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December 17, 2014

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

Via Electronic Filing

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

Dear Ms. Dortch,

On Monday, December 15, 2014, Lauren Wilson and I on behalf of Free Press met with Rebekah Goodheart, Commissioner Clyburn's Legal Advisor for Wireline issues, and Louis Peraertz, the Commissioner's Legal Advisor for Wireless, International and Public Safety issues. During the meeting, we chiefly discussed three matters in the above-captioned dockets:

- (1) the Commission's authority under Title II to adopt Open Internet rules applicable to mobile wireless broadband Internet access services;
- (2) broadband providers' now thoroughly discredited claims regarding the impact of Title II on their investment; and
- (3) the supposed imposition of new state taxes and fees on broadband Internet access service that reclassification allegedly would permit.

With respect to point number one, we explained that the Commission could indeed adopt rules against blocking and unreasonable discrimination by mobile wireless broadband Internet access providers under Title II, and that the CMRS definition and common carrier provisions of Section 332 are no barrier to such a ruling. Treating mobile wireless broadband Internet access as a telecommunications service, and preventing unreasonable discrimination against users of such service, would rectify a previous Commission's mistaken choice in the 2010 Open Internet order not to apply the same principles and same category of protections to all users of the Internet – no matter the technology or the platform they use to access it.

We discussed at length the legality of such a technology neutral application of these rules – so that the same rights would be afforded to mobile wireless users, even if reasonable network management might mean different things on different network architectures. We spent the balance of the meeting briefly reiterating presentations made in prior written *ex parte* filings by Free Press in the record of these proceedings – focusing on the often-claimed but never proven negative effects of Title II on broadband investment and taxes.

Section 332 Does Not Bar the Commission From Treating Mobile Wireless Broadband Internet Access as a Telecommunications Service or a Common Carrier Service.

In paragraph 149 of the *Notice of Proposed Rulemaking* in the instant proceeding,¹ the Commission sought comment on its authority to reclassify broadband Internet access, and specifically wireless broadband, as a telecommunications service. In that same passage, it noted that the Commission had also sought comment on these issues in GN Docket No. 10-127, and had asked questions then regarding Section 332's definition of commercial mobile service (commonly referred to as "CMRS"). The instant *Notice* then sought further and updated comments on these topics, making any suggestion that the Commission has not properly noticed this question impossible to square with these clear and comprehensive questions in that May 2014 item.

Section 332(d)(1) defines "commercial mobile service" as an interconnected service made available to the public and provided for a profit. Section 332(d)(2) in turn defines "interconnected service" as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . ." (emphasis added). Lastly, Section 332(d)(3) defines a private mobile service as any mobile service that is not a commercial mobile service (as defined above) or "the functional equivalent of a commercial mobile service." Each of these definitions are important and each one is clear, although wireless carriers have misinterpreted their plain meaning as well as the discretion they grant to the Commission.

As Free Press has demonstrated at great length, broadband Internet access service is an interstate telecommunications service under Section 153 of the Act.² It permits users to send and receive information of their choosing, between endpoints of their choosing, without change in the form or content of that information.³ Yet, as the argument made by some wireless carriers runs, the Commission is barred from treating mobile broadband Internet access as a telecommunications service because of the language in Section 332(c)(2) that prohibits common carrier treatment of private mobile services. The carriers' argument in this vein misses the mark, both from a technical standpoint and a legal one, for at least three reasons.

First, the Commission could quite readily conclude that mobile broadband service is interconnected with the public switched network today. A broadband subscriber may reach any and all telephone numbers by way of a Voice-using-IP application or similar interface that allows the broadband user to place and receive calls from telephone stations connected to that public switched network.⁴

¹ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 149 (2014).

² *See, e.g.*, Comments of Free Press, GN Docket No. 14-28, at 54-90 (filed July 18, 2014) ("Free Press July 2014 Comments")

³ *See id.* at 66-69; *see also* 47 U.S.C. § 153(50), (53).

⁴ *See* 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, at 3-4 (filed Dec. 10, 2014) ("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' 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.").

Some carriers may suggest emptily that broadband Internet access does not allow the connection of such telephone calls without a separate software interface or application; but this is akin to arguing that a mobile voice service is not a telecom service because it requires the use of a handset to make and receive such calls from the PSTN.⁵

Second, the arguments against treating mobile broadband Internet access as an interconnected service also ignore the “functional equivalent” language in Section 332(d)(3). As the Commission made clear when it adopted implementing rules for Section 332, it intended to construe the CMRS definition broadly and the private mobile definition narrowly in order to treat alike commercial services that function alike. The Commission thus interpreted the term “interconnected” to mean “direct or indirect connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider.”⁶ Mobile broadband Internet access networks that can be used to place telephone calls to PSTN numbers must, at minimum, be indirectly interconnected with the PSTN in order to allow for the completion of such calls.⁷

Third, even assuming that mobile broadband Internet access service were not directly or indirectly interconnected with the public switched according to the Commission’s current interpretations and definitions of the statute, the Commission has the discretion to modify those interpretations. As the language of Section 332(d)(1) makes clear, the terms “interconnected” and “public switched network” are to be defined by the Commission. The Commission has offered guidance on these terms in the implementing order for Section 332 cited above, and it formalized those interpretations and definitions in Section 20.3 of its rules, 47 C.F.R. § 20.3.

In sum, the Commission can and must reverse its mistaken decision in the 2007 *Wireless Framework Order*⁸ to classify mobile wireless broadband access as an information service. The definitions in Section 332 of the Act are not a bar to such a change in the classification of mobile services. And the Commission’s more recent use of the term “commercial data service” in the *Data Roaming Order* is likewise no impediment. The Commission there found it did not need to determine that broadband was a CMRS in order to adopt data roaming requirements,⁹ but it did not make any additional substantive findings with regard to the proper classification of wireless broadband service beyond the classification decisions and conclusions drawn in the *Wireless Framework Order*.

⁵ See *id.* (“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.”).

⁶ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1141, ¶ 56 (1994) (emphasis added).

⁷ See, e.g. Reply Comments of Center for Media Justice, Consumers Union, Media Access Project, and New America Foundation, GN Docket No. 10-127, at 42-45 (filed Aug. 12, 2010).

⁸ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

⁹ See, e.g., *Reexamination of the Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Service*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, ¶ (2011).

Broadband Providers' Claims Regarding the Supposed Negative Consequences of Title II for Broadband Investment and Tax Liability are False.

At the conclusion of the meeting, we discussed briefly some previously filed Free Press *ex parte* submissions in these dockets, attached as exhibits hereto. We focused on our refutation of the flawed US Telecom study purporting to show a decline in investment tied to Title II classification of the services offered over various networks.¹⁰ We also referenced statements made the week of December 8, 2014, by various Verizon, Comcast, Time Warner Cable, and Charter executives,¹¹ conclusively demonstrating their respective companies' plans for continued investment in broadband regardless of the Commission's classification decisions – proving the validity of Free Press's years of research and advocacy to this same effect.¹²

We described as well as our more recently filed, comprehensive explanation¹³ of how the renewed Internet Tax Freedom Act, coupled with the Commission's designation of broadband Internet access as an interstate telecom service, would combine to eliminate any purported new state and local taxes on broadband stemming from a Title II classification.

Respectfully submitted,

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¹⁰ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 21, 2014).

¹¹ See, e.g., Brian Fung, "Comcast, Charter and Time Warner Cable all say Obama's net neutrality plan shouldn't worry investors," Washington Post Switch blog, Dec. 16, 2014.

¹² See, e.g., Free Press July 2014 Comments at 90-125.

¹³ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Dec. 14, 2014).