January 28, 2015

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

Notice of Oral Ex Parte Meeting
Re: *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28
Framework for Broadband Internet Service, GN Docket Nos. 10-127

Dear Ms. Dortch:

On January 26, 2015 Michael Calabrese of the New America's Open Technology Institute (OTI) and Delara Derakhshani of Consumers Union (CU) met, concerning the above-referenced proceeding, with Michael Janson, Gloria Sheu, Pramesh Jobanputra and Sara Mechanic (by phone) of the Wireless Telecommunications Bureau.

The public interest advocates discussed several issues related to the nature of competition and consumer switching costs in the mobile broadband marketplace. OTI and CU maintain that contrary to recent filings by mobile carrier interests,[1] which assert that "robust" competition in the wireless industry make network neutrality consumer protections unnecessary, there is neither effective competition among carriers nor do consumers have the ability to switch readily from one carrier to another due to price or non-price factors. As Chairman Wheeler stated in remarks to the Competitive Carriers Association (September 8, 2014), even where consumers can choose among four carriers, high switching costs undermine the sort of consumer choice and market discipline normally associated with competitive markets, such as long-distance calling two decades ago.[2] Switching costs in the mobile industry are high and rising as mobile carriers have adopted charges and strategies that layer one cost and obstacle on top of another in an increasingly successful attempt to deter even dissatisfied customers from moving to another carrier at a reasonable cost.

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[1] *See, e.g.*, Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 at 1 (filed Jan. 15, 2015) ("Verizon Letter"); Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Jan. 26, 2015).
[2] "Keynote Remarks by FCC Chairman Tom Wheeler," RCR Wireless News YouTube page (Sept. 8, 2014), *available at*: https://www.youtube.com/watch?v=mweWx9x_qWI#t=634.

The OTI representative opined that mobile broadband carriers are the hotel California among service companies: "You can check out, but you can never leave." Of course, subscribers *can* switch carriers, but relatively few do primarily because of the multiple strategies that carriers use to create both the perception and the reality of substantial financial penalties, loss of time and uncertainties about retaining your data or even, in some cases, your phone number. These strategies include not only long-term service contract lock-in with substantial early termination fee penalties (ETFs), but also the rapid increase in group share plans (which can greatly inflate the lump sum cost of ETFs), installment upgrade plan options, device incompatibilities across wireless providers,[3] limitations on local number portability,[4] and the constraints on device unlocking.

Most obviously, Early Termination Fees (ETFs) impose substantial lump sum switching costs on consumers. Most mobile providers have ETFs exceeding $300. The OTI representative noted that although T-Mobile has used an offer to pay ETFs to switchers as a temporary marketing strategy, the trend overall is toward higher and more punitive ETFs. Verizon recently amended its policy to delay the pro-rating of its ETF by eight months, thereby extending the time subscribers are subject to paying the full fee ($350) if they want to switch providers.[5]

In 2012 both Verizon and AT&T introduced shared mobile plans, subscriptions that encourage customers to share voice, texting and a pool of data across multiple mobile devices.

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[3] *See* Nicholas Economides, "Broadband Openness Rules Are Fully Justified by Economic Research," *Communications and Strategies*, 84(4): 1-25 at 9 (2011). *See also* Wireless Local Number Portability Website, "Transfer your Number to C Spire," available at http://www.wirelesslocalnumberportability.com/providers-C%20Spire/cs ("In some instances, wireless handsets of different wireless telephone companies are incompatible. If you switch from AT&T to C Spire, you may need to purchase a new handset, even if you retain the same phone number.")

[4] Phone number portability is administered so that it works well only for national carriers, since consumers often don't have the option to keep their number when moving from a national to a non-national carrier. *See, e.g.,* Letter from C. Sean Spivey, Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, *Numbering Policies for Modern Communications*, WC Docket No. 13-97 (filed May 23, 2014) ("[A] significant number of [CCA's] rural and regional members have experienced problems with porting-in wireless numbers from disparate parts of the country. As a result, non-nationwide carriers are placed at a competitive disadvantage. Numerous studies have shown that consumers will not switch service providers if required to change their mobile numbers—a fact that led the Commission to initially adopt number portability requirements. Number portability expands competition . . . and these positive policy outcomes are diminished when non-nationwide carriers do not have the same capability as the nationwide carriers.").

