

February 10, 2015

VIA ELECTRONIC FILING

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

Re: *Protecting and Promoting the Open Internet*; (GN Docket No. 14-28)
Framework for Broadband Internet Service (GN Docket No. 10-127)

Dear Ms. Dortch:

Last fall, Chairman Wheeler recognized that our mobile broadband ecosystem is “incredibly dynamic,” and that the U.S. has the “mobile momentum.”¹ That America leads the world in wireless once again is undeniable. Our networks and our mobile ecosystem are envied around the globe, as U.S. consumers enjoy faster speeds, differentiated services, lower prices and reduced switching costs, as well as innovative devices and apps unimagined only a few years ago. This progress – borne from intense competition in the marketplace and nurtured by a carefully constructed mobile broadband policy framework – is in jeopardy. Below, CTIA – The Wireless Association® (“CTIA”) responds to recent critics calling for expanded mobile broadband open Internet regulation. In particular, CTIA demonstrates that:

- Competition in the mobile broadband market has resulted in an open mobile Internet and massive public benefits, which reclassification would put at risk, as demonstrated in the attached White Paper, “The Wireless Difference: Competition Demands a Mobile-Specific Approach to Open Internet Rules”;
- Reversing the Commission’s long-standing treatment of mobile broadband as an information service would unlawfully upend well-established reliance interests;
- The Commission cannot and should not seek to impose a Title II plus forbearance approach on mobile broadband services; and
- Section 332 bars the Commission from subjecting mobile broadband services to common carrier treatment, and claims to the contrary are unavailing.

CTIA remains strongly committed to the open Internet and supports mobile-specific rules that will promote stability and investment in the mobile broadband marketplace. The Commission can achieve these ends through the exercise of Section 706 authority, which offers a solid legal foundation grounded in the D.C. Circuit’s *Verizon* decision, in contrast to a Title II plus forbearance approach that will result in uncertainty and stagnation.

¹ Tom Wheeler, *Meeting the Mobile Moment*, OFFICIAL FCC BLOG (Sept. 26, 2014), <http://www.fcc.gov/blog/meeting-mobile-moment>.

I. COMPETITION HAS RESULTED IN AN OPEN MOBILE INTERNET AND BENEFITS TO CONSUMERS THAT TITLE II WOULD PUT AT RISK.

The Competitive Mobile Broadband Market Demands Openness and Is Delivering Tremendous Benefits to Consumers. As the attached White Paper explains, the Net Neutrality debate has long been fueled by concerns that consumers lacked adequate competitive choices in the *wired* broadband market. By contrast, *mobile* broadband received little open Internet consideration until 2010, when the Commission recognized that mobile broadband is different and that only “measured steps” were warranted in applying open Internet rules to the mobile platform.² This approach is even more appropriate today.

The White Paper highlights that the decision to take a measured approach to mobile open Internet rules was driven in significant part by competition among mobile providers. Today, the mobile broadband market is even more competitive than it was in 2010: Data from the Commission’s just-released *Seventeenth Report* shows that 82% of Americans can choose among *four* or more mobile broadband providers.³ Conversely, only 15% of U.S. homes have *three* or more wired broadband providers.⁴ Of note, during his time in the U.S. Senate, President Obama indicated that the existence of four or more competitors would obviate the need for net neutrality regulation.⁵ The White Paper demonstrates that mobile competition is delivering massive benefits to consumers, driving price and service differentiation that are the hallmarks of the mobile broadband experience today. Quite simply, mobile providers that fail to act in a reasonable manner will see their customers go elsewhere, and this competitive reality results in an open mobile Internet today.⁶

² See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17956-58 ¶¶ 94-96 (2010) (“*Open Internet Order*”), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

³ See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Seventeenth Report, WT Docket No. 13-135, DA 14-1862, rel. Dec. 28, 2014, at Chart III.A.2 (WTB rel. Dec. 18, 2014) (“*Seventeenth Report*”).

⁴ See Remarks of Tom Wheeler, Chairman, FCC, “The Facts and Future of Broadband Competition,” 1776 Headquarters, Washington, DC, at 2 (Sept. 4, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf. Americans recognize the difference: According to a recent survey, a majority of respondents reported that they have more available choices among mobile wireless providers than home Internet or cable providers. See CTIA, *CTIA Mobile Wireless Service Survey*, at 10 (Dec. 2014) (“*CTIA Mobile Wireless Service Survey*”), <http://www.ctia.org/docs/default-source/default-document-library/2014-ctia-mobile-wireless-service-survey-final.pdf>.

⁵ See Barack Obama, Then-U.S. Senator, Network Neutrality Podcast Transcript (June 8, 2006), <http://obamaspeeches.com/076-Network-Neutrality-Obama-Podcast.htm> (noting that “[i]f there were four or more competitive providers of broadband service to every home, then cable and telephone companies would not be able to create a bidding war for access to the high-speed lanes,” but “[w]e can’t have a situation in which the corporate duopoly dictates the future of the internet and that’s why I’m supporting what is called net neutrality”).

⁶ See White Paper § II; ANDRES V. LERNER AND JANUSZ A. ORDOVER, THE “TERMINATING ACCESS MONOPOLY” THEORY AND THE PROVISION OF BROADBAND INTERNET ACCESS 4 (Jan. 15, 2015) (“Lerner/Ordover Paper”) (“Any restrictions on access to the content or services of online providers would lower demand for the network itself, which would lead current subscribers to switch to other providers and inhibit the ability of the wireless broadband provider to attract new customers.”), *appended to* Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch,

Claims that Switching Costs and Other Factors Warrant the Need for Title II Reclassification of Mobile Broadband Are Unavailing. There is no merit to recent claims by New America’s Open Technology Institute (“OTI”) and Consumers Union (“CU”) that “there is neither effective competition among carriers nor do consumers have the ability to switch readily.”⁷

OTI/CU make the astonishing claim that mobile switching costs are “high and rising” and carriers are adopting “strategies” to deter switching.⁸ The facts show just the opposite. As the Commission just reported in the *Seventeenth Report*, switching barriers have “eased” and switching costs are “reduced,” as carriers have introduced no-contract plans and procured wider availability of premium phone models.⁹ Likewise their claim that the trend is toward “higher and more punitive” Early Termination Fees (“ETFs”) is belied by evidence in the *Seventeenth Report* that providers are increasingly offering ETF buyouts, the purpose of which is to “encourage customers to switch from rivals by *reducing switching costs*.”¹⁰ Indeed, the *Seventeenth Report* cites as examples ETF buyout options offered by AT&T, Sprint, and T-Mobile just last year alone. OTI/CU’s puzzling contention that group plans may complicate switching at its essence is a claim that providers are offering too many options – but customers remain free to choose individual plans.

OTI/CU’s selective recitation of consumer satisfaction data provides a misleading picture. A May 2014 national consumer survey conducted by McLaughlin & Associates partnered with Penn Schoen Berland found that 94% of wireless consumers are satisfied with their wireless service.¹¹ Indeed, international comparisons put U.S. smartphone users ahead of smartphone users in the other G7 countries, with 74% of U.S. smartphone customers reporting high satisfaction (8, 9 or 10 on a 10 point scale).¹² Moreover, the very report OTI/CU highlights – the American Consumer Satisfaction Index (“ACSI”) – notes that “[t]he boom continues for

Secretary, FCC, GN Docket No. 14-28 (Jan. 15, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001013599>; *id.* (“[T]he risk of losing wireless subscribers imposes a powerful competitive constraint on wireless broadband providers. There is significant competition for subscribers, and subscribers have the ability and incentive to switch providers in response to any limitation in access to high-quality content.”).

⁷ Letter from Michael Calabrese, Open Technology Institute, and Delara Derakhshani, Consumers Union, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Jan. 28, 2015) (“OTI/CU Jan. 28 Letter”), <http://apps.fcc.gov/ecfs/document/view?id=60001017747>.

