January 16, 2015

Via ECFS
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth 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. 10-127)

Dear Ms. Dortch:

On Thursday, January 15, 2015, Scott Bergmann and Krista Witanowski of CTIA – The Wireless Association® ("CTIA"), along with Adam Krinsky of Wilkinson Barker Knauer, LLP, met with Erin McGrath and Amy Bender of Commissioner O'Rielly's office to urge the Commission to adopt a mobile-specific, Title I approach it its open Internet rules. During the meeting, CTIA discussed the attached White Paper, *Section 332's Bar Against Common Carrier Treatment of Mobile Broadband: A Legal Analysis.*[1] As described in this paper, Section 332 forbids the Commission from subjecting services that are not commercial mobile service ("CMRS") or the functional equivalent thereof to common carrier mandates of Title II. As CTIA explained, mobile broadband is not a CMRS service, and the Commission may not reverse itself and declare otherwise. Likewise, mobile broadband is not the "functional equivalent" of CMRS. Mobile broadband therefore is a private mobile service ("PMRS"), and immune from common carrier regulation.

Of note, both in the meeting and in the White Paper, CTIA responded to an argument that reflects a simple misreading of the relevant authorities. Specifically, some have argued that CTIA has misstated the history of the legislation that defined CMRS under Section 332.[2] They claim that the legislative history shows that Congress intended the CMRS definition to involve interconnection with a "public switched network" that is different than the "public switched telephone network," but their reading – and their claim against CTIA's argument – is wrong. In particular, they assert that the Conference Committee chose the Senate version, which used "public switched network," over the House version, which they assert used the term "public switched telephone network," and they allege that Congress "expressly delet[ed] the word 'telephone' from Section 332's references to 'public switched

[1] *See* Letter from Scott K. Bergmann, CTIA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-137 (Dec. 22, 2014).
[2] *See* Letter from Michael Calabrese, OTI, Erik Stallman, CDT, and Harold Feld, PK, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 at 3 (Dec. 11, 2014) ("OTI/PK/CDT Letter"); Letter from Michael Calabrese, Open Technology Institute, New America Foundation, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 at 7 (Nov. 17, 2014).

network.'"[3] This is flatly untrue. In fact, *both* the House and Senate versions of the bill presented to the Conference Committee used the term "public switched network."[4] The language that commenters have cited comes *not* from the text of the House bill, but from the Conference Committee Report's *characterization* of that bill – specifically, its statement referring to the term "public switched network" as the "public switched *telephone* network."[5] The legislative history bolsters CTIA's position, as both bills used the term "public switched network" and Congress made clear that the phrase means "public switched telephone network." As CTIA has explained, this fact precludes the Commission from amending its definition of the term "public switched network" to include the broadband Internet.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being electronically filed via ECFS with your office. Please direct any questions to the undersigned.

Sincerely,

/s/ Scott K. Bergmann
Scott K. Bergmann

Attachment
cc (email): Erin McGrath
Amy Bender

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[3] OTI/PK/CDT Letter at 3.

[4] *Compare* 139 Cong. Rec. H2997 (reproducing House bill, which required that a service be "interconnected … with the public switched network" in order to constitute CMRS) *with* 139 Cong Rec S7913 (reproducing Senate bill, which also required the service to be "interconnected with the public switched network" to constitute CMRS).

[5] 139 Cong. Rec. H5792 at 495 (daily ed. Aug. 3, 1993) (emphasis added).

SECTION 332'S BAR AGAINST COMMON CARRIER TREATMENT OF MOBILE BROADBAND: A LEGAL ANALYSIS

December 22, 2014

Michael F. Altschul
Scott K. Bergmann
Krista L. Witanowski
CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036

Adam D. Krinsky
Russell P. Hanser
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037

Michael K. Kellogg
Scott H. Angstreich
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

TABLE OF CONTENTS

INTRODUCTION 1

I. THE ACT PROHIBITS THE COMMISSION FROM SUBJECTING MOBILE BROADBAND TO COMMON CARRIER MANDATES 2

A. Mobile Broadband is Not CMRS. 2

B. Mobile Broadband is Not the "Functional Equivalent" of CMRS. 13

C. Mobile Broadband is PMRS and Immune From Common Carrier Regulation. 18

II. MOBILE BROADBAND IS AN INTEGRATED INFORMATION SERVICE WITH NO SEPARATE "TELECOMMUNICATIONS SERVICE" COMPONENT 19

III. THE ACT BARS ANY "HYBRID" RECLASSIFICATION APPROACH TO MOBILE BROADBAND 21

A. Section 332 Prohibits the Commission From Subjecting a Hybrid "Service" to Common Carrier Mandates 22

B. Section 3 Precludes the Commission From Pursuing The Hybrid Approach 24

CONCLUSION 26

INTRODUCTION

While CTIA – The Wireless Association® ("CTIA") and its members are committed to preserving an open mobile Internet, any new rules in this area must rest on a solid legal foundation – one that is consistent with the Communications Act of 1934, as amended (the "Act") and will withstand judicial scrutiny. And on one point in particular, the Act is clear: Under Section 332, mobile broadband may not, under any circumstances, be subjected to common carrier treatment under Title II. The Commission may move forward to help preserve an Open Internet pursuant to section 706, but may not legally apply Title II mandates to mobile broadband services.

Specifically, Section 332 erects barriers to common carrier regulation of mobile broadband that extend beyond the restrictions that other provisions of the Act establish for broadband offerings generally. Moreover, this bar applies regardless of whether the Commission wrongly reverses 15 years of precedent and declares that the broadband offering sold to end users includes a distinct telecommunications service or if it pursues a "hybrid" approach that, for the first time, identifies a distinct "service" purportedly offered to edge providers and declares that to be a telecommunications service.

Several parties attempt to read the Section 332 prohibition out of the statute, articulating far-fetched theories under which the provision simply does not mean what it says. Their arguments are not properly addressed in this proceeding, as the Commission has not provided any notice to support the legislative rules they seek here. In any event, those arguments cannot be squared with the statutory text or this Commission's decisions. As the Commission held 20 years ago and the D.C. Circuit has confirmed, Congress intended only mobile offerings that mimic traditional telephone service to be subject to common carrier treatment. All other mobile offerings, including mobile broadband, are "private" offerings, for which Section 332 expressly

prohibits common carrier treatment. There is thus no lawful basis for subjecting mobile broadband offerings to common carrier obligations.

I. THE ACT PROHIBITS THE COMMISSION FROM SUBJECTING MOBILE BROADBAND TO COMMON CARRIER MANDATES

Section 332(c) forbids the Commission from subjecting services that are not CMRS or the functional equivalent thereof to common carrier mandates. Section 332(c)(2) provides that the Commission "shall not" treat any private mobile service ("PMRS") provider "as a common carrier for any purpose." 47 U.S.C. § 332(c)(2). Section 332(d)(3), in turn, 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." *Id.* § 332(d)(3).

Thus, the Commission may only subject mobile broadband services to Title II if those services are commercial mobile services ("CMRS") or the functional equivalent of CMRS. As detailed below, they are not.

A. Mobile Broadband is Not CMRS.

Section 332(d) defines CMRS as an "interconnected service" made available for profit to a substantial portion of the public, *id.* § 332(d)(1), and defines "interconnected service" to mean "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)," *id.* § 332(d)(2).

