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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Protecting and Promoting the Open Internet; Framework for Broadband Services* – GN Docket Nos. 14-28 & 10-127

Dear Ms. Dortch:

In § 332, Congress drew a bright line between the regulatory treatment of commercial mobile radio services (“CMRS”) and private mobile radio services (“PMRS”). *See* 47 U.S.C. § 332(d). In particular, an entity engaged in providing CMRS “shall, insofar as [it] is so engaged, be treated as a common carrier,” but an entity engaged in providing PMRS “*shall not . . . be treated as a common carrier for any purpose.*” *Id.* § 332(c)(1)(A), (c)(2) (emphases added).

In 2007, the Commission correctly classified mobile wireless broadband Internet access services as both PMRS under Title III *and* as information services under Title II. *See Wireless Broadband Declaratory Ruling*¹ ¶¶ 19-34 (information service), ¶¶ 37-47 (PMRS). Those separate findings constitute independent and equally sufficient barriers to regulating wireless broadband Internet access as a common carrier service. As the D.C. Circuit recognized, in light of those findings, “mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers.” *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).

Both of the Commission’s rulings were correct. We have discussed in other filings why wireless broadband Internet access was then — and remains today — an integrated service that satisfies the statutory definition of information service and, therefore, cannot be re-classified as a telecommunications service.² Here, we focus on recent claims from Public Knowledge and

¹ Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Declaratory Ruling*”).

² *See, e.g.*, AT&T Comments at 19-25, 44-49, GN Docket Nos. 14-28 & 10-127 (July 15, 2014); AT&T Reply Comments at 24-42, 60-90, GN Dockets No. 14-28 & 10-127 (Sept. 15, 2014).

others that the Commission should reclassify wireless broadband Internet access as CMRS so that it can impose common carrier obligations on wireless broadband providers.³ As explained below, the Commission could not do so as either a procedural or substantive matter: the Commission has provided no notice that it might amend those regulations, and the amendments that would be necessary to reclassify wireless broadband Internet access as CMRS conflict with the terms of the statute.

First, Public Knowledge urges the Commission to “update” its regulations defining key terms in Congress’s definition of CMRS: “interconnected service” and “public switched network.” Public Knowledge Ex Parte at 3-4. By “update,” however, Public Knowledge means “amend.” The Commission’s current regulations define an interconnected service as one that “gives subscribers the capability to communicate to or receive communication from all other users on the public switched network,” which is the “common carrier switched network[s]” that “use the North American Numbering Plan in connection with the provision of switched services.” 47 C.F.R. § 20.3. Public Knowledge contends that the Commission should “add” to that “regulatory definition” networks that use the Internet’s “IP addressing system.” Public Knowledge Ex Parte at 4.

The Commission, like all administrative agencies, is bound by its regulations unless and until it amends or repeals them. *See, e.g., American Fed’n of Gov’t Employees, AFL-CIO, Local 3090 v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985). Adding text to the existing definition in § 20.3 could be accomplished only through an amendment. *See, e.g., Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987) (Easterbrook, J.). The process for amending a rule is the same as the one for promulgating a rule: public notice and the opportunity for comment. *See, e.g., id.* But the Commission has not given any public notice that it might amend its regulations defining these key statutory terms, nor has it proposed any revised rules that it might adopt.

Public Knowledge nevertheless contends (at 1-2) that the Commission has given adequate notice. However, it can cite nothing that indicates that the Commission has proposed to amend its rules in this respect. The Commission asked whether wireless broadband Internet access “fit[s] within the definition of ‘commercial mobile service,’” citing § 332 and § 20.3. Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561, ¶ 150 & n.307 (2014). Asking about classification under the *current* rules provides no notice of an intention to *amend* those rules. *See, e.g., Solite Corp. v. EPA*, 952 F.2d 473, 499-500 (D.C. Cir. 1991) (finding that agency violated notice-and-comment requirement where, as here, “[n]othing . . . indicated that EPA was going to reconsider its” existing rule). The Commission, therefore, could not amend its definitions of “interconnected service” or “public switched network” without first issuing a notice of proposed rulemaking. Indeed, as demonstrated below, Public Knowledge’s arguments in favor of such amendments are subject to substantial legal, factual, and policy rebuttal, which further demonstrates why a notice and comment rulemaking would be necessary before any such change can or should be contemplated.

³ *See* Letter from Harold Feld, Public Knowledge, *et al.* to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Dec. 11, 2014) (“Public Knowledge Ex Parte”).