⁸ *Id.* at 1-2.

⁹ *Seventeenth Report* at ¶ 69; *see also* Lerner/Ordo Paper at 10-14 (demonstrating that wireless broadband consumers are well-informed and switch among wireless providers on the basis of price and non-price attributes; *id.* at 3 (“The high rate of switching by subscribers shows that subscribers are not ‘locked-in’ to specific broadband networks, and indicates that *subscriber switching costs are low*.”) (emphasis added).

¹⁰ *Seventeenth Report* at ¶ 145 (emphasis added); *see also* Lerner/Ordo Paper at 13-14.

¹¹ *See* 2014 National Consumer Survey (May 2014), <http://www.mywireless.org/media-center/data-center/2014-national-consumer-survey/>.

¹² *See* Roger Entner, Spectrum Fuels Speed and Prosperity, September 2014, at 32-33 (citing comScore MobiLens data), <http://reconanalytics.com/wp-content/uploads/2014/09/Spectrum-Fuels-Speed-and-Prosperity.pdf>.

wireless telephone service – penetration has exceeded 100%, and more households are opting out of landlines in favor of cell-only service. Smartphone customers are more satisfied and adoption is growing as well.”¹³ The ACSI also cites “stable customer satisfaction for the wireless service industry,” praising high marks with respect to easy-to-understand bills, service reliability, and call clarity, and ACSI specifically finds “wireless carriers are doing a better job ... providing faster speeds for downloading data and streaming content.”¹⁴ This is hardly the picture of a market in need of prescriptive rules designed for monopoly wired services. Indeed, a recent survey conducted by CTIA reveals that most respondents (78%) say the government should treat mobile wireless distinctly, with only 16% saying mobile ought to be treated exactly the same as wired services.¹⁵

OTI/CU’s contention that the mobile market is not competitive lacks rigor. As a threshold matter, its myopic focus on HHI scores and industry “consolidation” and marketplace structure utterly ignores marketplace behavior and what really matters: the consumer perspective. And as discussed herein and in the White Paper, the mobile wireless consumer today enjoys more choices, lower prices, reduced switching costs, faster and more reliable service, and greater differentiation¹⁶ – all of which point to a market that is robustly competitive and producing for consumers. As Department of Justice Assistant Attorney General for Antitrust Bill Baer recently made clear, “the [wireless] market is thriving and consumers are benefitting from the current competitive dynamic.”¹⁷

Perhaps recognizing these competitive market realities, OTI/CU contend that rules are still needed even if the market is competitive, pointing to claims of harm in the record and the “walled gardens” of years past. CTIA has already debunked the claims of harm, showing that the “examples” cited in the record by commenters are irrelevant or inapt.¹⁸ And while it has been suggested that competition may not assure Internet openness because “walled garden[s]”

¹³ See American Customer Satisfaction Index, ACSI Telecommunications and Information Report, at 7 (2014), <http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2014/acsitelecommunications-and-information-report-2014>.

¹⁴ *Id.* at 9. OTI/CU’s claim that 27% of dissatisfied mobile broadband consumer are reluctant to switch due to long-term contracts with ETFs or fear of making a bad choice means that the vast majority – 73% do not share those concerns. See OTI/CU Jan. 28 Letter at 3.

¹⁵ CTIA *Mobile Wireless Service Survey* at 16.

¹⁶ See *infra* notes 52-55 and accompanying text; White Paper § II.A; Lerner/Ordo Paper at 6-10 (demonstrating that there is significant competitive rivalry between providers of wireless broadband Internet access).

¹⁷ Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, N.Y. Times, Jan. 30, 2014, at B3, http://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/?_php=true&_type=blogs&_r=0.

¹⁸ See CTIA Reply Comments at 16-17. Unless otherwise noted, references herein to “Comments” and “Reply Comments” refer to those pleadings filed in GN Docket Nos. 14-28 and 10-127 on or around July 18, 2014, and September 15, 2014, respectively.

once existed despite “multi-carrier competition,”¹⁹ the White Paper explains that technological restraints, and not control over last mile connections, led to walled gardens in the early mobile Internet – far from the reality today.²⁰ In any case, Professor Janusz Ordovery, former Deputy Assistant Attorney General for Economics in the Department of Justice’s Antitrust Division, and Dr. Andres Lerner recently demonstrated that there is no “terminating access monopoly” for wireless broadband, rendering the case for Title II regulation of mobile broadband both inconsistent with the competitive reality of the mobile broadband marketplace and deeply flawed as a matter of economic theory.²¹

The FCC Got It Right in 2010: Wireless Is Different and Deserves a Mobile-Specific Regulatory Approach. Under these circumstances, the Commission should maintain the mobile-specific approach that it embraced in 2010 and avoid rules or standards that would impede the differentiated offerings and choices mobile consumers enjoy today. Indeed, Americans recognize this competitive reality: a recent survey shows that two-thirds of Americans (66%) agree that the government, if it were to regulate mobile services, should adopt rules that take into account today’s mobile technologies and competitive landscape.²² As Chairman Wheeler has stated, competition is “[o]ne of the most effective tools for ensuring Internet openness,”²³ and “[i]f there are good things happening [in] the marketplace, if there is competition, then the [FCC] doesn’t have to do much”²⁴ and “regulation can be low.”²⁵ The Commission should apply this philosophy to mobile open Internet rules.

II. RECLASSIFICATION OF MOBILE BROADBAND WOULD UNLAWFULLY UPEND WELL-ESTABLISHED RELIANCE INTERESTS.

Reclassification of Mobile Broadband Would Not Meet the Hurdle for an Agency Changing Course. To overturn the agency’s long-standing treatment of mobile broadband as a lightly-regulated information service, the Commission would need to ignore the world-leading investment and innovation undertaken by wireless providers in reliance on the Commission’s chartered policies. In reversing policy, an agency must “provide a more detailed justification

¹⁹ Remarks of Tom Wheeler, Chairman, FCC, 2014 CTIA Show, Las Vegas, NV, at 3 (Sept. 9, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf, cited in OTI/CU Jan. 28 Letter at 5 & n.13.

²⁰ See White Paper § II.C.

²¹ See generally Lerner/Ordovery Paper.

²² CTIA Mobile Wireless Service Survey at 7.

²³ Remarks of Tom Wheeler, Chairman, FCC, National Cable & Telecommunications Association, at 4 (Apr. 30, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf.

²⁴ David S. Cohen, *FCC Chairman Voices Clear But Cautious Support for Net Neutrality*, VARIETY, Jan. 8, 2014, <http://variety.com/2014/digital/news/fcc-chairman-voices-clear-but-cautious-support-for-net-neutrality-1201037827/#> (quoting FCC Chairman Tom Wheeler at the 2014 Consumer Electronics Show).