[5] Verizon now does not pro-rate ETFs until after the eighth month of a two-year contract. Ian Paul, "Verizon Wireless just made it more expensive to cancel your contract," PCWorld, November 17, 2014, available at http://www.pcworld.com/article/2848405/verizon-just-made-it-more-expensive-to-cancel-your-contract.html. "Sprint also carries a hefty $350 ETF for customers with a two-year commitment on a smartphone. Similar to Verizon, Sprint only starts discounting its ETF in month seven. AT&T's ETF is slightly lower at $325 for smartphones, and the company says it immediately starts discounting that ETF by $10 each month. With Verizon and Sprint moving away from immediate discounts, it wouldn't be surprising to see AT&T quietly follow suit in the coming months." *Ibid.*

These plans are starting to reshape the mobile marketplace from one of individual customers to groups of customers, such as families. At an event in 2013 an executive from AT&T stated they expected shared plans to result in lower churn and higher revenues for the company.[6] After heavy promotional campaigns both mobile ISPs report rapid growth of shared plans among their postpaid subscriber base. In fact, the large majority of postpaid subscribers for both AT&T and Verizon are now on shared plans.[7]

The OTI representative stated that when considering whether to switch providers, the vast majority of postpaid subscribers must now do so as a group and not as individuals. The interaction between the group plan trend and early termination fees (ETFs) substantially increases the switching costs faced by subscribers, OTI asserted. Not only do groups face the cost of multiple ETFs, but frequently the contract termination dates become nonsynchronous due to the addition of new lines and individuals upgrading their devices at different points in time. Over time, due to added lines, upgrades and taking advantage of savings to replace a lost or damaged device, the contract termination dates can vary widely among different members of a group. The OTI representative noted, anecdotally, that his family is now locked into paying a minimum of three ETFs to switch carriers (at a likely lump sum cost of $1,000 or more), because his spouse and two college-age children were either added onto the plan and/or upgraded to an iPhone at different points in time.

The advocates stated that the combination of strategies that mobile carriers use to increase "stickiness" by raising switching costs are clearly having their intended effect. Despite recent increased price competition from T-Mobile and Sprint, the two dominant carriers (AT&T and Verizon) continue to enjoy industry-low customer churn rates.[8] In 2014 AT&T realized both its

[6] "[AT&T Mobility CFO Pete Ritcher] said that over time customers will add more data connections using Mobile Share plans, which AT&T introduced last August, and that AT&T will benefit from that in the form of both lower churn and higher revenue." *See* Phil Goldstein, "AT&T exec: Mobile Share plans, more data connection will lower churn," *FierceWireless*, March 6, 2013, http://www.fiercewireless.com/story/att-exec-mobile-share-plans-more-data-connections-will-lower-churn/2013-03-06)

[7] AT&T reported that shared plans grew from 33 percent of postpaid subscribers in the 4th quarter of 2013 to nearly 70 percent by 4th quarter 2014. *See* AT&T Quarterly Earnings Report from 4Q 2014, available at https://www.att.com/gen/investor-relations?pid=262. During the same time Verizon reported that mobile share plans grew from 46 percent postpaid subscribers to 61 percent. *See* Verizon Quarterly Report for 4Q 2014, available at http://www.verizon.com/about/investors/quarterly-reports/.

[8] For 2013 and 2014, both AT&T and Verizon enjoyed churn rates among postpaid subscribers at or below 1 percent. Churn rates for the smaller national carriers, T-Mobile and Sprint, were 2 percent or higher. *See, e.g.*, Spencer Ante and Ryan Knutson, "Good Luck Leaving Your Wireless Phone Plan: Only About 1% of Contract Customers Switch From Top Wireless Carriers; 'It Kind of Feels Like a Trap,'" *The Wall Street Journal*, July 31, 2013.

lowest churn rate for a quarter (0.86 percent among postpaid subscribers) and for a full year (1.035 percent).[9]

Of course, carriers claim that lower churn rates among their customers are a sign of increased satisfaction. Yet the results of national customer satisfaction surveys suggest the opposite. The American Customer Satisfaction Index found that wireless service "remains among the lower-scoring categories" of industries they review. [10] Among the 43 major U.S. industries rated, the consumer satisfaction ranking of mobile carriers are tied for 38th worst with the U.S. Postal Service and just one spot above the satisfaction score of airlines (wireline ISPs are dead last).[11] The OTI representative stated that it would be completely implausible to attribute historically low churn rates to consumer satisfaction when, in fact, consumer satisfaction is among the lowest five industries among America's 43 largest consumer-facing industries.