In all events, Public Knowledge’s proposed amendment is based on statutory language that the Commission fully considered when it adopted the current rules. The Commission specifically noted that in 1993 Congress used “the term ‘public switched network,’ rather than . . . ‘public switched telephone network’” in § 332(d)(2). *Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 59 (1994) (“*Second Report and Order*”). Furthermore, the FCC noted that the public switched network was “continuously growing and changing because of new technology.” *Id.* With all of that knowledge, the Commission defined the term to include “the traditional local exchange or interexchange switched network,” and viewed the use of NANP numbers as “a key element in defining the [public switched] network.” *Id.* ¶¶ 59-60. Revisiting the issue in 2007, the Commission explained that its references in the *Second Report and Order* to the “growing and changing” public switched network did not include the Internet, stating that both “section 332 and our implementing rules *did not contemplate* wireless broadband Internet access service as provided today.” *Wireless Broadband Declaratory Ruling* ¶ 45 n.119 (emphasis added). Indeed, Public Knowledge concedes (at 4) that “mobile broadband Internet access was unknown” when Congress enacted § 332.

Nothing in the legislative history supports Public Knowledge’s assertion (at 3) that — contrary to the Commission’s express conclusion — Congress chose the term “public switched network” rather than “public switched telephone network” because Congress was contemplating that the Internet might become the public switched network. In fact, Public Knowledge’s assertion is based on the fundamentally erroneous assumption that Congress, in choosing the Senate’s definition of CMRS rather than the House’s definition, was rejecting a bill that used the term “public switched telephone network” in defining CMRS. Instead, like the Senate’s version, the House version used the term “public switched network” in defining CMRS. H.R. 2264, § 5205 (May 27, 1993). Therefore, when Conference Committee “adopt[ed] the Senate definitions with minor changes,” H.R. Conf. Rep. 103-213 at 496, it was not choosing between competing definitions that used different terms to describe the network with which a CMRS service is interconnected. Nor does anything in the Conference Report suggest that the conferees viewed “public switched network” as having a meaning different from “public switched telephone network.” On the contrary, the conferees’ use of the two terms interchangeably — the conferees used “public switched telephone network” to describe the House bill, which actually used “public switched network,” *see id.* at 495-96 — demonstrates that they saw no substantive difference between the terms. Prior to 1993, courts and the Commission had likewise treated the terms interchangeably.⁴

Therefore, although Congress authorized the Commission to define the term “the public switched network,” 47 U.S.C. § 332(d)(2), that authority remains bounded by the text of the statute which — as the Commission correctly found in 1994 — is “the traditional local exchange or interexchange switched network.” *Second Report and Order* ¶ 59. Furthermore, Congress’s use of the definite article “the” and the singular “network” makes clear that there is a single “public switched network,” which forecloses Public Knowledge’s claim that the Commission

⁴ *See, e.g.,* Memorandum Opinion and Order, *Petition for Declaratory Ruling and Expedited Relief Filed by Aeronautical Radio, Inc. and the Air Transport Association of America*, FCC 86-123, 1986 WL 291339, ¶¶ 7-8 (Mar. 18, 1986) (using the terms interchangeably); *Public Util. Comm’n of Tex. v. FCC*, 886 F.2d 1325, 1327, 1330 (D.C. Cir. 1989) (same).

could redefine that term to include two separate networks — the PSTN and the Internet. When Congress recently established the nationwide public safety broadband network, Congress required that the safety system’s “core network” connect the radio access network to “the public Internet or the public switched network, or both.” 47 U.S.C. § 1422(b)(1). Congress’s use of the term “public switched network” in this context, which also involves interconnection, further confirms that the “public switched network” and the “public Internet” are two separate things. *See, e.g., New Hampshire v. Ramsey*, 366 F.3d 1, 26 (1st Cir. 2004).

Second, Public Knowledge urges the Commission to re-interpret its rule defining “interconnected service” so that it would treat consumers’ ability to use over-the-top VoIP and messaging applications to communicate with PSTN users as a capability of wireless providers’ broadband Internet access service itself. *See* Public Knowledge Ex Parte at 4-6.⁵ But, as the Commission has previously found, although some VoIP and messaging services are interconnected with the PSTN, the broadband Internet access service by itself is not. *See Wireless Broadband Declaratory Ruling* ¶ 45. In fact, providers of over-the-top VoIP and messaging services rely on other telecommunications carriers — normally CLECs — to provide users of over-the-top services with connectivity to the PSTN. It is those CLECs that are interconnected with the public switched network, and the VoIP and messaging providers that are interconnected with the CLECs. That consumers today are making greater use of these over-the-top services, or that some such services are now bundled with popular smartphone operating systems, does not change the fact that it is the over-the-top service, through its separate arrangement with a CLEC, that interconnects with the public switched network — not the broadband Internet access service. Indeed, the Commission recently reaffirmed that these over-the-top, interconnected applications are distinct from the underlying wireless broadband Internet access service in asserting authority to require those services to provide 911 bounceback messages. *See Report and Order, Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, 28 FCC Rcd 7556, ¶¶ 131-132 (2013).