The Commission first interpreted the key terms CMRS and PMRS in 1994's *Second CMRS Order*. *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1434 ¶ 54 (1994) ("*Second CMRS Order*"). In defining the "public switched network" component of the CMRS definition, the Commission emphasized that Congress was referring to the traditional *telephone* network:

> [A]ny switched common carrier service that is interconnected with the *traditional local exchange or interexchange switched network*

> will be defined as part of that network for purposes of our definition of "commercial mobile radio services."
>
> . . . 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 participants in the Plan.

Id. at 1436-37 ¶¶ 59-60 (emphases added). Accordingly, in section 20.3, the Commission defined "public switched network" to mean "[a]ny common carrier switched network . . . 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." 47 C.F.R. § 20.3.[1]

More recently, in 2007, the Commission explained that Section 332(c) and its implementing rules barred it from classifying mobile broadband as common carriage. It first found that "mobile wireless broadband Internet access service does not fit within the definition of 'commercial mobile service' because it is not an 'interconnected service.'" *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5916-17 ¶¶ 41-43 (2007) ("*Wireless Broadband Order*"). The Commission reiterated its 1994 determinations that the CMRS definition requires "interconnect[ion] with the traditional local exchange or interexchange switched network," and 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.'" *Id.* at 5917 ¶ 44, *quoting*

[1] This language unequivocally rebuts Vonage's suggestion, Letter from William B. Wilhelm, Counsel for Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 6 (Dec. 11, 2014) ("Vonage Letter"), that the Commission "explicitly rejected" an interpretation linking the CMRS definition to voice services traversing the traditional telephone network.

Second CMRS Order, 9 FCC Rcd at 1436-37 ¶¶ 59-60. Because "[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," it "does not meet the definition of 'interconnected service," and therefore is not CMRS. *Wireless Broadband Order* at 5917-18 ¶ 45, *citing* 47 C.F.R. § 20.3. The Act calls for common carrier treatment only of CMRS, not of PMRS, and thus precludes such treatment for mobile broadband. *Id.* at 5919-20 ¶¶ 48-51. While the Commission noted that, in the *Second CMRS Order*, it had stated that the public switched network was "'continuously growing and changing because of new technology and increasing demand,'" the Commission held that both "section 332 and [its] implementing rules did not contemplate wireless broadband Internet access service as provided today." *Id.* at 5918 ¶ 45 n.119.

The Commission reiterated this core point under Chairman Genachowski, stating in a 2012 brief to the D.C. Circuit that "CMRS is defined as a mobile service that is 'provided for profit,' 'interconnected' to the public switched *telephone* network." Brief for Respondents, *Cellco P'ship v. FCC*, Case Nos. 11-1135, 11-1136, at 7 (D.C. Cir. Mar. 8, 2012) (emphasis added).

The D.C. Circuit has twice confirmed that Section 332, as long interpreted by this Commission, precludes the Commission from regulating mobile broadband as common carriage. First, in the 2012 *Cellco* decision on data roaming, the court explained that "section 332 specifies that providers of 'commercial mobile services,' such as wireless voice-telephone service, are common carriers, whereas providers of other mobile services are exempt from common carrier status." *Cellco P'Ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012). The court determined that this framework erects a "statutory exclusion of mobile-internet providers from common carrier

status." *Id.* at 544. Given the separate bar against common-carrier treatment of information services, the court noted further, mobile broadband providers were "statutorily immune, perhaps twice over," from such treatment. *Id.* at 538. Therefore, "[e]ven though wireless carriers ordinarily provide their customers with voice and data services under a single contract, they must comply with Title II's common carrier requirements only in furnishing voice service." *Id.* at 538.

In 2014, the D.C. Circuit again addressed the issue in its review of the Commission's *Open Internet Order*. In that order, the Commission conceded that Section 332(c)(2) bars the application of common carrier mandates to mobile broadband, but argued that the provision did not constrain its actions because the rules it was adopting did not impose common carriage. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17950 ¶ 79 & n.247 (2010), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The court disagreed with this latter proposition in *Verizon*, overturned the Commission's rules, and emphasized that "treatment of mobile broadband providers as common carriers would violate section 332." *Verizon*, 740 F.3d at 650.

The Commission may not reverse itself and declare that mobile broadband is CMRS. A handful of commenters have argued that the Commission should amend its current rules in section 20.3 to redefine the "public switched network" to include the Internet. *See* Letter from Michael Calabrese, Director of the Wireless Future Project, Open Technology Institute ("OTI"), New America Foundation to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Nov. 10, 2014) ("OTI Letter"); Vonage Letter; Letter from Gene Kimmelman, President, Public Knowledge ("PK"), to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (Nov. 7, 2014) ("PK Letter"); Letter from Harold Feld, Sr. Vice President, PK, Michael

Calabrese, Director, Wireless Future Project, OTI and Erik Stallman, Director of the Open Internet Project, Center for Democracy & Technology ("CDT"), to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Dec. 11, 2014) (filed as Public Interest Organizations) ("OTI/PK/CDT Letter"); Letter from Marvin Ammori to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Nov. 12, 2014) ("Ammori Letter"). This argument fails – the Commission has no authority to pursue such an interpretation of section 332.

As an initial matter, the Commission has not provided the requisite notice for any such amendment. The Administrative Procedure Act ("APA") requires an agency to provide notice of proposed rule changes. *See* 5 U.S.C. § 553. An "[a]gency notice must describe the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). Here, the *Notice* asked only whether mobile broadband Internet access service "fit[s] … the definition of 'commercial mobile radio service.'" *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5614 ¶ 150 (2014). It never asked whether "the definition" – set out in Section 20.3 – should be changed, or provided notice that it might be. Indeed, while the *Notice* proposed specific additions and changes to various Commission's rules, it never raised the possibility of amending section 20.3. Comments in the record cannot substitute for the required notice from the Commission. The legally mandated "notice necessarily must come – if at all – from the agency." *Small Refiner*, 705 F.2d at 549. Thus, the Commission could not amend section 20.3 without first providing notice and seeking comment on such a modification. Moreover, any amendment to Section 20.3 would have implications well beyond the Open Internet context and could well affect the interests of parties not participating in this docket, further compounding the notice failure. Moreover, if it were not legally barred from amending Section 20.3 (and it is), the

absence of notice creates substantial risk that any such amendment would fail to account for the broad and substantial implications stemming from expansion of the CMRS definition.

In any event, there is no statutory basis for the reinterpretation urged by these commenters. While Section 332 directs the Commission to define "public switched network" by regulation, that definition must be consistent with the statutory text and congressional intent. Here, whatever limited discretion the Commission has as to that definition, it cannot be interpreted broadly enough to cover the broadband Internet.