²⁵ Remarks of Tom Wheeler, Chairman, FCC, The Ohio State University, Columbus, OH, at 4 (Dec. 2, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324476A1.pdf.

than what would suffice for a new policy created on a blank slate” when its prior policy “has engendered serious reliance interests that must be taken into account.”²⁶ Indeed, the Supreme Court explicitly “has instructed agencies to consider reliance interests when shaping agency positions.”²⁷ Overcoming reliance interests generated from the Commission’s mobile broadband classification will be particularly problematic here because the FCC specifically designed its policies to provide regulatory certainty and generate the kind of investment, innovation, and coverage that carriers have created. Thus, contrary to some commenters’ claims,²⁸ reclassification would trigger heightened scrutiny. As the Supreme Court has made clear, when parties develop reliance interests based on agency policies, “additional justification [for a policy change] is required.”²⁹

Recognition of Wireless Broadband as an Information Service Was Designed to Encourage Reliance on That Commission Policy. As detailed below, Congress in 1993 fenced off services like mobile broadband from common carrier treatment, thus providing carriers incentives to invest. In 2007, the FCC doubled down on what it rightly deemed a pro-investment policy by classifying wireless broadband Internet access service as an information service under the Communications Act,³⁰ thus “removing [it] from potential regulation under Title II of the Communications Act.”³¹ The agency’s goal was to establish “a minimal regulatory environment for wireless broadband Internet access service that *promotes our goal of ubiquitous availability* of broadband to all Americans,”³² particularly for rural and underserved areas “where wireless broadband may be the most efficient broadband option.”³³ Recognizing that wireless “technologies continue to evolve at a rapid pace,” the decision – adopted without dissent – sought to “provide the *regulatory certainty needed to help spur growth and deployment*” of mobile broadband³⁴ and deliver “reliable, *ever-increasing bandwidth to individuals at ever-decreasing cost.*”³⁵

²⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”). The more detailed justification is also required when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.*

²⁷ *Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm’n*, 742 F.3d 82, 104 (4th Cir. 2014) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) and *Fox*, 556 U.S. at 515) (Agee, J., dissenting).

²⁸ See, e.g., Letter from Michael Beckerman, President & CEO, The Internet Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (Jan. 6, 2015); Letter from COMPTEL *et al.*, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 3 (filed Dec. 30, 2014).

²⁹ *Qwest Corp. v. FCC*, 689 F.3d 1214, 1225 (10th Cir. 2012).

³⁰ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902 ¶ 1 (2007) (“*Wireless Broadband Order*”).

³¹ *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13074 ¶ 29 (2009).

³² *Wireless Broadband Order*, 22 FCC Rcd at 5902 ¶ 2 (emphasis added).

³³ *Id.* at 5911 (¶ 27).

³⁴ *Id.* (emphasis added).

³⁵ *Id.* at 5933 (Statement of Commissioner Robert M. McDowell) (emphasis added).

Commissioner statements at the time and in subsequent proceedings reflect the investment-encouraging goal of the agency's policy. Chairman Kevin Martin noted, "Today's classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and will further encourage investment and promote competition in the broadband market."³⁶ Commissioner Robert McDowell, in adopting the item, sought to "spark investment, speed competition, empower consumers, and make America a stronger player in the global economy."³⁷ And in 2010, Chairman Julius Genachowski stayed the course of flexible regulation, recognizing that "any reduction in innovation and investment in mobile broadband applications, devices or networks" would be "cause for concern."³⁸

Wireless Providers Relied on This Commission Policy to Invest, Innovate and Deploy Mobile Broadband. The FCC's light-touch information services regime for mobile broadband has generated investment, innovation, and consumer benefits in many of the exact ways that the FCC envisioned seven years ago. And the objectives of the 2007 *Wireless Broadband Order* – dramatic investments and wireless broadband ubiquity that offers increasing speeds delivered at decreasing cost – are being met.

Through generation after generation of wireless broadband – from 3G to 4G and to the 5G networks of tomorrow – wireless operators have secured and deployed billions of dollars to develop mobile networks that provide a platform for untold billions of innovation, productivity, and economic growth. This investment, totaling over \$175 billion since the *Wireless Broadband Order*,³⁹ has relied upon a regulatory environment that treats wireless broadband as an information service.

Indeed, America's wireless companies have "invested hundreds of billions of dollars in their networks in reasonable reliance on their Title I status."⁴⁰ Following the agency's information service classification decision, "[d]uring 2008 and 2009, mobile wireless service providers ... focus[ed] largely on the upgrade and expansion of mobile broadband networks to enable high-speed Internet access and other data services for their customers."⁴¹ And "despite the ... economic downturn,"⁴² after the *Wireless Broadband Order*, "annual investment in U.S. wireless networks grew more than 40% between 2009 and 2012, from \$21 billion to \$30

³⁶ *Id.* at 5926 (Statement of Chairman Kevin J. Martin).

³⁷ *Id.* at 5933 (Statement of Commissioner Robert M. McDowell).

³⁸ *Open Internet Order*, 25 FCC Rcd at 8309 (Statement of Chairman Julius Genachowski).

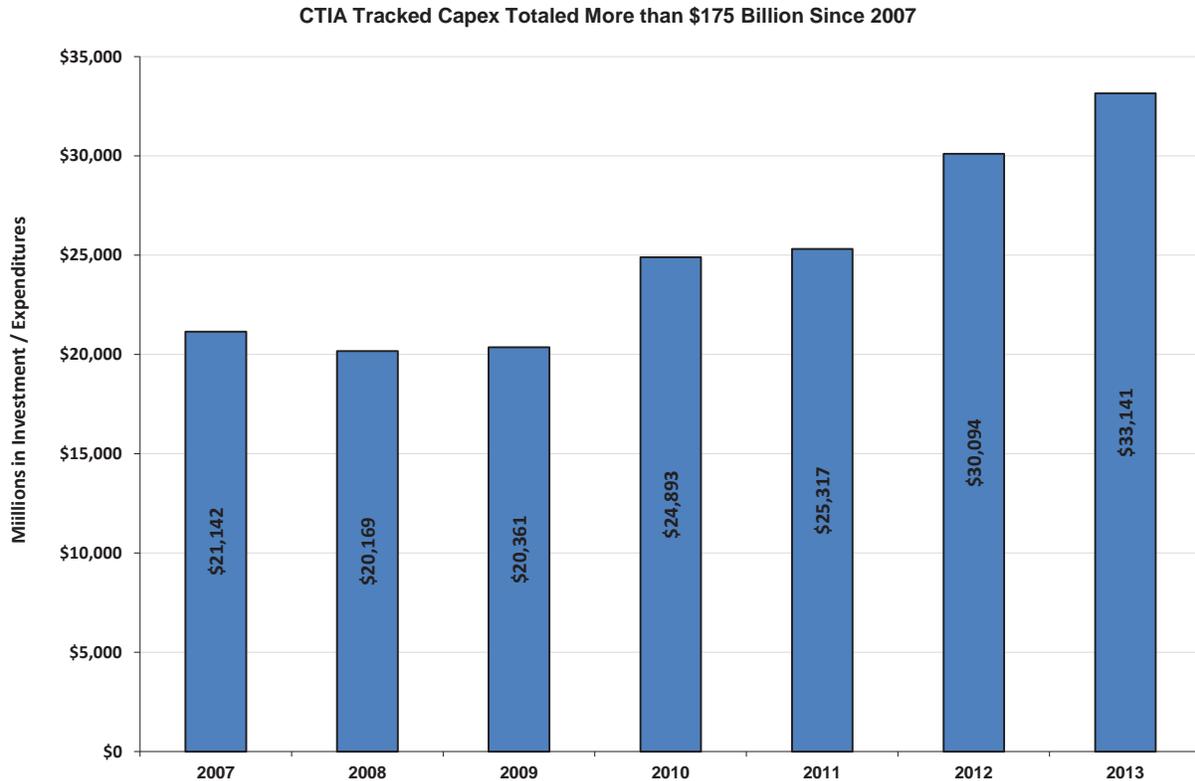
³⁹ CTIA, *Annual Wireless Industry Survey*, at 12 (June 2014) ("*CTIA Annual Wireless Industry Survey*"), http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

⁴⁰ TechFreedom Comments at 95; *see also* T-Mobile Comments at 12 (describing the "billions of dollars [mobile broadband providers] have invested in their networks"); GSMA Comments at 9 (same); Mobile Future Comments at 14 (same); AT&T Comments at 8 (same); Verizon Comments at 39 (same).

⁴¹ *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407, 11476 ¶ 105 (2010) ("*Fourteenth Report*").

