



February 5, 2015

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

Via Electronic Filing

Re: Notice of Ex Parte Communications, GN Docket Nos. 10-127, 14-28

Dear Ms. Dortch:

On February 3, 2015, Sarah Morris, Joshua Stager, and Michael Calabrese of New America's Open Technology Institute (OTI) met with Scott Jordan, Stephanie Weiner, Michael Janson, and Joel Taubenblatt, Matt DelNero, and Claude Aiken of the Federal Communications Commission. During that meeting, OTI made the following presentation regarding the Commission's Open Internet Proceeding.

Michael Calabrese summarized a number of points from OTI's recent filings in the current proceeding on the Commission's legal authority to implement a common regulatory framework for both wired and wireless open Internet rules.¹ Calabrese stated that the Commission's analysis of its authority to regulate mobile broadband Internet access as a common carrier service must begin with the classification of the service itself. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used.*"² Either broadband Internet access services are "telecommunications services" or they are not, regardless whether the delivery platform is wireline or wireless, fixed or mobile. The Commission has no rational basis for classifying *wireline* broadband Internet access as a telecommunications service and functionally identical *wireless* broadband Internet access as an information service.

¹ See Letter from Michael Calabrese, New America's Open Technology Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Jan. 27, 2015) (OTI Jan. 27 *Ex Parte*). See also Letter from Michael Calabrese, OTI, Erik Stallman, CDT, and Harold Feld, PK, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Dec. 11, 2014); Letter from Michael Calabrese, New America's Open Technology Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 14-28, 10-127 (filed Nov. 10, 2014).

² 47 U.S.C. § 153(46) (emphasis added).

Since Section 3 of the Act requires that telecommunications services be regulated as common carriers, Calabrese stated that the Commission must then resolve the same statutory contradiction it faced, concerning Section 332, when it reclassified wireless broadband as an information service in the 2007 *Wireless Declaratory Order*.³ While Section 3 of the Act *requires* common carrier treatment of a telecommunications service, Section 332(c)(2) *prohibits* common carrier treatment unless the wireless service satisfies the definition of “commercial mobile service” in Section 332(d)(1).⁴

Calabrese stated that the Commission can avoid this statutory contradiction – and maintain consistent regulatory treatment among broadband ISPs – by using its express authority under Section 332 to recognize that mobile broadband Internet access is an “interconnected service” under Section 332(d)(1) and/or the “functional equivalent of a commercial mobile service” under Section 332(d)(3). By giving the Commission express authority to make each of these determinations with respect to future services, Congress built into Section 332 the mechanism for maintaining harmony between the requirements of that section and Section 3.

Calabrese acknowledged that mobile carrier interests insist that Congress in 1993 intended to forever limit the consumer protections associated with designation as CMRS to mobile services directly interconnected with the public switched *telephone* network. However, he said, this is contradicted by the clear Congressional intent to extend common carrier consumer protections to mobile services that are not “private” (PMRS) and Section 332’s express grant of authority directing the Commission to define “interconnected service” and determine if a service is the “functional equivalent” of CMRS. In 1993 the primary distinction between CMRS and PMRS was between “commercial” services that were broadly offered to the public – and facilitated universal interconnection – and services that were “private” in the sense that they were closed to the general public and facilitated specific communications needs.⁵ Mobile data services that offer unfettered Internet access are interconnected and clearly not “private” services.

Indeed, Calabrese asserted that mobile carrier arguments attempt to obscure the fact that the Commission has two different options under Section 332(d)(1) to avoid the statutory contradiction noted above: First, it can update its definition of “public switched network” (PSN), as OTI and others have argued previously.⁶ Alternatively, even assuming that the term PSN refers only to the traditional telephone network, the Commission can recognize that in 2015 mobile broadband Internet access provides users with the “capability” to interconnect with all users of both the Internet and the traditional public switched *telephone* network. The Commission in its 2007 *Wireless Declaratory Order* sustained regulatory parity and avoided statutory contradiction by declining to find that

³ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 at ¶¶ 19-20 (2007) (“*Wireless Declaratory Order*”).