Indeed, when Congress used the term "public switched network" in 1993, it did so knowing that the Commission and the courts had routinely used that term interchangeably with "public switched *telephone* network."[2] It is axiomatic that, when Congress "borrows" a term of

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[2] *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982) ("[WATS] calls are switched onto the interstate long distance telephone network, known as the public switched network, the same network over which regular long distance calls travel.") (quoted in *American Tel. and Tel. Co.; Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, Memorandum Opinion and Order, 91 FCC2d 338, 344 ¶ 16 (1982)); *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC Rcd 719, 720 ¶ 9 (1992) (Commission's cellular service policy is to "encourage the creation of a nationwide, seamless system, *interconnected with the public switched network* so that cellular and landline telephone customers can communicate with each other on a universal basis.") (emphasis added)), *recon. on other grounds*, 8 FCC Rcd 2834 (1993), *further recon. on other grounds*, 9 FCC Rcd 4487 (1994); *Provision of Access for 800 Service*, 6 FCC Rcd 5421, 5421 ¶ 1 n.3 (1991) ("800 numbers generally must be translated into [plain old telephone service] numbers before 800 calls can be transmitted over the public switched network."), *recon. on other grounds*, 8 FCC Rcd 1038 (1993); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, 7190 ¶ 20 (1990) ("subscribers to every telephone common carriers' interstate service, including private line, public switched network services, and other common carrier services"); *MTS and WATS Market Structure*, Order Inviting Further Comments, 1985 FCC LEXIS 2900 at *2 (Fed.-State Jt. Bd. 1985) ("costs involved in the provision of access to the *public switched network*[] are assigned . . . on the same basis as . . . the local loop used by subscribers to access the *switched telephone network*.") (emphasis added)); *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC2d 689, 690 ¶ 2 n.3 (1981) ("the public switched network interconnects all telephones in the country.").

art that has been given meaning by the courts or the relevant agency, it "intended [that term] to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). In this case, Congress – like the courts and the Commission before it – used "public switched network" to mean "public switched telephone network."

This point is confirmed by the text of the more recently enacted Section 1422(b)(1), which established the FirstNet public safety radio network. In that provision, adopted in 2012, Congress distinguished between the "public switched network," on the one hand, and the "public Internet," on the other, demonstrating that nearly 20 years after 1993, Congress continued to view these as different and separate networks. 47 U.S.C. § 1422(b)(1). This fact belies any suggestion that Congress used the term "public switched network" in a way that could be interpreted to include the broadband Internet.

Moreover, Section 332(d)(2) addresses interconnection with "*the* public switched network." Congress's use of that phrasing demonstrates that it meant for there to be only one such network; the CMRS definition does not contemplate offerings that interconnect with either of two separate networks.

The relevant legislative history further confirms that the Congressional understanding is inconsistent with defining the Internet to be ***the*** "public switched network." The Conference Report accompanying the legislation confirms that, though Congress used the term "public switched network," it viewed that term as synonymous with "the Public switched *telephone* network." H.R. Rep. No. 103-213, at 495 (1993) (Conf. Rep.) (emphasis added) ("OBRA Conference Report"). OTI, PK, and CDT claim that the legislative history supports the opposite reading, but they have misread the Conference Committee's Report. Citing page 495 of the Conference Report, they contend that the House version of the bill used the term "public

switched telephone network," and that the Conference Committee chose the Senate version, which dropped the word "telephone." *See* OTI/PK/CDT Letter at 3-4; OTI Letter at 7-8. These groups exclaim in bold, italicized text that Congress "expressly delet[ed] the word 'telephone' from Section 332's references to 'public switched network,'" but this is not true. The House and Senate versions of the bill (attached as Exhibit 1) *both* used the term "public switched network." *See* 139 Cong. Rec. H2997 (reproducing H.R. 2264, the House's version of the bill, which (in section 5205(d)(1)(B)) required that a service be "interconnected … with the public switched network" in order to qualify as CMRS). Therefore, the claim that Congress chose statutory text that used the term "public switched network" over text that used "public switched telephone network" is factually wrong. The Conference Report language to which OTI, PK, and CDT refer (attached as Exhibit 2) does not *quote* the House bill, but rather *describes* it – and characterizes it as requiring interconnection "with the Public switched telephone network," OBRA Conference Report at 495, even though the legislation itself used the term "public switched network." This, of course, *confirms* (rather than refutes) the conclusion that Congress meant the term "public switched network" to mean "public switched telephone network," and that the Commission cannot adopt a contrary definition in section 20.3 of its rules.

Lacking any textual basis for their claims, commenters resort to conclusory assertions regarding Congress's intent. OTI, PK, and CDT state that "it would have been extraordinarily shortsighted if Congress had tied the Commission's hands to such a degree that only wireless services directly interconnected with the telephone system and using the North American Numbering Plan (NANP) could be regulated as a common carrier[s] for any purpose." OTI/PK/CDT Letter at 6-7; OTI Letter at 2. But this argument simply *assumes* the point it purports to prove – that Congress would have wanted the Commission to subject mobile

broadband to common carrier requirements. In fact, the evidence shows otherwise: Congress specifically established CMRS and PMRS as distinct categories, specifically limited CMRS to offerings that interconnected to the public switched telephone network, specifically deemed all other offerings to be PMRS, and specifically exempted PMRS from common carrier treatment. These actions show that Congress intended to exempt mobile Internet offerings from common carrier regulation. As noted above, the Commission recognized this very point, explaining that "section 332 . . . did not contemplate wireless broadband Internet access service as provided today." *Wireless Broadband Order*, 22 FCC Rcd at 5918 ¶ 45 n.119.

That point is bolstered, not undercut, by the fact that Congress in 1993 was aware of the emerging Internet. *See* OTI/PK/CDT Letter at 4; OTI Letter at 5. If 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. But it chose instead to draw a sharp distinction between traditional common-carrier offerings and other offerings, and exempted the latter from common carrier regulations. Indeed, this was Congress's principal intention in adopting Section 332(c) – namely, to ensure that common carrier voice services interconnected with the traditional network were treated alike while encouraging investment and innovation in new, advanced networks by leaving them unburdened by those rules.

Likewise, Ammori suggests that the Commission can redefine the statutory terms because "the Internet is so central to American life and business that it has become the nation's 21st Century public switched network and the current definition should be seen as outdated." Ammori Letter at 2. This, however, is a policy choice for Congress to make, not the Commission. Congress did not tie the CMRS designation to the "centrality" of the network a service uses, but instead limited the term to services that interconnect with the public switched

telephone network. In any event, there is more than a little irony in this argument, given that the mobile broadband Internet has become "central to American life" *without* being classified as CMRS or subject to common-carrier duties. There is thus no reason to believe that Congress would have intended the mobile broadband Internet's importance to provide a basis to include it within the definition of the public switched network, or that the courts would ever accept such an interpretation.

The Commission may not determine that mobile broadband is interconnected. OTI and Vonage further argue that mobile broadband already *is* an interconnected service as that term is *currently* defined, because (in OTI's words) "broadband users quite readily can call any telephone number they wish using their broadband connection." OTI Letter at 5. *See also* Vonage Letter at 5 (contending that the statute never uses the term "in and of itself" and suggesting that one service (mobile broadband) can be regulated based on the characteristics of a *different* service).