⁴² *Id.* at 11412 ¶ 4.

billion.”⁴³ In fact, the wireless industry invested more than \$175 billion from 2007 through 2013.⁴⁴



There can be no disagreement with Commissioner Clyburn’s observation that “the level of investment in the wireless sector has been mind-boggling.”⁴⁵ This massive investment in infrastructure includes a record \$33 billion in 2013,⁴⁶ which has helped create a hyper-competitive mobile ecosystem and a world-leading 4G infrastructure. Wireless broadband investment shows no sign of abating, either. This is not mere hyperbole: the level of American

⁴³ FCC, SIGNIFICANT FCC ACTIONS AND KEY DEVELOPMENTS IN THE BROADBAND ECONOMY 1 (2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-319728A1.pdf.

⁴⁴ See *CTIA Annual Wireless Industry Survey* at 12.

⁴⁵ *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7926 (2010) (Statement of Commissioner Mignon L. Clyburn).

⁴⁶ CTIA, *Annual Wireless Industry Survey*, Year-End U.S. Figures from CTIA’s Annual Survey Report (June 2014), <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

risk capital amounts to six times more per subscriber than its global counterparts: \$94 per subscriber here versus \$16 per subscriber outside the U.S.⁴⁷

New mobile broadband deployment covering all parts of the country – including the rural areas the *Wireless Broadband Order* was designed to address – has been dramatic. Today, according to the *Seventeenth Report*, 93.4% of Americans live in census blocks covered by three or more mobile broadband providers.⁴⁸ This represents a significant increase even from 2007, when just 41% of the population had a choice of at least three mobile broadband providers.⁴⁹ In fact, today virtually all Americans enjoy access to mobile broadband services.⁵⁰ This demonstrates a marked improvement from May 2007, when 18% of the population still lacked access to any of these services.⁵¹

Americans now also experience significantly faster connection speeds than those available in 2007, fulfilling another Commission goal of the *Wireless Broadband Order*. With the rollout of 4G services, the vast majority of U.S. consumers have access to wireless broadband download speeds of 10 Mbps or greater.⁵² In 2007, wireless providers continued to deploy a patchwork of lesser broadband technologies, such as CDMA EV-DO and CDMA/HSDPA, with average download speeds of only 400-800 kbps.⁵³ The average consumer has access to broadband networks built in reliance on the Commission's *Wireless Broadband Order* that are *more than 20 times faster* than the networks available in 2007.

As the wireless broadband speeds Americans enjoy have increased, price has declined. In the five years following the *Wireless Broadband Order*, the price for data services – measured in price per megabyte (“MB”) – dropped a whopping 93%, from \$0.46 in 2008 to \$0.03 in 2012.⁵⁴ At the same time, overall data usage soared. According to one estimate, U.S. mobile

⁴⁷ Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA, to Honorable Thomas E. Wheeler, Chairman, FCC, GN Docket No. 09-51, WT Docket No. 13-135 (Nov. 13, 2013), <http://www.ctia.org/docs/default-source/default-document-library/networks.pdf?sfvrsn=0>.

⁴⁸ *Seventeenth Report* at Chart III.A.2 and Table III.A.iv.

⁴⁹ *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241, 2304 ¶ 145 & tbl.12 (2008) (“*Twelfth Report*”).

⁵⁰ *Seventeenth Report* at Table III.A.iv (reporting 99.7% are covered by one or more mobile broadband providers).

⁵¹ *Twelfth Report*, 23 FCC Rcd at 2304 ¶ 145 & tbl.12.

⁵² FCC, NATIONAL BROADBAND MAP (2014), <http://www.broadbandmap.gov/summarize/nationwide> (data as of December 2013).

⁵³ *Twelfth Report*, 23 FCC Rcd at 2248.

⁵⁴ CTIA, THE U.S. WIRELESS INDUSTRY: LEADING THE WORLD IN INVESTMENT, VALUE, INNOVATION, AND COMPETITION 10 (2013) (“*Leading the World*”), appended to Letter from Scott K. Bergmann, CTIA, to Thomas E. Wheeler, Chairman, FCC, GN Docket No. 09-51, WT Docket No. 13-135 (Nov. 13, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7520957610>.

data traffic in 2013 was approximately 73 times the volume of mobile traffic in 2007.⁵⁵ These lower prices were also one of the goals of the Commission's Title I classification decision.

Today, wireless providers are continuing this reliance and have begun investing in 5G technologies to meet the demands of Americans ever increasingly "connected life." If current policies remain in place, under the current trajectory this investment may increase GDP by nearly \$100 billion and generate "up to 1.2 million net new jobs."⁵⁶

III. THE COMMISSION CANNOT AND SHOULD NOT SEEK TO IMPOSE A TITLE II PLUS FORBEARANCE APPROACH ON MOBILE BROADBAND SERVICES.

The FCC Should Not Use Its "Forbearance" Authority to Impose Expansive New Regulatory Mandates on Mobile Broadband. Commenters have recently compared Section 332's CMRS framework to a potential Title II broadband regime, stating that Section 332 forbearance from most of Title II except for Sections 201, 202, and 208 provides a model suitable for mobile broadband reclassification.⁵⁷ CTIA disagrees. Broadband Internet access and CMRS are different services governed by disparate Congressional provisions. The use of the Commission's "forbearance" authority to impose expansive new regulatory mandates, rather than to remove existing regulation, would upend the deregulatory purposes for which Congress enacted the forbearance provisions in Section 332(c) and Section 10 alike.

Any suggestion that the CMRS regulatory regime would be appropriate as a mobile broadband regulatory regime would fail to account for Congress's clear intentions with respect to these services. When it amended Section 332 in 1993, Congress directed the Commission to treat CMRS offerings as Title II common-carrier services.⁵⁸ In sharp contrast, as CTIA and others have explained at length, Congress expressly *prohibited* the Commission from treating services like mobile broadband as common carrier offerings subject to Title II.⁵⁹ There is a vast

⁵⁵ *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd 3700, 3872 ¶ 264 (2013) (citing Cisco Visual Networking Index, http://www.cisco.com/en/US/netsol/ns827/networking_solutions_sub_solutions.html).

⁵⁶ ALAN PEARCE *ET AL.*, WIRELESS BROADBAND INFRASTRUCTURE: A CATALYST FOR GDP AND JOB GROWTH 2013-2017 at 1 (Sept. 2013), <http://apps.fcc.gov/ecfs/document/view?id=7520949630>.

⁵⁷ See Letter from COMPTTEL *et al.*, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 1-2 (Dec. 30, 2014); Letter from Harold Feld *et al.*, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 20 (Dec. 19, 2014); Letter from Lauren M. Wilson, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 & 09-191, at 2 (Oct. 3, 2014).

⁵⁸ See 47 U.S.C. § 332(c)(1)(A).

⁵⁹ See *id.* § 332(c)(2); see generally Letter from Scott Bergmann, CTIA, to Marlene H. Dortch, FCC, GN Docket Nos. 10-137, 14-28 (Dec. 22, 2014), attaching White Paper, "Section 332's Bar Against Common Carrier Treatment of Mobile Broadband: A Legal Analysis" (Dec. 2014) ("Section 332 White Paper"); Letter from William H. Johnson, Verizon, to Marlene H. Dortch, FCC, GN Docket Nos. 10-137, 14-28 (Dec. 24, 2014); Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, FCC, GN Docket Nos. 10-137, 14-28 (Jan. 8, 2015).

difference between applying Title II's obligations to voice CMRS offerings, as Congress directed, and applying such mandates to mobile broadband, contrary to Congress's instructions.

