand X*”).

²⁴ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”).

²⁵ *Wireless Broadband Order*, 22 FCC Rcd 5901 (2007).

²⁶ *Id.* at 5916 ¶ 42; 5917 ¶ 45.

²⁷ *Id.*

²⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the APA “makes no distinction ... between initial agency action and subsequent agency action undoing or revising that action.”).

²⁹ *See* 47 U.S.C. § 332(d)(2) (defining interconnected and public switched network “as such terms are defined by regulation of the Commission.”).

And the Commission did not define those terms so narrowly in its implementation of Section 332(d) so as to compel the “in and of itself” requirement added in *Wireless Broadband Order*. Rather, the *CMRS Second Report and Order* adopted a far more expansive view of the relevant terms in Section 332(d).³⁰

CTIA argues that the term “public switched network” in section 332(d) refers to the PSTN.³¹ But the Commission explicitly rejected that construction of the statute, instead holding that “the [Public Switched] network should not be defined in a static way.”³² The Commission specifically rejected the assertion that the term “Public Switched Network” meant the “Public Switched Telephone Network,” holding that “the more technologically based term ‘public switched telephone network’” failed to reflect that the “network is continuously growing and changing because of new technology and increasing demand.”³³ Thus, the Commission concluded the “public switched network” is a network that “allow[s] the public to send or receive messages to or from anywhere in the nation.”³⁴

Nor is it accurate that the use of the NANP is an absolute requirement in order to qualify a service as interconnected.³⁵ While the *CMRS Second Report and Order* found that use of the NANP is a key element, it did so only “because participation in the N[ANP] provides the participant with ubiquitous access to all other participants in the Plan.”³⁶ At the time the *CMRS Second Report and Order* was adopted, use of the NANP was the only way to achieve the ubiquitous access the Commission found determinative in the meaning of the term “public switched network.” Under today’s “new realities,” mobile wireless users no longer need access to the NANP to “send or receive messages to or from anywhere.”³⁷ Internet access, as a platform that supports myriad applications for messaging and voice communications provides the capability to communicate globally with anyone else who is also connected to the Internet.

Further, while the Commission found switching capability to be an important (but not essential) element of the definition of “interconnected service,” it did not limit its interpretation of the term “switching” to the predominant circuit switching technology in use in 1994. Instead, the *CMRS Second Report and Order* held that the term switching refers to “any common carrier switching

³⁰ *Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411 (1994) (“*CMRS Second Report and Order*”).

³¹ CTIA Oct. 17 *ex parte* at p. 2.

³² *CMRS Second Report and Order*, 9 FCC Rcd at 1436 ¶ 59.

³³ *Id.*

³⁴ *Id.*

³⁵ CTIA Oct. 17 *ex parte* at p. 2.

³⁶ *See CMRS Second Report and Order*, 9 FCC Rcd at 1437 ¶ 60.

³⁷ *Id.* at 1436 ¶ 59.

capability.”³⁸ This includes packet switching technology used in Internet Protocol transmission, since packet switching has been an integral component of common carrier networks since at least the early 1980s.³⁹

In short, the *CMRS Second Report and Order* broadly construed the terms in Section 332(d) to foster “a system of universal service where all people in the United States can use the network to communicate with each other.”⁴⁰ As demonstrated above, mobile broadband easily fits within this construct. There is little disagreement that the Internet is a platform of interconnected networks that affords users in the United States the ubiquitous ability to communicate with all other users in the United States and across the globe.⁴¹

Nor is there any merit to the argument that the courts have resolved the question, despite CTIA’s claims.⁴² While the DC Circuit has noted that under the Commission’s current rules, section 332(d) bars the imposition of common carriage regulation,⁴³ neither the *Cellco* court nor the *Verizon* court addressed the Commission’s discretion to modify the terms in its own rules in order to classify mobile broadband as CMRS.⁴⁴

CTIA further argues that mobile broadband is not the “functional equivalent” of CMRS because the Commission has yet to make that declaration.⁴⁵ There is no doubt that the Commission has not yet made that decision. But CTIA points to nothing that bars the Commission from making such a determination, and making it now. As set forth above, there is enough evidence regarding the Commission’s intent in broadly classifying CMRS to support a determination that mobile broadband is the functional equivalent of CMRS.

³⁸ *Id.* at 1437 ¶ 60.

³⁹ See e.g., *AT&T Communications Revisions to Tariff F.C.C. Nos. 260, 266, 267, 268, 270, 273 and 274; Establishment of Rates and Regulations Applicable to ACCUNET Packet Service*, 101 FCC 2d 144 (1985); *American Telephone and Telegraph Company; Tariff F.C.C. No. 270 Rates and Regulations for Bell Packet Switching Service*, 91 FCC 1, ¶ 28 (1982).

⁴⁰ *CMRS Second Report and Order*, 9 FCC Rcd at 1437 ¶ 60.

⁴¹ See *ACLU v. Reno*, 521 U.S. 844, 849 (1997) (describing the “Internet [as] an international network of interconnected computers.”).

⁴² CTIA Oct. 17 Ex Parte Letter, at p. 2.

⁴³ *Verizon v. FCC*, 740 F.3d 623, 350 (DC Cir. 2104); *Cellco Partnership v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (“*Cellco*”).