The Commission has already expressly rejected that argument. In the *Wireless Broadband Order*, it held that, even though VoIP or other applications that ride over mobile broadband Internet service may provide an interconnected service, the underlying mobile broadband service "itself is not an 'interconnected service' as the Commission has defined the term." *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45. In short, services are classified and regulated on the basis of their *own* features. Mobile broadband might well facilitate use of VoIP offerings, but the provision of a VoIP offering is atop the broadband service, and constitutes its own offering. Mobile broadband does not provide dial tone, does not offer the user access to NANP endpoints, and does not "interconnect[]" with the public switched network. Broadband service allows access to video, but it is not a broadcast television or cable service. It

offers access to Facebook and Instagram and LinkedIn, but it is not a social network. Broadband is not a newspaper or a financial service, even though users can read headlines or purchase stocks online, nor is broadband a bookstore, a music streaming service, or a search engine. So too, broadband is not VoIP, and cannot be said to offer interconnection with the public switched network simply because its users can access other services that do. Indeed, the suggestion that over-the-top VoIP services interconnect with the PSTN is itself untrue: These providers historically have delivered traffic to a local exchange carrier, and it is that carrier – not the VoIP provider, let alone the mobile broadband provider – that interconnects with the PSTN. *See, e.g.*, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3514 ¶ 2 (WCB 2007).

Other claims seeking to conflate VoIP with mobile broadband for classification purposes are similarly misguided. First, the assertion that the need to use a VoIP application is no different from the need to use an end-user device, and thus not determinative of whether mobile broadband service qualifies as CMRS, *see* OTI/PK/CDT Letter at 5-6; Ammori Letter at 1-2, is simply wrong. The VoIP application is distinct from the broadband offering over which it rides and, as Commission precedent establishes, must be evaluated on its own terms. Second, it is irrelevant whether VoIP applications "come bundled with" a device's "operating system." OTI/PK/CDT Letter at 6. Rather, VoIP and mobile broadband are distinct, and each is subject to its own regulatory framework. Finally, while commenters might not like Congress's framework, the need to use a separate application to access a particular service *is* relevant to classification questions. Indeed, the Commission in 2007 held that the "need to rely on another service or

application" was not only relevant, but *determinative* as to classification of a service. *Wireless Broadband Order*, 22 FCC Rcd at 5917-18 ¶ 45.

Ultimately, the approach advocated by Vonage and others would upend the Commission's entire regulatory framework by conflating over-the-top services of all types with the broadband offerings on which they ride. The effects of such a framework would reverberate throughout the Internet ecosystem, eviscerating decades' worth of Commission precedent and creating debilitating uncertainty. The Commission must reject this outcome, particularly where, as here, the absence of APA notice has left it without the benefit of comprehensive and meaningful comment on these issues.

B. Mobile Broadband is Not the "Functional Equivalent" of CMRS.

OTI, PK, and CDT contend that that the Commission should deem mobile broadband the "functional equivalent" of CMRS, *see* OTI/PK/CDT Letter at 6-8; OTI Letter at 4-8; PK Letter at 3-5. That argument, however, is not presented here, as the *Notice* does not raise this question (which would require a significant factual record), and, in any case, its proponents cannot overcome the hurdles erected by Congress.

The FCC Has Failed to Provide Notice. The Commission has not provided notice that it might deem mobile broadband the "functional equivalent" of CMRS. As mentioned above, the *Notice* asked only whether mobile broadband might be deemed CMRS. But the term "functional equivalence" does not appear in the definition of CMRS. Rather, it appears in the definition of PMRS, which is defined to include "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." *Id.* § 332(d)(3). Having declined to seek comment on the PMRS definition generally or the "functional equivalent" language in particular, the Commission cannot "specify

by regulation" based on the existing record that mobile broadband is the functional equivalent of CMRS.

The Commission cannot rely on Administrative Procedure Act's exception for interpretive rules to excuse its failure to provide notice and an opportunity to comment the "functional equivalence" question. As noted above, Congress specifically directed that any 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). Even aside from that clear Congressional directive to use legislative rules to identify services that are the functional equivalent of CMRS, a declaration that a service is the functional equivalent of CMRS meets the test for a legislative rule because it would have "'legal effect.'" *American Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Specifically, in the "absence of the rule there would not be an adequate legislative basis for . . . agency action to . . . ensure the performance of duties" — namely, the common carrier obligations that some urge the Commission to impose on providers of wireless broadband Internet access services. *Id.* As the D.C. Circuit recently reiterated, the "most important factor" in determining whether a rule is legislative or interpretive is "the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *National Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). The effect of any "interpretation" of § 332(d)(3) finding that wireless broadband Internet access is the functional equivalent of CMRS — indeed, the very purpose of such an interpretation — is to impose new common-carrier obligations on providers of that service. For all these reasons, the Commission could not adopt a rule finding

that wireless broadband Internet access is the functional equivalent of CMRS without first providing notice and comment — which the Commission has never provided.

Mobile Broadband is Not the Functional Equivalent to CMRS. Nor is there any factual or legal basis for a finding of functional equivalence. "Congress's purpose," the Commission has concluded, was to treat as CMRS only a "'mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network.'" *Wireless Broadband Order*, 22 FCC Rcd at 5917 ¶ 44. Congress intended the hallmark of CMRS to be the provision of interconnected service through use of the PSTN. No service lacking this essential attribute could amount to a functional equivalent of CMRS. The functional equivalent language was intended to ensure that "'similar services are accorded similar regulatory treatment.'" *Second CMRS Order*, 9 FCC Rcd at 1418 ¶ 13 (quoting OBRA Conference Report at 494). To that end, the Commission observed that the primary criterion in determining whether a given service is the functional equivalent of CMRS is "whether the service is a close substitute for CMRS," *id.* at 1448 ¶ 80.[3] It further made clear that it was principally concerned with traditional economic criteria for substitutability: "For example, we will evaluate whether changes in price for the service under examination, or for the comparable commercial service, would prompt customers to change from one service to the other." *Id.* There is no evidence in the record that customers are dropping CMRS in favor of mobile broadband – and particularly no evidence that they are doing so in favor of mobile broadband

[3] Thus, for example, the Commission found that automatic vehicle monitoring systems "do not offer interconnected service" and thus are presumptively classified as PMRS, but explained that, if they "develop interconnected service capability in the future . . . they will be subject to reclassification." *Second CMRS Order*, 9 FCC Rcd at 1453 ¶ 99. Likewise, 220-222 MHz private land mobile services "that are not interconnected . . . will be presumptively classified as PMRS," *id.* at 1452 ¶ 95, and SMR services might be either, depending on whether they are interconnected, *id.* at 1451 ¶¶ 90-91.

itself. In all events, the need to develop a record as to such issues demonstrates why it would be both necessary and appropriate to seek comments on these matters, which the Commission has never done, before addressing these claims.

Contrary to some parties' apparent belief, references to the House Report's discussion of "private carriers" that were "permitted to offer what are essentially common carrier services," OTI/PK/CDT Letter at 7, *quoting* H.R. Rep. 103-111 at 586-87, in fact undercut these parties' functional equivalence argument. That Report explicitly recognized that the functional equivalence prong was limited to services that were "interconnected with the public switched *telephone* network." *See id.* (emphasis added).

OTI contends that "mobile broadband is … the functional equivalent of what a commercial mobile service was in 1993," OTI Letter at 4, because its users can access the PSTN "through use of VoIP applications," *id.* at 6. Others similarly contend that the Commission should deem mobile broadband CMRS's functional equivalent because "phones using mobile broadband are capable of replicating the functions of CMRS phones." PK November 7 Letter at 5; Vonage Letter at 9. As noted above, however, these arguments confuse the service offered by a VoIP provider (and its CLEC partner) from the separate broadband Internet access offering.