Applying Title II with Forbearance Would Turn Congress's Deregulatory Framework on Its Head. The very use of forbearance to create from whole cloth a regulatory framework for services that have never before been subjected to Title II turns Congress's statutory design on its head. Section 10 was designed as a *deregulatory* tool – a key component of the 1996 Act's effort to “reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”⁶⁰ To this end, in Section 706, captioned “Advanced Telecommunications Incentives,” Congress directed the Commission to encourage broadband deployment using “regulatory forbearance,” among other tools.⁶¹ The same is true of Section 332(c)'s forbearance provision, which Congress adopted to enable the Commission to remove obligations that had previously applied to commercial mobile offerings. Indeed, the very term “forbear” means to “restrain an impulse to do something” or “refrain.”⁶² This, of course, is what the Commission did with respect to CMRS under Section 332(c) – it *pared down* existing regulation. Likewise, the Commission in 1996 used forbearance to reduce regulations burdening interexchange carriers, not to create them.⁶³ There is no evidence whatsoever that Congress intended the Commission to use forbearance as a key tool to apply Title II to services that never were subject to common carrier regulation. Reclassifying broadband as Title II and then forbearing is an unprecedented regulatory two-step directly contrary to the deregulatory imperatives that animated the forbearance provisions.

The Mobile Broadband Market Is Far More Dynamic, Innovative, and Rapidly Evolving Than Traditional Voice Services. In any case, there is no basis for concluding that the success of the U.S. CMRS industry under a pared-down Title II framework justifies similar treatment of mobile broadband Internet access services. Application of a particular regulatory regime to one service does not mean that the same rules can be applied in the same manner in connection with another or that they will have the same specific effects. Voice CMRS offerings and mobile broadband offerings serve different functions and reflect differing degrees of innovation. The fact that the wireless voice market has succeeded while CMRS services have been subject to a truncated version of Title II is no basis for reclassifying distinct mobile broadband offerings under Title II – especially when the mobile marketplace's success has been driven in large part by the investment and innovation in mobile broadband free from common carrier regulation. For example, whereas CMRS providers would have had little reason to doubt that their voice offerings were lawful, providers of ever-evolving broadband services will be unable to know whether the Commission will deem their increasingly differentiated and divergent offerings, charges, and practices as unjust or unreasonable under Section 201(b), or

⁶⁰ Telecommunications Act of 1996, 110 Stat. 56, Pub. L. 104-104, Preamble.

⁶¹ 47 U.S.C. § 1302(a).

⁶² OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oxforddictionaries.com/definition/english/forbear#forbear-2>.

⁶³ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20732-33 ¶ 3 (1996).

whether different treatment of two services would be considered unreasonably discriminatory under Section 202(a). The Commission should eschew any suggestion that the CMRS experience supports the reclassification of broadband Internet access service here. It should instead adopt a regulatory framework grounded in its Section 706 powers. This remains the best legal path to preserving an open Internet.

An Approach Based on Forbearance Would Create Unnecessary Legal Risk and Uncertainty. Reclassifying broadband Internet access service as including a distinct telecommunications service component, but simultaneously forbearing from portions of Title II,⁶⁴ raises numerous dangers of its own. The Commission should reject this path.

First, an approach based on forbearance would still apply core Title II requirements to mobile (and fixed) broadband services – including Sections 201 and 202 of the Act, which are “among the broadest and most burdensome sections of Title II and would result in a highly complex regulatory regime.”⁶⁵ These provisions themselves would severely limit the flexibility that allows mobile broadband providers to manage limited network resources and experiment with new business models. As Verizon recently explained:

Applying Sections 201 and 202 to broadband would, by their terms, open the doors to endless requests for direct price regulation, as well as regulation of providers’ service-related practices.... Sections 201 and 202 could also be used by advocates of extensive regulation to try to deprive broadband providers of the flexibility necessary to engage in a variety of practices from which consumers could benefit on the paternalistic theory that these advocates, rather than consumers, know what is best for them.⁶⁶

Thus, application of Sections 201, 202, and 208 could badly undermine their ability to serve their customers’ needs, reducing consumers’ welfare and harming the public interest. Mobile broadband providers also would be subject to formal complaints filed by any entity that believed that broadband prices or practices were unlawful, allowing individuals or competitors to hold innovation hostage as the Commission worked to resolve disputes. Developments such as these would undermine the public interest.⁶⁷

Second, it is not at all clear that the “limited” class of requirements the Commission has proposed to keep in place will in fact be the only requirements applied to mobile broadband

⁶⁴ See generally *Framework for Broadband Internet Service*, GN Docket No. 10-127, 25 FCC Rcd 7866 (2010).

⁶⁵ See Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 3 (Jan. 26, 2015).

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* (“Applying these provisions to broadband would thus force providers to defend themselves at every turn from parties seeking a prescribed, one-size-fits-all regulatory model. The resulting death by a thousand cuts would discourage providers from experimenting or introducing innovative new models ... that consumers may want.”).

providers. When the Commission sought comment on this type of approach based on forbearance in 2010, several parties sought to expand the list, and asked the Commission to keep in place a more fulsome collection of mandates. Among the provisions parties sought to add to the six listed above were Sections 203, 211, 213, 214, 215, 218, 219, 220, 251, 256, and 257.⁶⁸ The current proceeding includes requests to expand that list even further.⁶⁹ And even if the Commission were to reject such calls, and forbear from all of these additional provisions, there is no way to know whether parties will challenge those forbearance grants – or whether Courts will overturn them. Thus, mobile broadband providers would face substantial uncertainty in the months or years following any reclassification decision, and the regime that emerges from the inevitable litigation could be much more regulatory than the one the Commission adopts.

IV. SECTION 332 BARS THE COMMISSION FROM SUBJECTING MOBILE BROADBAND SERVICES TO COMMON CARRIER TREATMENT.

The Commission Has Not Provided the Requisite Notice to Rework the CMRS Definition, As Some Would Like. In its January 27 *ex parte* filing,⁷⁰ OTI, tries, but fails, to rebut various submissions demonstrating that the Commission is legally barred from subjecting mobile broadband – a private mobile service (“PMRS”) – to common carrier requirements. As an initial matter, OTI simply refuses to address the core procedural problem the Commission faces here – its failure to provide adequate Administrative Procedure Act (“APA”) notice to support the changes OTI seeks. CTIA raised this problem in its December 22, 2014 Section 332

⁶⁸ See Comments of Public Knowledge, GN Docket No. 10-127, at 41-50 (July 15, 2010); Comments of Free Press, GN Docket No. 10-127, at 66-73 (July 15, 2010).

⁶⁹ See, e.g., Letter from John M. Simpson, Privacy Project Director, Consumer Watchdog, to Tom Wheeler, Chairman, FCC, et al., GN Docket No. 14-28, at 1-2 (Jan. 26, 2015) (“[T]he Commission [should] apply these 13 sections of Title II to broadband providers when they are classified as telecommunications services: [Sections 214, 217, 222, 224, 225, 230, 251, 253, 254, 255, 256, 257, and 258.]”); Letter from Lauren M. Wilson, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 2 (Jan. 13, 2015) (“Sections 201, 202 and 208 form the bedrock of Title II and provide sufficient authority for strong, enforceable open Internet rules.... [T]he Commission should not forbear from ... Sections 222, 251, 255 and 256.... [T]he Commission [should] consider retaining Section 214’s discontinuance provisions and ... Section 254 provides a sound basis for extending the Universal Service Fund to support broadband for rural and low-income communities.”); Letter from Mark Cooper, Director of Research, Consumer Federation of America, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-2 (Jan. 7, 2015) (“[Sections 214, 217, 222, 224, 225, 230, 251, 253, 254, 255, 256, 257, and 258 of the Communications Act] deserve independent notice and comment proceedings.”); Letter from Harold Feld *et al.*, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 & 10-127, at 19 (Dec. 19, 2014) (“In addition to not initially forbearing from certain provisions governing service changes, interconnection, deployment, consumer protection, and the Commission’s ability to ensure accountability and prescribe remedies, the Commission should explicitly apply certain sections of Title II in reclassifying broadband access service and crafting Open Internet rules in this docket.”) (citing 47 U.S.C. §§ 203, 205-07, 209, 211-16, 218-20, 222, 225, 261, 254-57).