The Consumers Union representative described new CU survey results that reinforce this view. The most recent issue of *Consumer Reports* (February, 2015) includes survey results showing that 27 percent of mobile broadband consumer who are dissatisfied with their mobile broadband service provider are reluctant to switch carriers due to long-term contracts with ETFs and/or because they are afraid of making a bad choice due to uncertainty created by the complex options available.

The OTI representative also mentioned several more general reasons why the current degree of competition in the mobile broadband market in no way justifies a divergent regulatory framework for network neutrality that would exempt wireless carriers from basic common carrier consumer protections under Title II.

First, even if there was effective competition, that would not diminish the rationale for basic "rules of the road" for network neutrality. Network neutrality protections—for both consumers and edge providers—is too important to be left to the vagaries of the market. The fact that most

[9] AT&T reported a record low churn rate of just 0.86 percent for the second quarter of 2014 among postpaid subscribers. AT&T's average churn rate over all quarters of 2014 was just 1.035 percent. *See* AT&T Quarterly Earnings Reports from 2Q 2014 and 4Q 2014, available at https://www.att.com/gen/investor-relations?pid=262. Similarly, Verizon had a churn rate of 0.94 percent for the second quarter of 2014 and an overall 2014 churn rate of 1.038 percent. *See* Verizon Quarterly Reports, available at http://www.verizon.com/about/investors/quarterly-reports/.

[10] "As users download more data and take greater advantage of streaming services, overloaded wireless networks are being challenged to keep up with the increase in usage. This contributes to stagnating customer satisfaction with wireless service providers—unchanged at an ACSI score of 72. . . . [T]he industry remains among the lower-scoring categories in the ACSI. Along with TV and Internet service, only airlines and Internet social media display lower levels of customer satisfaction." *See* American Customer Satisfaction Index, *ACSI Telecommunications and Information Report 2014*, at 8-9, available at http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2014/acsi-telecommunications-and-information-report-2014 (registration required).

[11] *Id.* at 15.

consumers have more choices for mobile ISPs than for wireline service has questionable relevance "given the Commission's determination [in the NPRM] that the open Internet rules do not hinge on a market power theory."[12] FCC Chairman Wheeler made a similar point at the CTIA Show last September, when he stated that the recent history of the mobile industry demonstrates that "competition does not assure openness."[13] Whereas wireline ISPs have generally not attempted to block or degrade consumer access to devices, applications or services over the Internet, mobile carriers have done so repeatedly in recent years.[14]

Second, OTI asserted, even if there was "robust" competition among mobile carriers to attract and retain retail subscribers, mobile ISPs have a common interest in seeking rents from adjacent market providers and in securing a competitive advantage for their own competing apps, content, and services. As Microsoft observes, "mobile broadband access providers today can be an edge provider's only option for reaching a particular end user."[15] The leverage that mobile ISPs have over the adjacent markets for devices, applications, content, and services over the Internet—and the potential impact of that leverage on innovation, productivity, and consumer welfare in the broader economy—is justification in itself for network neutrality rules.

Finally, and most importantly, the factual predicate of mobile carrier claims about an "intensely competitive" industry is unfounded. The mobile broadband market has grown steadily more concentrated and less competitive since 2010, as the Commission has concluded each year since 2010 in its mobile market competition reports (declining to find "effective competition"),[16] as the Antitrust Division has concluded,[17] and as virtually every mobile ISP other than Verizon

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[12] Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28 at ¶ 49 (May 15, 2014).

[13] Prepared Remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show, Las Vegas, NV (Sept. 9, 2014), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf. The Chairman stated; "I remember when the industry was united around the walled garden, where the only apps that reached the consumer were those which the carrier approved, usually in return for a payment. . . . [I]t is instructive that the walled garden existed despite multi-carrier competition. At least in the short run, this suggests that competition does not assure openness."

[14] *See, e.g.*, Comments of Electronic Frontier Foundation, GN Docket Nos. 14-28, 10-127 at 23-24 (July 17, 2014) ("examples of discriminatory practices by mobile providers abound").

[15] Comments of Microsoft, GN Docket Nos. 14-28, 10-127 at 23 (July 17, 2014) ("Microsoft Comments").

[16] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, Seventeenth Report ¶ 2 (2014) ("17th Competition Report") (declining to issue a formal finding as to whether there is "effective competition" in the marketplace, consistent with its decision not to issue such findings in the Fourteenth , Fifteenth and Sixteenth Mobile Competition Reports).