Public Knowledge's suggestion that mobile broadband is (or is about to become) "indistinguishable from Title II wireline service" is flatly wrong. The two services differ dramatically: VoIP offers only the ability to engage in voice communications, whereas mobile broadband "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," *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 26, including "email, newsgroups, and interaction with or hosting of web pages," *id.* at 5910 ¶ 25, not to mention the

huge array of apps that have arisen since the *Wireless Broadband Order*'s release. Indeed, the repeated references to VoIP highlights that mobile broadband is not the functional equivalent of CMRS – the mobile *broadband* service that carries VoIP traffic is not in and of itself the voice service offered by either CMRS or VoIP, and mobile broadband is not a "close substitute" for mobile voice. (Similarly, voice over LTE ("VoLTE") is a distinct offering and cannot render the broadband offering CMRS.) In all events, even if this position were potentially tenable – and it is not – the Commission would need to create a factual record as to the substitutability of these services using traditional economic analysis. The Commission has not even sought to create such a record to date.

Nor is there any merit to the claim that the Commission must deem mobile broadband the functional equivalent of CMRS to resolve a potential contradiction between (1) Section 3's requirement that a telecommunications service be subject to common carrier requirements and (2) Section 332(c)(2)'s prohibition against subjecting PMRS to such requirements. *See* OTI Letter at 2; Ammori Letter at 1; OTI/PK/CDT Letter at 8-9. OTI, PK, CDT, and Ammori have things backwards: 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 Section 332, under which mobile broadband is 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.*, *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991), resolves any possible conflict. That canon requires that the Commission give effect to the more specific requirements of Section 332, which govern wireless providers, and which were intended to ensure that private mobile services such as mobile broadband remained immune from common carrier mandates. Notably, Congress in that section

decided that common carrier status would turn *not* solely on whether a wireless provider's service meets the definition of telecommunications service in Section 153(53), but also on whether that service meets the narrower definition of CMRS in Section 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), regardless of the Commission's applications of the definitions of telecommunications service and information service in Section 153.

C. Mobile Broadband is PMRS and Immune From Common Carrier Regulation.

PMRS, as noted above, is defined by statute to mean "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." *Id.* § 332(d)(3).

Vonage is wrong to suggest that this provision is immaterial because sections 301 and 303 give the Commission authority over mobile service that is "independent of Section 332." Vonage Letter at 3-4. The D.C. Circuit firmly rejected this position in both *Cellco* and *Verizon*, explaining that Section 332's limitations trump affirmative grants of power elsewhere in the Act. Thus, in *Cellco*, the court "concluded that Title III authorizes the Commission to promulgate the data roaming rule," but nevertheless had to face "the critical issue" – whether the rule on review "contravene[d] the Communications Act's prohibition against treating mobile-internet providers as common carriers." *Cellco*, 700 F.3d at 544. The *Verizon* court likewise held that, notwithstanding provisions affording the FCC regulatory authority over broadband service, it was "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers." *Verizon*, 740 F.3d at 650.

For the reasons discussed above, mobile broadband is not, and cannot be, either CMRS or its functional equivalent. It therefore is PMRS, and cannot be subject to common carrier requirements.

II. MOBILE BROADBAND IS AN INTEGRATED INFORMATION SERVICE WITH NO SEPARATE "TELECOMMUNICATIONS SERVICE" COMPONENT

As explained above, Section 332 provides an independent and complete barrier to imposing common carrier duties on mobile broadband providers. But there is a separate, and equally sufficient, barrier to imposing those duties: mobile broadband services meet the definition of "information service" and the Commission cannot sub-divide mobile broadband services into 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." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 991 (2005) ("*Brand X*"). Ever since the Commission's 1998 *Report to Congress*, which concluded that broadband providers "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service," *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11540 ¶ 81 (1998), the Commission consistently has held that broadband Internet access is an integrated information service, *see, e.g.*, *Wireless Broadband Order*, 22 FCC Rcd 5901. The Supreme Court, of course, has upheld that approach. *See Brand X*, 545 U.S. 967. When the Commission examined mobile broadband 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 concluded that wireless

broadband "meets the statutory definition of an information service under the Act." *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 26.

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 that CTIA has entered into the record, as mobile technologies and networks have evolved, "subscribers are increasingly using advanced networks for multiple simultaneous data services," necessitating "[e]xtensive and complex processing in the mobile broadband network…." 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, CTIA, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 (filed Sept. 4, 2014). They 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 other activities made possible by mobile broadband. Indeed, "[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" *Id.* 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.

Further, a decision splitting broadband Internet access into discrete "telecommunications service" and "information service" components would be especially vulnerable on appeal in light the Supreme Court's 2009 decision in *FCC v. Fox Television Stations, Inc.* 556 U.S. 502 (2009). 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" in two circumstances:

(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." *Id.* at 515. Any decision to reclassify mobile broadband service would implicate both of these circumstances, because it would (1) reflect new factual findings contradicting previous findings and (2) disrupt established reliance interests.

Indeed, the Commission expressly invited the reliance at issue here: When 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." *Wireless Broadband Order*, 22 FCC Rcd at 5911 ¶ 27. The result has been clear: America's wireless companies have "invested hundreds of billions of dollars in their networks in reasonable reliance on their Title I status." *See* Comments of TechFreedom, GN Docket Nos. 14-28, et al, at 95 (July 17, 2014). Wireless providers have invested over $113 billion in capital expenditures since 2010 alone, including a record $33 billion in 2013. *See* CTIA Ex Parte, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (Oct. 1, 2014), http://apps.fcc.gov/ecfs/document/view?id=60000870154.

III. THE ACT BARS ANY "HYBRID" RECLASSIFICATION APPROACH TO MOBILE BROADBAND

Any effort to pursue a so-called "hybrid" reclassification of mobile broadband service would likewise be unlawful. As CTIA understands the hybrid approach, the Commission would leave intact its prior holdings that broadband Internet access service provided to subscribers is an integrated information service, but would, for the very first time, identify a new "remote host

service" that is provided by the broadband provider to the edge (or content) provider, and declare *that* offering to be a telecommunications service. *See* Mozilla, *Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services under Title II of the Communications Act*, GN Docket Nos. 14-28, 10-127 & 09-191 at 4-5, 9 (May 5, 2014); Letter from Tim Wu and Tejas Narechania, Columbia Law School, to Marlene H. Dortch, FCC, *Open Internet Remand*, GN Docket No. 14-28 (Apr. 14, 2014). The hybrid approach has multiple legal infirmities that apply in the context of fixed and mobile services alike, as well as separate mobile-specific barriers grounded in Section 332(c)(2). And like "complete" reclassification, hybrid reclassification of mobile broadband is simply incompatible with the facts.

A. Section 332 Prohibits the Commission From Subjecting a Hybrid "Service" to Common Carrier Mandates

Section 332(c)(2) bars the Commission from imposing common carrier regulation on a mobile broadband provider's "service" offered to edge providers. Again, the "service" at issue is the broadband provider's delivery of the edge provider's content to the broadband provider's own subscriber over its last-mile facilities, purportedly on the edge provider's behalf. This "service" clearly is not CMRS or its equivalent, both because it is not "interconnected" with the public switched network (which, as discussed above, means the public switched *telephone* network) and also because it is not offered "for profit."