⁷⁰ Letter from Michael Calabrese, Director, Wireless Future Project, Open Technology Institute, New America to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Jan. 27, 2015) (“OTI Jan. 27 Letter”).

White Paper,⁷¹ and others have mentioned it as well,⁷² but OTI finds no room in its 17-page filing to even reference the issue.

Instead, OTI's filing simply states that Congress delegated to the Commission the authority to define the terms "interconnected with the public switched network" and "functional equivalent" and offers up its preferred views.⁷³ But the Commission has not provided sufficient APA notice to ground either (1) a modification of the CMRS definition, including "interconnected service" and "public switched network," as set forth in Section 20.3 of the Commission's rules or (2) a determination that mobile broadband is the "functional equivalent" of CMRS as that term is used in Section 332(d)(3) (defining "private mobile service"). The May 2014 NPRM asked only whether mobile broadband Internet access service "fit[s] ... the definition of 'commercial mobile radio service.'"⁷⁴ 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 NPRM proposed specific additions and changes to various Commission's rules,⁷⁵ it never raised the possibility of amending section 20.3. Likewise, the Commission has not provided notice that it might deem mobile broadband the "functional equivalent" of CMRS. Indeed, the term "functional equivalence" does not appear in the definition of CMRS but rather in the definition of PMRS, which the NPRM never even mentioned.⁷⁶ Similarly, the *2010 Broadband Framework NOI* did not seek comment on these issues. It asked only "[t]o what extent" Section 332 "should ... affect [the Commission's] classification of wireless broadband Internet services."⁷⁷ Again, OTI does not even acknowledge let alone refute this issue.

Calls to Redefine the Meaning of CMRS Ignore Congress's Will. In any case, OTI's interpretation of the relevant statutory provisions continues to be riddled with flaws. To begin with, OTI ignores clear evidence that Congress used the term "public switched network" to mean "public switched telephone network." It is axiomatic that, when Congress "borrows" a term of art that has been given meaning by the courts or the relevant agency, it "intended [that term] to have its established meaning."⁷⁸ Here, Congress adopted the 1993 legislation at issue knowing that the Commission and the courts had routinely used the term "public switched network"

⁷¹ See Section 332 White Paper at 6-7, 13-15.

⁷² See Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 5-7 (Dec. 24, 2014).

⁷³ OTI Jan. 27 Letter at 5.

⁷⁴ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5614 ¶ 150 (2014).

⁷⁵ See, e.g., *id.* at 5626-27 App. A (proposing specific amendments to Part 8 of the Commission's rules, 47 C.F.R. §§ 8.1-8.11 (Protecting and Promoting the Open Internet), including specific new and revised definitions in Section 8.11).

⁷⁶ See 47 U.S.C. § 332(d)(3).

⁷⁷ *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7909 ¶ 104 (2010).

⁷⁸ *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

interchangeably with “public switched *telephone* network.”⁷⁹ Moreover, Congress demonstrated that it viewed the terms as interchangeable by describing the legislation as requiring interconnection with the “public switched telephone network” in the Conference Report.⁸⁰ OTI’s argument that Congress could have used the term “public switched telephone network” if it wanted to misses the point, because – as the above demonstrates – it used a shorter term that it properly understood to mean *just that*. The Commission understood this point well when, in 1994, it determined that what mattered was whether the network was “interconnected with the *traditional local exchange or interexchange switched network*” and explained 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.”⁸¹ OTI tries to brush this language aside by saying that the term “key element” does not mean that use of the NANP is “dispositive,”⁸² but this is exactly what that term “key element” means – that the characteristic at issue is of “paramount or crucial importance.”⁸³

Nor does the statutory text directing the Commission to define the term CMRS give the agency discretion to ignore this clear Congressional understanding. OTI’s contention – that by directing the Commission to “define [the term ‘interconnected service’] by rule,” Congress gave the Commission boundless discretion – offers no limiting principle, and would entirely unmoor the Commission from Congress’s will. This would be an absurd result incompatible with both core precepts of statutory interpretation (which look first and foremost to implementing Congressional will) and the Constitution (which bars Congress from delegating to agencies unbounded authority).

OTI’s structural argument regarding the relationship between Section 3’s definitions and Section 332’s definitions also fails. In short, OTI contends that the Commission should classify mobile broadband as a telecommunications service under Section 3’s definitions, and that this result, read in conjunction with Section 332(c), dictates a finding that mobile broadband is also

⁷⁹ See *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 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), *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*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5421 ¶ 1 n.3 (1991), *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); *MTS and WATS Market Structure*, Order Inviting Further Comments, 1985 FCC LEXIS 2900 at *2 (Fed.-State Jt. Bd. 1985); *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC2d 689, 690 ¶ 2 n.3 (1981).

⁸⁰ H.R. Rep. No. 103-213, at 495 (1993) (Conf. Rep.).

⁸¹ *Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1436-37 ¶¶ 59-60 (1994) (“*CMRS Second Report and Order*”).

⁸² OTI Jan. 27 Letter at 10.

⁸³ OXFORD ENGLISH DICTIONARY ONLINE (defining the term “key”), http://www.oxforddictionaries.com/us/definition/american_english/key.

CMRS. But this analysis stands traditional statutory analysis on its head. The classification of mobile broadband service is governed first and foremost by the statute specifically addressing that offering – namely, Section 332.⁸⁴ As CTIA and others have explained, that provision mandates classification of mobile broadband as PMRS. And *that* classification, as the Commission correctly has held, mandates a finding that mobile broadband is an information service under Section 3.⁸⁵

OTI's argument that the Commission should simply redefine the term "capability," such that broadband Internet access could be said to offer the "capability" of interconnecting with the public switched telephone network,⁸⁶ would require it to similarly ignore Congress's will by collapsing the distinction between PMRS and CMRS offerings. As CTIA has explained at length, it also would repudiate decades of Commission precedent under which services are evaluated on their own terms, rather than on the basis of the services that might ride over them. OTI's broad reading of Section 332(d)(3)'s "functional equivalent" language is similarly incompatible with Congressional intent. Indeed, in its 17-page filing, OTI never once mentions the *CMRS Second Report and Order*'s holding 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."⁸⁷ While OTI sets out its own unique vision of what might qualify as the functional equivalent of CMRS, it makes no effort to satisfy the specific criteria set out in Section 20.9(a)(14) of the Commission's rules, which governs petitions seeking such classification. Indeed, neither OTI nor any other party in this docket has filed such a petition.

Ultimately, OTI simply seeks to read its own policy preferences into Section 332.⁸⁸ But what matters is the statute that Congress adopted. The available evidence all demonstrates that Congress's intent was *not* to maximize the application of common carrier requirements – if it had been, then Congress would not have established the PMRS category and expressly shielded it from such requirements. Rather, as the Commission emphasized in the *CMRS Second Report and Order*, Congress intended to ensure that new offerings that were similar to preexisting cellular offerings be treated alike: "Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification."⁸⁹ OTI is of course entitled to its own view as to what the statute *should* require, but the law today does not match its prescriptions, and its vision can only be adopted by Congress, not the Commission.

⁸⁴ In conducting statutory analysis, a "specific provision controls over one of more general application." *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

⁸⁵ *See generally Wireless Broadband Order*, 22 FCC Rcd 5901 at 5919-21 ¶¶ 48-56.

⁸⁶ *See* OTI Jan. 27 Letter at 10-14.

⁸⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1448 ¶ 80.