⁴ *Wireless Declaratory Order*, 22 FCC Rcd. at 5916 ¶ 50, citing H.R. Conference Report 104-458.

⁵ See the more indepth discussion of this in OTI’s Jan. 27 *Ex Parte*, *supra* note 1 at 4-8.

⁶ See, e.g., OTI/PK/CDT *Ex Parte* Letter, *supra* note 1.

mobile broadband Internet access offered the “capability” to “interconnect[] with the public switched network.” But since 2007 mobile data plan offerings have evolved, particularly from the consumer’s perspective, such that integrated VoIP and VoLTE applications provide every subscriber with the *capability* to communicate not only with everyone on the Internet, but also with anyone on the traditional telephone network.⁷

Sarah Morris and Joshua Stager went on to emphasize the importance of clear protections for consumers directly affected by prolonged disputes about the terms of interconnection agreements between last mile Internet service providers and transit providers and the content companies whose traffic they host.⁸ Morris pointed to a policy brief published by OTI in November 2014 that detailed the dramatic and sustained degradation of throughput that customers of several large Internet Service Providers (ISPs) experienced as a result of interconnection disputes⁹, as well as the technical report released by the Measurement Lab research consortium on which the brief was based.¹⁰

Morris and Stager emphasized that the congestion experienced by millions of users in 2013 and 2014 was not the result of a lack of capacity *over* the last mile. Rather, it occurred only at the point of interconnection between certain transit providers and certain ISPs because of congested ports for which additional capacity was not adequately provisioned. The ability of ISPs to demand fees from edge providers or transit providers presumably gave the ISPs the incentive to allow the interconnection points to congest, leaving “[m]illions of people ... swept up as collateral damage in a dispute to which they were bystanders.”¹¹

In addition, Morris noted that clarifying how and when the FCC might intervene to address or prohibit access fees at the interconnection point onto the last mile would provide certainty for smaller edge providers and startups that may lack sufficient resources to navigate an FCC enforcement proceeding. If the Commission adopts a case-by-case approach to interconnection oversight, it should ensure that smaller entities, including startups and consumer advocates, can effectively adjudicate their concerns at minimal cost.

⁷ *Ibid.*

⁸ For extensive comments on this point already in the docket, *see* Comments of the Open Technology Institute at New America, GN Docket No. 14-28, GN Docket No. 10-127 (July 17, 2014); Reply comments of the Open Technology Institute at New America, GN Docket No. 14-28, GN Docket No. 10-127 (September 15, 2014); Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28 (October 30, 2014); Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (November 18, 2014); Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (December 22, 2014).

⁹ “Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes,” *Open Technology Institute*, November 2014.

¹⁰ “ISP Interconnection and its Impact on Consumer Internet Performance,” *Measurement Lab*, October 28, 2014.

¹¹ Notice of Ex Parte Communications, Open Technology Institute at New America, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (December 22, 2014).

Stager noted that OTI has proposed a framework to address interconnection disputes that includes a ban on access fees at the point of last-mile interconnection, buttressed by transparency requirements and congestion measurement tools.¹² This approach is designed to give the FCC a robust toolkit to protect consumers and innovators from interconnection-related harms.

Morris, Stager, and Calabrese all pointed to the ample notice in the record to support both mobile parity and prohibitions or presumptions against the imposition of access fees at the entry point onto the last mile. Regarding mobile parity, {{{MICHAEL}}}. As to interconnection, Morris noted that the *Verizon v. FCC* decision acknowledged a “two-sided market” that would necessarily implicate the point of interconnection between transit providers and last-mile ISPs. Further, Calabrese pointed to the Commission’s consideration of various hybrid proposals in the proceeding.

Pursuant to the Commission’s rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully submitted,

/s/ Sarah Morris

Sarah J. Morris
Senior Policy Counsel

Michael Calabrese
Director, Wireless Future Project

Joshua Stager
Policy Counsel

Open Technology Institute
New America Foundation
1899 L Street NW, Suite 400
Washington, DC 20036

¹² Id.