As a threshold matter, one commenter, Public Knowledge, seeks to evade the Section 332(c) analysis by asserting that "'[s]ender-side' broadband … is not mobile or necessarily wireless," given that the edge provider's server "sits at a fixed location." Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, FCC, GN Docket Nos. 10-127, 14-28 (Oct. 24, 2014). The statute, however, dictates otherwise. Section 332(d) establishes that both PMRS and

CMRS are mobile services "*as defined in section 153 of this title*," (i.e., Section 3 of the Act). 47 U.S.C. § 332(d)(1) & (d)(3) (emphasis added). That provision defines the term "mobile service" to mean "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," and specifies that the term includes "both one-way and two-way radio communication services." *Id.* § 153(33). Under this statutory definition, mobile broadband providers are indisputably providing a "mobile service" even with respect to the edge provider. In particular, the delivery of content over the wireless last mile is "a radio communication service carried on between mobile stations or receivers and land stations," and it is such even if one conceives of the sender-side service as a "one-way" service.

Thus, the offering at issue is a "mobile service" under Section 3 and is either PMRS or CMRS. For the reasons discussed herein, it is clearly PMRS, and immune from common carrier treatment.

First, like the service that broadband providers offer to their subscribers, any service that might be understood to be provided to edge providers is not "interconnected" as that term is used in Section 332. Specifically, that service does not allow the edge provider to connect to "[a]ny common carrier switched network, whether by wire or radio, … that *uses the North American Numbering Plan* in connection with the provision of switched services." 47 C.F.R. § 20.3 (definition of public switched network) (emphasis added). Indeed, when a broadband provider delivers an edge provider's content to the broadband subscriber, that subscriber is the *only* entity to whom the edge provider can send its content. The edge provider cannot choose to send content even to other entities connected to the Internet, much less to recipients on networks using NANP numbering. Congress imbued the term "interconnected" with a specific meaning, tied to

the public switched telephone network, and any effort to ignore that intent would unlawfully collapse the framework established by Congress.

Second, under Section 332(d)(1), CMRS is a mobile service "that is provided for profit and makes interconnected service available." *Id.* § 332(d)(1). Thus, whereas Congress only required that a "fee" be charged in order for an offering to be a telecommunications service, it required even more for a service to be CMRS – that is, such a service must be provided "for profit." As discussed above, any "service" offered by broadband providers to edge providers in connection with the delivery of broadband traffic to end users is not offered to such edge providers "for a fee" – and it certainly is not offered "for profit." Indeed, even if there were merit to Mozilla's claim that the fees paid to broadband providers by their subscribers satisfy the Act's "for a fee" requirement with respect to the "service" broadband providers offer to edge providers, that argument still would fail to demonstrate that the service is provided to the edge provider "for profit." In that case, the only service that the broadband provider offers "for profit" is the service to its subscriber – *i.e.*, the entity that pays the broadband provider for the service.

B. Section 3 Precludes the Commission From Pursuing The Hybrid Approach

Moreover, even if broadband providers offer a "service" to edge providers as described above, it is not a "telecommunications service" under Section 3 of the Act. Section 3(53) defines the term "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." 47 U.S.C. §153(53). Any such hybrid "service" is not offered "to the public," is not made available "for a fee," and, in any event, is not even "telecommunications."

First, if such a "service" exists, broadband providers do not offer it "directly to the public, or to such classes of users as to be effectively available directly to the public." In fact, broadband providers do not offer *any* service "directly" to edge providers. They only offer their

services directly to their own subscribers. Edge providers, in turn, buy service from other entities – including their own broadband providers, transiting providers, content delivery networks, and so on. They have a direct relationship with *those* entities, not with the subscriber's broadband provider.

Second, even if broadband providers offer a "service" to edge providers, they do not offer that service "for a fee," as the "telecommunications service" definition requires. Broadband providers collect fees from their subscribers, and CTIA is not aware of any circumstances in which a broadband provider collects a fee from an edge provider as compensation for the broadband provider's delivery, to its subscriber, of that edge provider's content.

Mozilla has argued that the Act's "for a fee" requirement is satisfied by the monies that broadband providers collect from their own subscribers. *See* Comments of Mozilla, GN Docket Nos. 14-28, 10-127 at 12 (July 15, 2014). This argument fails, because "the plain meaning of the Communications Act … suggests that the entity to which the service is offered must pay the fee, not some other party." Barbara van Schewick and Alec Schierenbeck, Comments on Mozilla's Proposal at 2-3, 7-8, *attached to* Letter from Barbara van Schewick, Stanford Law School, to Marlene H. Dortch, FCC, GN Dockets 14-28, 09-191 (Oct. 30, 2014). The Commission has held as much: Just as Mozilla suggests that a broadband provider can be understood to provide a telecommunications service to an edge provider when the "fee" the broadband provider receives is from a third party (its own subscriber), a competitive LEC argued in 2011 that it could be deemed to be providing a telecommunications service to a party to whom it delivered traffic when the fee that it received was from a third party (in that case, an interexchange carrier that paid it access charges in connection with the traffic). *See Qwest Communications Co., LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332,

8337-38 ¶ 10 (2011) (quoting Northern Valley's Answer and Legal Analysis at 18-22). The Commission disagreed: "'[I]n order [for the service provider's offering] to be a telecommunications service, the service provider must assess a *fee for its service'" – i.e.*, the service that is being deemed a "telecommunications service" – rather than for a different service it provides to a different entity. *Id.* (quoting *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312-13, ¶ 10 (2004)) (emphasis added). That logic applies with equal force here: For the "service" offered by broadband providers to edge providers to be a telecommunications service, the broadband providers must charge the edge providers a fee *for that service*. They do not, and the hybrid approach is therefore unlawful.

CONCLUSION

For the reasons discussed herein, the Act bars the Commission from reclassifying broadband Internet services as including a distinct telecommunications service component, and from pursuing the "hybrid" approach. Instead, it should adopt a regulatory framework grounded in its Section 706 powers. This remains the best legal path to preserving an open Internet.

Respectfully submitted,

CTIA–THE WIRELESS ASSOCIATION®

Michael F. Altschul
Scott K. Bergmann
Krista L. Witanowski
CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036

Adam D. Krinsky
Russell P. Hanser
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037

Michael K. Kellogg
Scott H. Angstreich
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036

December 22, 2014

Exhibit 1

Union Calendar No. 57

103D CONGRESS
1ST SESSION

H. R. 2264

[Report No. 103-111]

To provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994.

IN THE HOUSE OF REPRESENTATIVES

MAY 25, 1993

Mr. SABO, from the Committee on the Budget, reported the following bill; which was committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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A BILL

To provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Omnibus Budget Reconciliation Act of 1993".

SEC. 2. TABLE OF CONTENTS.

The table of contents is as follows:

1 "(4) REGULATORY TREATMENT OF COMMU-
2 NICATIONS SATELLITE CORPORATION.—Nothing in
3 this subsection shall be construed to alter or affect
4 the regulatory treatment required by title IV of the
5 Communications Satellite of 1962 of the corporation
6 authorized by title III of such Act.

