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VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

As AT&T and others have demonstrated, the Commission could not — as either a procedural or substantive matter — reclassify wireless broadband Internet access as CMRS or its functional equivalent so that it can impose common carrier obligations on wireless broadband providers.¹ As discussed below, recent attempts by Public Knowledge and Vonage to rehabilitate their arguments fail.²

What is most notable about these attempts are the arguments these commenters previously pressed, but have now abandoned. No longer do they assert that it is meaningful that Congress used the term “the public switched network” in § 332(d)(2) rather than “the public switched telephone network.” As AT&T and others demonstrated, that argument was based on the false premise that the Senate and House bills used different terms and that Congress purposefully selected the former term. *See* AT&T Ex Parte at 3. In fact, the legislative history on which these commenters relied is further confirmation that everyone — Congress, the courts, and the Commission — understood that “the public switched network” and “the public switched telephone network” are synonymous. *See id.* at 3 & n.4; CTIA White Paper at 7-8 & n.2.

¹ *See* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28 (Jan. 8, 2015) (“AT&T Ex Parte”); Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28, Attachment (“CTIA White Paper”) (Jan. 14, 2015); Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28 (Dec. 24, 2014) (“Verizon Ex Parte”).

² *See* Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28 (Jan. 15, 2015) (“Public Knowledge Ex Parte”); Letter from Joshua M. Bobeck, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28 (Jan. 15, 2015) (“Vonage Ex Parte”).

Public Knowledge, however, continues to assert that “the public switched network” is broad, sweeping language; that Congress must have intended the Commission to redefine that term to include the Internet because it granted the Commission authority to define the term by regulation; and that Congress’s simultaneous recognition that digital telephony was replacing analog telephony further supports their proposed redefinition. *See* Public Knowledge Ex Parte at 1-2. Each claim fails.

First, Congress used the term “the public switched network.” There is nothing broad or sweeping about that term. On the contrary, Congress’s use of the definite article “the” and the singular “network” makes clear that it was referring to a single “public switched network,” which forecloses Public Knowledge’s claim that the statutory language is broad enough to include two separate networks — the PSTN and the Internet.³ Indeed, Congress recently recognized again that “the public switched network” and “the public Internet” are two entirely separate things. 47 U.S.C. § 1422(b)(1). Although Public Knowledge claims (at 2) that nothing can be gleaned from Congress’s use of these terms in § 1422, that is not so. Where “Congress uses the same term in the same way in two statutes with closely related goals” — here, interconnection with existing networks — “basic canons of statutory construction suggest a presumption that Congress intended the term to have the same meaning in both contexts.” *New Hampshire v. Ramsey*, 366 F.3d 1, 26 (1st Cir. 2004).

Second, Congress’s decision to grant the Commission authority to define terms in § 332(d)(2) by regulation is not evidence that “the public switched network” is a term with sufficient breadth to mean, simultaneously, both the PSTN and the Internet. As the Commission recognized in 1994, the public switched network is “continuously growing and changing because of new technology”⁴; Congress gave the Commission authority to address those changes. But, at the same time, the Commission has repeatedly — and correctly — found that Congress, in § 332, “did not contemplate wireless broadband Internet access service,” but instead only “the traditional local exchange or interexchange switched network.”⁵ Public Knowledge simply ignores the Commission’s prior, correct statutory interpretation.

Third, digital telephony is not the Internet, and Congress’s awareness that carriers were moving from analog signals to digital ones provides no basis for concluding that Congress intended for “the public switched network” to be broad enough to include the Internet. In fact, the relevant statutory provision that gives insight into Congress’s intent is 47 U.S.C. § 230. There, Congress announced that it is “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or

³ In contrast, in the case Public Knowledge cites, the statute granted the Commission “authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving *all frequencies* allocated by the Commission to television broadcasting.” 47 U.S.C. § 303(s) (emphasis added); *see Consumer Electronics Ass’n v. FCC*, 347 F.3d 291, 297-98 (D.C. Cir. 2003).

⁴ Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 59 (1994) (“*Second Report and Order*”).

⁵ *Id.*; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶ 45 n.119 (2007).

State regulation.” 47 U.S.C. § 230(b)(2). Interpreting the term “the public switched network” to include the Internet so that the Commission can impose Title II obligations on wireless broadband Internet access services is directly contrary to that clear statement of congressional policy.

Finally, in urging the Commission to redefine the term “the public switched network,” Public Knowledge ignores entirely the Commission’s failure to give adequate notice that it might amend its existing rule interpreting that term.⁶ In contrast, Vonage asserts (at 2) that the Commission provided “ample” notice. But not one of the portions of the *Open Internet NPRM* or the 2010 Notice of Inquiry that Vonage cites gives even the slightest indication that the Commission was considering amending its existing regulation defining “the public switched network.”⁷ See, e.g., *Solite Corp. v. EPA*, 952 F.2d 473, 499-500 (D.C. Cir. 1991) (finding that agency violated notice-and-comment requirement where, as here, “[n]othing . . . indicated that EPA was going to reconsider its” existing rule).

Sincerely,

/s/Gary L. Phillips

⁶ See AT&T Ex Parte at 2; Verizon Ex Parte at 7-8. Public Knowledge also ignores the Commission’s failure to provide notice that it might amend other rules implementing § 332(d)(2) or that it might consider whether wireless broadband Internet access, although not CMRS, is the functional equivalent of CMRS. See AT&T Ex Parte at 2, 5.

⁷ The portions Vonage cites also do not give notice that the Commission might amend its rule interpreting the term “interconnected” in § 332(d)(2) or engage in the economic analysis the Commission has previously found necessary to determine whether a service is the functional equivalent of CMRS service. See *Second Report and Order* ¶ 80 (explaining that the “principal inquiry” in determining whether a service is functionally equivalent to CMRS is “whether the service is a close substitute for CMRS,” that is, “whether changes in price for the service under examination, or for the comparable commercial [mobile radio] service, would prompt customers to change from one service to the other”).