[17] *Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (April 11, 2013) at 8. ("Carriers do have the ability and, in some cases, the incentive to exercise at least some degree of market power, particularly given that there is already significant nationwide concentration in the wireless industry.")

and AT&T has stated repeatedly in pleadings before the Commission.[18] Measures of industry consolidation suggest an industry that is highly concentrated.[19] Regional, rural, and pre-paid competitive carriers are disappearing as the industry consolidates.[20] Most recently the Commission has approved the acquisition of MetroPCS by T-Mobile and the acquisition of Leap Wireless by AT&T,[21] further reducing the number of mobile operators available to consumers. As Microsoft correctly stated in its comments, "[s]ince the Commission adopted its 2010 open Internet rules, mobile broadband access providers have become more horizontally and vertically integrated, reducing competition in the mobile broadband access marketplace and, therefore, making robust open Internet rules even more important."[22]

Increasing consolidation and the dominance of the two largest mobile carriers has been lamented by competitive carriers and consumer advocates alike. In the period between the 14th and 16th Mobile competition reports, AT&T and Verizon's combined share of total wireless industry revenue rose from 60 percent to 67 percent,[23] while their combined share of the lucrative post-paid market is even greater. In the recent spectrum holdings proceeding, both the Competitive Carriers Association (CCA) and the two smaller, national mobile carriers (Sprint and T-Mobile) emphasized how increasing market consolidation, low-band spectrum dominance, the ability to over-charge for special access backhaul and data roaming, among other factors, hamper their ability to compete effectively with the two largest mobile carriers.[24] And this year T-Mobile filed a petition with the Commission asking for greater protections against

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[18] The Competitive Carriers Association has emphasized the anti-competitive effects of ongoing industry consolidation in several recent filings: "Consolidation in the wireless industry, as measured by the Herfindahl-Hirschman Index ('HHI') increased from 2,151 in 2003 to an alarming 2,848 in 2010 (where an HHI of greater than 2,500 indicates a 'highly concentrated' market)." Comments of Competitive Carriers Association, Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269 (Nov. 28, 2012) ("CCA Comments in 12-269") at 4.

[19] The Herfindahl-Hirschman Index ("HHI") for the wireless industry has increased from 2811 in 2009 to 2873 on 2011. *See* 16th Competition Report at ¶54-61.

[20] As the Competitive Carriers Association described in recent comments, "the number of nationwide wireless carriers has declined from six in 2003 to four in 2012, and during that span, several 'regional and rural facilities-based providers have exited the marketplace through mergers and acquisitions [citation omitted].'" CCA Comments in 12-269 at 4.

[21] *See* Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 12-301, DA-13-384 (Mar. 12, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-13-384A1.pdf; *See* Memorandum Opinion and Order, WT Docket No. 13-193, DA-14-349 (Mar. 13, 2014). https://apps.fcc.gov/edocs_public/attachmatch/DA-14-349A1.pdf.

[22] Microsoft Comments at 22-23.

[23] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, Fourteenth Report (2010) at ¶30; 16th Competition Report at ¶2.

[24] *See, e.g.*, CCA Comments in 12-269 at 6-7 ("The Commission must recognize that control of the lion's share of prime broadband spectrum by one or two carriers makes it increasingly difficult for new entrants or other carriers to gain access to spectrum, which in turn prevents access to all other critical inputs, which in turn inhibits effective competition in the industry.").

unreasonable data roaming charges, an anti-competitive practice that T-Mobile said harms not only its customers but also results in higher prices for Verizon and AT&T customers.[25]

CCA President Steve Berry accurately summed up the general trend in mobile market consolidation and competition: "Just a few years ago, the US wireless industry enjoyed robust competition. . . . Unfortunately, the market has changed, and the FCC's most recent wireless competition report confirmed that the wireless industry is in imminent danger of reverting back to the duopoly of its early days."[26] Given today's marketplace realities – and the high and increasing switching costs that deter consumers from moving readily between competing mobile broadband carriers – it is not close to plausible that normal market forces would protect consumers from paid prioritization and other violations of fundamental common carrier consumer protections absent a common regulatory framework with strong network neutrality rules grounded in Title II.

Respectfully submitted,

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[25] Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (May 27, 2014) at 4. ("Indeed, AT&T's recent acquisition of Leap Wireless International, Inc., including its Cricket brand, has further reduced the number of competitors in the wireless market and increased AT&T's market share, thereby also further limiting AT&T's need for roaming and reducing the number of roaming providers in the marketplace"). *Id.* at 8.
[26] *Id.*