7 "(d) DEFINITIONS.—For purposes of this section—
8 "(1) the term 'commercial mobile service'
9 means all mobile services (as defined in section 3(n))
10 that—
11 "(A) are provided for profit (i) to the pub-
12 lic, (ii) on an indiscriminate basis, or (iii) to
13 such broad classes of eligible users as to be ef-
14 fectively available to a substantial portion of the
15 public; and
16 "(B) are interconnected (or have requested
17 interconnection pursuant to paragraph (1)(B))
18 with the public switched network (as such terms
19 are defined by regulation by the Commission);
20 and
21 "(2) the term 'private mobile service' means
22 any mobile service (as defined in section 3(n)) that
23 is not a commercial mobile service.".

24 (b) CONFORMING AMENDMENTS.—

No. 91—Part II

Congressional Record

United States of America

PROCEEDINGS AND DEBATES OF THE 103d CONGRESS, FIRST SESSION

Vol. 139 WASHINGTON, THURSDAY, JUNE 24, 1993 No. 91—Part II

Senate

(Legislative day of Tuesday, June 22, 1993)

OMNIBUS BUDGET RECONCILIATION ACT

(Continued)

UNANIMOUS-CONSENT AGREEMENT

Mr. SASSER. Mr. President, I ask unanimous consent that the following be the sequence of first-degree amendments to be debated immediately under the following time limitations. They are a DeConcini deficit reduction trust fund, 3 minutes; a Brown highway trust, 3 minutes; a Bumpers immunization, 3 minutes; a McCain hospital insurance trust fund, 3 minutes; a budget enforcement amendment by myself, 3 minutes; an amendment by Senator GRAMM, dealing with Gramm-Rudman-Hollings, 3 minutes; that the amendments be debated and laid aside until all have been debated and that after the votes atacked under the previous order the Senate begin voting back to back on, or in relation to, each amendment in order in which they were offered and that no other amendments be in order prior to their disposition.

Mr. DOMENICI. Reserving to right to object.

Mr. BUMPERS. Mr. President, reserving the right to object, I have two immunization amendments. They were originally just one that had to be severed because of a parliamentary problem. In the 3-minute debate that the Senator is offering me, I will describe both amendments. I have still a third amendment, which I think will be accepted.

Mr. SASSER. I thank the Senator.

Mr. DOMENICI. Did the unanimous-consent request include a prohibition against second-degree amendments on these?

Mr. SASSER. It did.

Mr. DOMENICI. I have no objection.

Mr. BUMPERS. Mr. President, further reserving the right to object, I want it fully understood now I am offering three amendments. I am accepting 3 minutes total debate time, but I am offering three amendments.

Mr. SASSER. The Senator may offer three amendments, but, as I understand it, under our unanimous consent, only one amendment will be voted on. The Senator says a second amendment might be accepted, and we will certainly try to accommodate the Senator on that. But with regard to the third amendment, it is not on our unanimous consent list.

Mr. BUMPERS. Mr. President, I say to the distinguished Senator from Tennessee that I have offered to debate two amendments, which I had to sever. I am offering to debate 3 minutes, which I had to sever. I am offering to debate 3 minutes and describe both amendments and call the second one up without debate and the third one up without debate.

Mr. SASSER. The Senator is certainly entitled to call them all up without debate. But they would not come in sequence with these amendments here.

Mr. BUMPERS. When the Senator said no other amendments would be in order, I wanted to make sure the unanimous consent understood that.

Mr. SASSER. After these amendments are disposed of, then amendments will be in order until they are exhausted.

Under the rules there may be no debate on some of them.

Mr. BUMPERS. That is fine.

The PRESIDING OFFICER. If we can have the attention of the Senatora to my left, please? There is enough confusion in the Chamber without conversation going on on the side. If Senators will take their seats, it will facilitate the debates here.

The Senator from Tennessee has a request. Does the Senator from Tennessee want to repeat that unanimous-consent request? Or is the comment by the Senator from Arkansas sufficient to be included in the unanimous-consent request so the Chair may rule on it?

Mr. SASSER. I do not think there is really any need to include it in the unanimous-consent request. I think we have an understanding outside the unanimous-consent request, as I understand it.

Mr. DOMENICI. I understand it.

The PRESIDING OFFICER. Is the time to be equally divided on each of these amendments?

Mr. DOMENICI. It is.

Mr. SASSER. It is.

The PRESIDING OFFICER. If so, is there objection? Hearing none, the unanimous-consent request is agreed to.

Mr. SASSER. Mr. President, I ask unanimous consent that Senator BROWN be allowed to go out of order and that he be followed then by Senator DECONCINI, and then we pick up the regular sequence. Senator DECONCINI is not in the Chamber at the moment. That might expedite matters.

So the understanding is Senator BROWN will go first—I want to be sure my friend from New Mexico understands this—then we come to DECONCINI and then we go back to the regular sequence. That would pick up with BUMPERS and then alternate down from there.

Mr. DOMENICI. We have no objection to that.

The PRESIDING OFFICER. Without objection, the unanimous-consent request is agreed to. The Senator from Colorado is recognized. If the Senator will suspend until we have order so the Senator can be heard.

The Senator from Colorado is recognized.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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"(F) extend to any other service, class of services, or assignments that the Commission determines, after conducting public notice and comment proceedings, should be exempt from competitive bidding because of public interest factors warranting an exemption to the extent the Commission determines the use of competitive bidding would jeopardize appropriate treatment of those factors.

"(5) No provision of this subsection or of the Emerging Telecommunications Technologies Act of 1993 shall be construed, in any way, to—

"(A) alter spectrum allocation criteria and procedures established by the other provisions of this Act;

"(B) allow the Commission to consider potential revenues from competitive bidding when making decisions concerning spectrum allocation;

"(C) diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licenses;

"(D) grant any right to a spectrum licensee different from the rights awarded to licensees who obtained their license through assignment methods other than competitive bidding; or

"(E) prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.

"(6) Moneys received from competitive bidding pursuant to this subsection shall be deposited in the general fund of the Treasury."

(c) STATE AND LOCAL TAX TREATMENT OF LICENSES AND PERMITS.—Title VII of the Act (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

"SEC. 714. STATE AND LOCAL TAX TREATMENT OF LICENSES AND PERMITS.

"A license or permit issued by the Commission under this Act shall not be treated as the property of the licensee for property tax purposes, or other similar tax purposes, by any State or local government entity.".

SEC. 4009. REGULATORY PARITY.

(a) AMENDMENT.—Section 332 of the Act (47 U.S.C. 332) is amended—

(1) by striking "PRIVATE LAND" from the heading of the section; and

(2) by amending subsection (c) to read as follows:

"(c)(1)(A) A person engaged in the provision of commercial mobile services shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except that the Commission may waive the requirements of sections 203, 204, 205, and 214, and the 30-day notice provision of section 309(a), for commercial mobile services and such other provisions of title II as the Commission may, consistent with the public interest, specify by rule. In prescribing any such rule, the Commission may not waive for commercial mobile services the requirements of section 201, 202, 206, 208, 209, 215(c), 216, 217, 220 (d) or (e), 223, 225, 226 (a), (b), (c), (d), (e), (f), (g), or (i), 227, or 228, or any other provision that is necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with commercial mobile services are just and reasonable and are not unjustly or unreasonably discriminatory or that is otherwise in the public interest.