⁴⁴ See *Fox Television*, 556 U.S. at 515.

⁴⁵ CTIA Oct. 17 *ex parte* at p. 2.

Mobile Broadband is the Functional Equivalent of CMRS

Section 332(d)(3) defines private mobile service 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.”⁴⁶ If mobile broadband is not itself CMRS, it is at least functionally equivalent to CMRS because it is a platform that provides users with ubiquitous connectivity, consistent with the Commission’s definition of CMRS.

The *CMRS Second Report and Order* established the test for determining functional equivalence, primarily by examining substitutability.⁴⁷ The Commission has ample data confirming that consumers today are replacing CMRS voice service with mobile broadband service.

The communication options available to mobile broadband users are wide and varied: they can communicate by voice using traditional telephone service that uses IP in the middle; they can communicate using VoIP on either or both ends; they may send email, text messages or social media messages. It is undeniable that the platform supporting these forms of communication provide the functional equivalent of CMRS — the ability to communicate ubiquitously.

As the Commission explained in the *Sixteenth Mobile Competition* report, “[t]rends in mobile wireless services showed continuing evolution from being primarily voice-centric to data-centric.”⁴⁸ The *Sixteenth Competition Report* further shows that “mobile data traffic grew significantly” while “monthly mobile voice usage per subscriber, continued to decline.”⁴⁹ Consistent with this trend, “consumers are increasingly substituting among voice, messaging, and some data services, and ... are willing to move from voice to messaging or data services for an increasing portion of their communication needs.”⁵⁰ There is substantial evidence the decrease in “voice minutes is due to substitution from mobile voice to mobile messaging and other mobile data services”⁵¹ In other words, consumers are substituting mobile broadband for CMRS voice calling.

Consumers are also substituting mobile broadband for the non-voice applications that are typically part of CMRS, such as SMS and MMS text messaging. While data shows that usage of “SMS

⁴⁶ 47 U.S.C. § 332(d)(3).

⁴⁷ 9 FCC Rcd at 1447-48 ¶ 80 (the Commission will evaluate “consumer demand for the service in order to determine whether the service is a close substitute for CMRS”).

⁴⁸ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 28 FCC Rcd 3700, 3711 (2013).

⁴⁹ *Id.*

⁵⁰ *Id.* at 3730 ¶ 4.

⁵¹ *Id.* at 3867 ¶ 261.

and M[MS] ... were steady or declining,” due in part to the “emergence of data services that provide similar functionality.”⁵² For example, “the Apple iPhone’s iMessage service routes messages (to other iOS5 devices) through the customer’s mobile broadband data service instead of through an SMS or MMS service.”⁵³

The explosion in these services is “encouraging consumers to substitute Internet applications for mobile voice calls and traditional text messaging.”⁵⁴ As a result, not only are consumers substituting internet based messaging applications for CMRS, SMS and MMS applications, they are substituting mobile broadband service for “their service provider’s messaging bundles” to avoid “incurring ... per-message fees ... for pay-as-you-go text messaging.”⁵⁵ These messaging platforms also are substitutes for voice services.⁵⁶ This evidence is more than sufficient to support a determination that mobile broadband is a substitute for CMRS and is the functional equivalent of CMRS under Section 332(d)(3).

The increasing substitution of mobile broadband for traditional CMRS calling and messaging should not be surprising to CTIA or its members. The predecessor entity to one of its larger members, AT&T, prior to the adoption of the *Wireless Broadband Order*, urged the Commission to classify mobile wireless broadband internet service as CMRS. In making such recommendation, Cingular explained that “[w]ireless broadband access and advanced services provided by CMRS carriers fall within the statutory definition of ‘commercial mobile service.’ These services are, and will be, enhancements to today’s mobile service offerings—they will utilize the same cellular network architecture as the two-way mobile voice service, will use CMRS spectrum, and will allow seamless hand-off between cell sites as with mobile voice.”⁵⁷ The Commission should

⁵² *Id.* at 3711.

⁵³ *Id.* at 3871 ¶ 263.

⁵⁴ *Id.* at 3886 ¶ 280.

⁵⁵ *Id.* (“These include device-specific services like BlackBerry Messenger (“BBM”) for Blackberry smartphone users, and a number of downloadable third-party applications such as GroupMe, TextPlus, WhatsApp, Kik and Pinger. Analysts predict that these new services will cut into service providers’ text messaging revenues and profits by encouraging subscribers to bypass their providers’ text messaging offerings. In combination with the recent declines in the price per megabyte of mobile data services, these texting services may be encouraging subscribers to substitute data services for mobile voice service.”).

⁵⁶ *Id.* at 3885-86 ¶ 279 (“Consumers may consider voice calls and various messaging services to be close substitutes in certain circumstances.”).

⁵⁷ Comments of Cingular Wireless, LLC, *Wireless Broadband Access Task Force Seeks Public Comment on Issues Related to Commission’s Wireless Broadband Policies*, GN Docket No. 04-163, pp. 14-15 (filed June 3, 2004).

Marlene H. Dortch
December 11, 2014
Page 10

Morgan Lewis
C O U N S E L O R S A T L A W

heed the call and declare that mobile broadband is itself a CMRS or is at least the functional equivalent of CMRS under the Act.

Respectfully submitted,

/s/ Joshua M. Bobeck

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