⁸⁸ OTI contends that "[t]he Congressional [p]urpose [u]nderlying Section 332 was to [e]nsure that any [c]ommon [c]arrier [s]ervice [w]ould [r]eceive the [b]asic [c]onsumer [p]rotections [r]equired of CMRS," OTI Jan. 27 Letter at 5, but this of course begs the key question, which is whether mobile broadband is a "common carrier" service – and that question is only answered by determining whether it is CMRS.

⁸⁹ *CMRS Second Report and Order*, 9 FCC Rcd at 1418 ¶ 13.

The Search for Support in Commission Precedent and Reference to Misstated Facts Also Fail. OTI makes much of the Commission’s statement that it would not limit the CMRS definition to services connecting to the public switched telephone network,⁹⁰ but the Commission makes clear that it was only refusing to limit CMRS to specific *technologies* (i.e., cellular systems). The very language OTI cites declines to identify CMRS offerings with the “public switched telephone network” precisely because that term was, in the Commission’s view, “more technologically based” than the term “public switched network.”⁹¹ And, as noted above, the very same order held that CMRS must interconnect with a network using NANP numbering, making clear the Commission’s view that the term CMRS was indeed limited to the networks we today consider the PSTN.

On a similar note, OTI badly misunderstands the Commission’s 1994 discussion of PCS offerings. OTI expounds at length about the Commission’s presumption that PCS would be presumptively classified as CMRS and subject to common carrier regulation,⁹² in the seeming belief that “PCS” is defined to mean “all wireless technologies and services ever developed.” As the *CMRS Second Report and Order* itself makes clear, it is not. Rather, as used in the language OTI quotes, “PCS” refers only to “licensees receiving PCS spectrum” that would use the frequencies to offer basic voice service.⁹³ The Commission’s task here is to apply Section 332 and determine the appropriate regulatory classification for mobile broadband service *regardless of the spectrum band in which it operates*.

Similarly, there is no merit to OTI’s argument that its position is consistent with the 2007 *Wireless Broadband Order*. OTI suggests that VoIP in 2007 was a newly emerging offering not resembling the VoIP of today. This is simply wrong. By 2007, the FCC had issued multiple orders regarding VoIP, including (among others) the *CALEA VoIP Order*, the *Vonage Order*, the *VoIP 911 Order*, the *AT&T IP-in-the-Middle Order*, and the *Pulver.com Order*. These orders, along with many others that have stemmed from the 2004 *IP-Enabled Services NPRM*, continue to govern the VoIP marketplace, and no party has seriously suggested that they have become outdated by changes in the underlying service. Nor has anyone seriously suggested that VoIP is somehow any less a distinct service today than it was in 2007 or before.⁹⁴

Finally, OTI relies on several factual claims that are simply incorrect. For example, OTI states that “the service mobile carriers most commonly offer and sell to the general public today is a *broadband data service* that makes little if any distinction – in price, in the radio access

⁹⁰ See OTI Jan. 27 Letter at 8.

⁹¹ *CMRS Second Report and Order*, 9 FCC Rcd at 1436 ¶ 59.

⁹² OTI Jan. 27 Letter at 6-7, 9, 14-16.

⁹³ *CMRS Second Report and Order*, 9 FCC Rcd at 1447 ¶ 79 n.172.

⁹⁴ Indeed, OTI’s careless effort to conflate mobile VoIP and broadband Internet access would have far-reaching consequences – under OTI’s interpretation, mobile VoIP offerings, which the Commission has been careful *not* to label CMRS (or telecommunications services) for more than 10 years, would suddenly fall within that category, and be treated for the first time as common carrier services.

network, or in terms of the user's experience – between voice, text, and Internet access.”⁹⁵ Mobile providers' service plans typically treat voice minutes differently from data usage, and often allow users to adjust one without changing the other. Such plans certainly offer different prices based on the usage of voice and data services, respectively. Likewise, OTI states that mobile providers do not “offer broadband Internet access and voice/telephone services separately.”⁹⁶ Again, this is incorrect. Although different providers' practices differ (as one would hope in a competitive marketplace), many offer voice or data to customers who do not want the other.⁹⁷ And in all cases, any such bundling does not make mobile broadband service “a close substitute” or the functional equivalent of CMRS.

In sum, the Commission should reject OTI's misguided attempt to redefine the key terms in Section 332 to suit its regulatory aims. In the *CMRS Second Report and Order*, under Chairman Hundt, the Commission acted to “minimize[e] regulatory uncertainty and any consequent chilling of investment activity.”⁹⁸ It should maintain this course today by reaffirming mobile broadband's status as a PMRS offering immune from common carrier regulation.

* * *

⁹⁵ OTI Jan. 27 Letter at 15.

⁹⁶ *Id.*

⁹⁷ See, e.g., *Prepaid Phone Plans – No Contract Cell Phone Plans with AT&T GoPhone*, AT&T, http://www.att.com/shop/wireless/plans/prepaidplans.html#planlist-ptip_sku5360236 (last visited Feb. 9, 2015) (prepaid plans with talk and text but no data); *GoPhone SIM for Your Tablet – AT&T*, AT&T, <http://www.att.com/att/gophone-tablet/en/index.html> (last visited Feb. 9, 2015) (data plans for tablets); *AT&T GoPhone Mobile Hotspot – No Annual Contract Wi-Fi Hotspot*, AT&T, <http://www.att.com/att/gophone-mobile-hotspot/en/index.html> (last visited Feb. 9, 2015) (data plans for mobile hotspot devices); *Tablet Plans*, METROPCS, <https://www.metropcs.com/tablet-plans.html> (last visited Feb. 9, 2015) (data and text plans for tablets); *Tablet plans from Sprint for your iPad or Android tablets*, SPRINT, http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?tabId=plnTab1820002&flow=AAL&planFamilyType=null&INTNAV=ATG:HE:TabletPlans (last visited Feb. 9, 2015) (data plans for tablets); *Data Plans*, SPRINT, http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?tabId=pt_data_plans_tab&flow=AAL&planFamilyType=null (last visited Feb. 9, 2015) (3G/4G hotspot mobile broadband connection plan for eligible devices); *Mobile Internet Plans*, T-MOBILE, <http://www.t-mobile.com/cell-phone-plans/mobile-internet.html> (last visited Feb. 9, 2015) (tablet and hotspot data plans); *Pay As You Go Phone Plans*, T-Mobile, <http://prepaid-phones.t-mobile.com/pay-as-you-go> (last visited Feb. 9, 2015) (talk and text plans); *Messaging-Only Plans*, U.S. CELLULAR, <http://www.uscellular.com/plans/text-only.html> (last visited Feb. 9, 2015) (messaging and messaging plus data plans); *More Everything Plan – Verizon Wireless*, VERIZON WIRELESS, <http://www.verizonwireless.com/landingpages/more-everything/> (last visited Feb. 9, 2015) (talk and text plans); Verizon Wireless, *Your Guide: Plans, Coverage, Connectivity*, at 4 (Dec. 2014), http://www.verizonwireless.com/dam/support/pdf/collateral/ConsumerBrochure_EN_12-02-14.pdf (data-only plan).

⁹⁸ *CMRS Second Report and Order*, 9 FCC Rcd at 1421 ¶ 25.

Marlene H. Dortch
February 10, 2015
Page 19

The Commission has developed an unwavering track record of treating mobile broadband outside of Title II. The FCC's regulatory certainty and restraint has enabled mobile broadband – year in and year out – to continually fulfill the goals of its 2007 decision. Given the significant legal risk outlined above, the Commission should maintain the classification of wireless broadband. This remains the best – and most legally sustainable – path to preserving America's mobile Internet leadership.