Contrary to Public Knowledge’s claim (at 5), the recent rollout by some wireless carriers of Voice-over-LTE (“VoLTE”) does not change matters. VoLTE calls do not travel over the public Internet and, therefore, do not use the wireless broadband Internet access service. Wireless carriers’ investment in upgrading their voice networks to provide more efficient and higher quality voice service therefore provides no basis for reclassifying the separate wireless broadband Internet access service as an interconnected service.

Third, Public Knowledge urges the Commission to find that wireless broadband Internet access is the functional equivalent of CMRS and, therefore, not PMRS. *See* Public Knowledge Ex Parte at 6-8. In making this claim, Public Knowledge ignores what the Commission has previously described as the “principal inquiry” in determining whether a service is functionally equivalent to CMRS: “whether the service is a close substitute for CMRS.” *Second Report and Order* ¶ 80. The Commission used “substitute” there in the same way it is used in defining product markets in antitrust analysis: “whether changes in price for the service under

⁵ The rule defines interconnected service, in pertinent part, as one “[t]hat 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.” 47 C.F.R. § 20.3.

examination, or for the comparable commercial [mobile radio] service, would prompt customers to change from one service to the other.” *Id.* Wireless broadband Internet access is *not* a substitute for CMRS — and, therefore, not the functional equivalent of CMRS — under that test, as it is instead a complementary service, typically purchased alongside CMRS voice service. Public Knowledge points to no economic evidence of substitution to support its claim of functional equivalence, nor is there any in the record here. Public Knowledge is also wrong in claiming (at 8) that, as a procedural matter, the Commission could deem a declaration that wireless broadband Internet access is the functional equivalent of CMRS an interpretive rule that does not require notice and comment. Congress specifically directed that a service deemed the functional equivalent of CMRS would be “specified by regulation by the Commission.” 47 U.S.C. § 332(d)(3). Where a “statute defines a duty in terms of agency regulations, those regulations are considered legislative rules.” *USTA v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005). Moreover, a rule declaring a service that is not CMRS to be the functional equivalent of CMRS is legislative because, in the “absence of the rule there would not be an adequate legislative basis for . . . agency action to confer benefits or ensure the performance of duties” — here, common carrier duties. *American Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The Commission has not provided the required notice and opportunity to comment on a new legislative rule declaring wireless broadband Internet access to be the functional equivalent of CMRS. As discussed above, any such inquiry would require, among other things, notice seeking development of a full factual record as to whether wireless broadband Internet access is a substitute for CMRS. Neither Public Knowledge’s recent *ex parte* letter nor the earlier *ex parte* letter that it cites (at 8 n.28) identifies any instance in which the Commission anywhere even suggested that it might invoke its authority under § 332(d)(3) to promulgate such a rule, much less any attempt to seek comment as to the factual predicates that would be relevant to such a change.

Finally, Public Knowledge briefly suggests that classifying wireless broadband Internet access as CMRS or its functional equivalent is necessary to avoid a “statutory contradiction” if the Commission generally reclassifies broadband Internet access as a telecommunications service under Title II. *See* Public Knowledge *Ex Parte* at 8-9. As an initial matter, Public Knowledge is looking at things through the wrong end of the telescope: if there were any conflicting commands in the statute, they should lead the Commission to adhere to its correct conclusion that broadband Internet access is an integrated information service, rather than to ignore the plain language of § 332, under which wireless broadband Internet access is PMRS and not CMRS or its functional equivalent. In addition, the canon of construction that a “specific provision controls over one of more general application,” *e.g.*, *Golon-Peretz v. United States*, 498 U.S. 395, 407 (1991), requires the Commission to give effect to the more specific requirements of § 332 over its more general classification of broadband services under Title II. In § 332, which specifically governs wireless providers, Congress decided that common carrier status would turn *not* on whether a wireless provider’s service meets the definition of telecommunications service in § 153(53), but instead on whether that service meets the narrower definition of CMRS in § 332(d)(1) or is its functional equivalent. Because wireless broadband Internet access is PMRS, the Commission must enforce Congress’s specific and unambiguous command that PMRS “*shall not . . . be treated as a common carrier for any purpose.*” 47 U.S.C. § 332(c)(2) (emphases added). In sum, retaining the existing classification of broadband Internet access services as information services — and using the Commission’s authority under § 706 to adopt rules for

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those services — is the best (and only) means of ensuring the uniform treatment of all broadband services.

Sincerely,

/s/ Gary L Phillips