"(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to section 201. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection under this Act.

"(2) A person engaged in private land mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act. A common carrier shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent that such dispatch service is provided on stations licensed by the Commission in the Specialized Mobile Radio Service prior to May 24, 1993, or is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the commission determines that such termination will service the public interest.

"(3)(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private land mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the continued availability of telephone exchange service at affordable rates.

"(B) Notwithstanding subparagraph (A), a State may petition the Commission for authority to regulate the rates for any commercial mobile service if such State demonstrates that (i) such service is a substitute for land line telephone exchange service for a substantial portion of the communications within such State, or (ii) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

"(C) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service, such State may, no later than 1 year after the date of enactment of the Emerging Telecommunications Technologies Act of 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. The State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission issues a final order granting or denying such petition. The Commission shall review such petition in accordance with the procedures and schedule established in subparagraph (B), and shall grant such petition if the State satisfies the showing required under subparagraph (B)(i) or (B)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under the State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

"(D) After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (B) or (C), any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

"(4) Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 of the corporation authorized by title III of such Act.

"(5) The Commission shall continue to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

"(6) The provisions of section 310(b) shall not apply to any lawful foreign ownership in a provider of commercial mobile services prior to May 24, 1993, if that provider was not regulated as a common carrier prior to the date of enactment of the Emerging Telecommunications Technologies Act of 1993 and is deemed to be a common carrier under this Act.

"(7) As part of any proceeding under this subsection the Commission (i) shall consider in such proceeding the ability of new entrants to compete in the services to which such proceeding relates, and (ii) shall have the flexibility to amend, modify, or forbear from any regulation of new entrants under this subsection, or, consistent with the public interest, take other appropriate action, to provide a full opportunity for new entrants to compete in such services.

"(8) For purposes of this section—

"(A) the term 'commercial mobile service' means any mobile service (as defined in section 3(n)) that, as specified by regulation by the Commission, is provided for profit and makes interconnected service available (i) to the public or (ii) to such broad classes of eligible users as to be effectively available to a substantial portion of the public;

"(B) the term 'interconnected service' means service that is interconnected with the public switched network (as such term is defined by regulation by the Commission) or service for which interconnection pursuant to paragraph (1)(B) is pending; and

"(C) the term 'private land mobile service' means any mobile service (as defined in section 3(n)) that is not a commercial mobile service under subparagraph (A).".

(b) CONFORMING AMENDMENTS.—

(1) DEFINITION OF MOBILE SERVICE.—Section 3 of the Act (47 U.S.C. 153) is amended—

(A) in subsection (n)—

(i) by inserting "(1)" immediately after "and includes"; and

(ii) by inserting immediately before the period at the end the following: ", (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (3) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding; but such term does not include any rural radio service as defined by the Commission and does not include the provision, by a local exchange carrier, of telephone exchange service by radio instead of by wire"; and

(B) by striking subsection (gg).

(2) REGULATION OF INTRASTATE COMMUNICATIONS.—Section 2(b) of the Act (47 U.S.C. 152(b)) is amended by inserting "and section 332" immediately after "inclusive,".

(c) RULEMAKING SCHEDULE; EFFECTIVE DATE.—

(1) RULEMAKING REQUIRED.—Within 1 year after the date of enactment of this Act, the Commission shall—

(A) issue such modifications or terminations of its regulations as are necessary to implement the amendments made by subsection (a);

(B) make such other modifications of such regulations as may be necessary to promote par-

Exhibit 2

103D CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
103–213

OMNIBUS BUDGET RECONCILIATION ACT OF 1993

CONFERENCE REPORT

OF THE

COMMITTEE ON THE BUDGET HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H.R. 2264

A BILL TO PROVIDE FOR RECONCILIATION PURSUANT TO SECTION 7 OF THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 1994

AUGUST 4, 1993.—Ordered to be printed

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70–859

Conference agreement

The Conference Agreement adopts a modified version of the Senate provision. The purpose of this provision is to "grandfather" any foreign ownership in a provider of private land mobile services that existed prior to May 24, 1993 if that provider becomes a common carrier under this Act. Section 310(b) of the Communications Act limits the amount of private foreign ownership in a common carrier service but does not impose any such limits on the foreign ownership in private radio service. Currently, some foreign-owned companies provide private radio services. Some of these companies will become common carriers as a result of section 332(c)(1)(A). Without this "grandfathering" provision, these companies would be forced to divest themselves of any foreign ownership when this Act becomes effective.

In order to avoid this result, the Conference Agreement accepts the Senate provision with modifications to limit its application. First, Section 332(c)(6) as added by the Conference Report requires a person that may be affected by this provision to file a waiver request with the Commission within 6 months of enactment. The FCC may grant the waiver only on the following conditions:

(1) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(2) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b). In effect, this condition "grandfathers" only the particular person who holds the foreign ownership on May 24, 1993; the "grandfathering" does not transfer to any future foreign owners.

Section 310(b) addresses the permissible extent of foreign investment in certain radio licenses, including common carriers. One effect of the denomination of commercial mobile services as common carrier services is to broaden the range of services subject to limitations on foreign investment. In securing regulatory parity for commercial mobile services, the Conference Agreement does not restrict the FCC's discretion, pursuant to section 310(b)(4), to permit foreign investors to acquire interests in U.S.-licensed enterprises. These amendments in no way affect the Commission's authority under section 310(b).

SECTION 322(d)

House bill

Section 322(d) of the House bill defines the terms "commercial mobile service" and "private mobile service". "Commercial mobile service" is defined as a mobile service, as defined in section 3(n), that is interconnected with the Public switched telephone network offered for profit and held out to the public, or offered on an indiscriminate basis to classes of eligible users, or to such a broad class so as to equal the public. "Private mobile service" is defined as anything that does not fall under commercial mobile service. The provisions also direct the Commission to define "interconnected" and "public switched telephone network".

Senate amendment

Section 322(c)(8) as added by the Senate Amendment contains similar definitions of the terms "commercial mobile service" and "private land mobile service". The differences in the Senate definition of "commercial mobile service" are: (1) that "offered on an indiscriminate basis" is not one of the tests for determining a "commercial mobile service" in the Senate Amendment; (2) the Senate definition expressly recognizes the Commission's authority to define the terms used in defining "commercial mobile service"; and (3) the Senate definition requires that "interconnected service" must be made available to the public, as opposed to the House definition which simply requires the service offered to the public to be "interconnected". In other words, under the House definition, only one aspect of the service needs to be interconnected, whereas under the Senate language, the interconnected service must be broadly available. The Senate Amendment defines "interconnected service" as a service that is interconnected with the public switched network or service for which an interconnection request is pending. The definition of "private land mobile service" in the Senate amendment is virtually identical to the definition of "private mobile service" in the House bill.

Conference report

The Conference Report adopts the Senate definitions with minor changes. The Conference Report deletes the word "broad" before "classes of users" in order to ensure that the definition of "commercial mobile services" encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public.

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.

The Commission may determine, for instances, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.

SECTION (B)

House bill

Subsection (B) of the House bill adds a conforming amendment to the definition in Section 3(n) of the Communications Act of "mobile service" to clarify that the term includes all items previously defined as "private land mobile service" and includes the licenses to be issued by the Commission pursuant to the proceedings for personal communications services.