Sincerely,

/s/ Scott K. Bergmann

Scott K. Bergmann
Vice President – Regulatory Affairs
CTIA – The Wireless Association®

Attachment

**THE WIRELESS DIFFERENCE:
COMPETITION DEMANDS A MOBILE-SPECIFIC
APPROACH TO OPEN INTERNET RULES**

February 10, 2015

Scott K. Bergmann
Vice President, Regulatory Affairs

Krista L. Witanowski
Assistant Vice President, Regulatory Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 785-0081

CONTENTS

EXECUTIVE SUMMARY	1
I. COMPETITION HAS LONG GUIDED THE FCC’S OPEN INTERNET POLICIES, RESULTING IN A MEASURED APPROACH FOR MOBILE BROADBAND.....	2
A. Beginning with 2004’s Internet Freedoms, Competition Has Been Critical to the Commission’s Approach to Net Neutrality.....	3
B. The Open Internet Debate Has Focused on Competition in the Wired Broadband Market, Not Mobile.....	7
C. Competition Among Mobile Broadband Providers Made Mobile Different and Led to a Measured Approach to Mobile Open Internet Rules.....	13
II. COMPETITION IN MOBILE BROADBAND BENEFITS CONSUMERS AND OBIVIATES THE NEED FOR HARMFUL REGULATION.....	14
A. The Competitive Mobile Broadband Market Demands Openness and Is Delivering Massive Benefits to Consumers.....	15
B. Burdensome Regulation Will Harm Consumers and Limit Competitive Differentiation.	22
C. The FCC Got It Right in 2010: Wireless Is Different and Deserves a Mobile-Specific Regulatory Approach.....	24
CONCLUSION.....	25

EXECUTIVE SUMMARY

A review of the Commission’s open Internet decisions over the past decade reveals that the Net Neutrality debate was fueled by concerns that consumers lacked adequate competitive choices in the market for wired broadband Internet access. In particular, regulators and others expressed their concern about the residential broadband Internet access market including cable and telephone operators – concerns that remain prevalent in the current record. By contrast, the Commission recognized in 2010 that mobile broadband is different and that only “measured steps” were appropriate in applying open Internet rules to mobile broadband Internet access.

The decision to take a measured approach to mobile open Internet rules was driven in significant part by competition among mobile providers. These competitive conditions are delivering massive benefits to consumers, who demand mobile Internet openness, making more restrictive rules unnecessary. Today, the mobile broadband market is even *more* competitive than it was in 2010. While 82% of Americans are served by four or more mobile broadband providers, only 15% of U.S. homes have three or more wired broadband providers.¹ Of note, in 2006 then-Senator Barack Obama indicated that the presence of four competitors would obviate the need for net neutrality regulation.² As Department of Justice Assistant Attorney General for Antitrust Bill Baer recently made clear, “the [wireless] market is thriving and consumers are benefitting from the current competitive dynamic.”³

Indeed, the record before the Commission demonstrates that price competition and service differentiation are at the core of the mobile broadband experience today. From Sprint’s offer to cut in half the monthly bills of Verizon and AT&T customers who switch over, to T-Mobile’s *Music Freedom* program, AT&T’s *Sponsored Data* service, Verizon’s recently enhanced *MORE Everything* plan, and U.S. Cellular’s *Shared Connect* plans, differentiation is providing extraordinary benefits for consumers. Quite simply, mobile providers that fail to act in a reasonable manner will see their customers go elsewhere, and this competitive reality makes mobile wireless different. In contrast, there is no reliable evidence of a threat to mobile broadband openness, making more intrusive regulation simply unnecessary; such regulation could strongly deter competitive differentiation to the detriment of consumers.

Under these circumstances, the Commission should maintain the mobile-specific approach that the Commission embraced in 2010 and avoid rules or standards that would impede the differentiated offerings and choices mobile consumers enjoy today. As Chairman Wheeler has stated, competition is “[o]ne of the most effective tools for ensuring Internet openness,” and “[i]f there are good things happening [in] the marketplace, if there is competition, then the [FCC] doesn’t have to do much” and “regulation can be low.”⁴ The Commission should put this philosophy into practice as it considers mobile broadband and open Internet policy.

¹ See *infra* notes 70, 72.

² See *infra* note 46 and accompanying text.

³ See *infra* note 106.

⁴ See *infra* notes 6-8.

I. COMPETITION HAS LONG GUIDED THE FCC’S OPEN INTERNET POLICIES, RESULTING IN A MEASURED APPROACH FOR MOBILE BROADBAND.

From the Internet Freedoms adopted in 2004, to today’s *Open Internet NPRM*, competition has consistently been a central element in the FCC’s framework to preserve and promote the open Internet. An assessment of the Commission’s open Internet decisions over the past decade reveals that the Net Neutrality debate was fueled by perceived concerns that consumers lacked adequate competitive choices in the market for wired broadband Internet access. Today, competition in the wired broadband Internet access market including cable and telephone remains a primary focus of concern in the record before the Commission.

By contrast, the Commission recognized that competition among mobile broadband Internet access providers merited a different, more measured approach – an approach that is even more appropriate now. Indeed, dating back more than fifteen years ago, Chairman William Kennard had already spoken of a mobile difference, citing wireless as “one of the great success stories of competition” and noting that “[i]n a competitive marketplace, excessive regulation can only handcuff the invisible hand, and wireless is a case study of achieving success through market forces instead of government.”⁵ Chairman Wheeler recently echoed this view, stating that competition is “[o]ne of the most effective tools for ensuring Internet openness,”⁶ and “[i]f

⁵ Press Statement of Chairman William Kennard on “Wireless Day” (June 10, 1999), <http://transition.fcc.gov/Speeches/Kennard/Statements/stwek940.html>.

⁶ Remarks of Tom Wheeler, Chairman, FCC, National Cable & Telecommunications Association, at 4 (Apr. 30, 2014) (Wheeler NCTA Remarks), https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf.

there are good things happening [in] the marketplace, if there is competition, then the [FCC] doesn't have to do much"⁷ and "regulation can be low."⁸

A. Beginning with 2004's Internet Freedoms, Competition Has Been Critical to the Commission's Approach to Net Neutrality.

In a 2004 speech, Chairman Michael Powell first outlined four "Internet Freedoms," citing the national importance of promoting competition among broadband networks.⁹ His remarks explained that "competition among broadband networks" presents "a historic opportunity to bring multiple pipes to consumers and, thereby, take a big bite out [of] the 'last mile' problems that have plagued competition and invited heavy monopoly regulation."¹⁰ The remarks also noted that "we must keep a sharp eye" on market practices as the Internet continues to evolve.¹¹

⁷ David S. Cohen, *FCC Chairman Voices Clear But Cautious Support for Net Neutrality*, VARIETY, Jan. 8, 2014, <http://variety.com/2014/digital/news/fcc-chairman-voices-clear-but-cautious-support-for-net-neutrality-1201037827/#> (quoting FCC Chairman Tom Wheeler at the 2014 Consumer Electronics Show).

⁸ Remarks of Tom Wheeler, Chairman, FCC, The Ohio State University, Columbus, OH, at 4 (Dec. 2, 2013) (Wheeler Ohio State Remarks), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324476A1.pdf; *see also id.* ("If the facts and data determine that a market is competitive, the need for FCC intervention decreases. I have zero interest in imposing new regulations on a competitive market just because we can. I have repeatedly advocated the "see-saw" rule – that when competition is high, regulation can be low.").

⁹ Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 5 (Feb. 8, 2004) (*Internet Freedoms*), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf. That is, consumers should have access to their choice of legal content; be able to run the applications of their choice; be permitted to attach any devices they choose to their broadband Internet access service connections; and receive meaningful information regarding their service plans. *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3.

The following year, the Commission issued the *Internet Policy Statement*.¹² The *Internet Policy Statement* generally tracked the Internet Freedoms,¹³ but also recognized that consumers are entitled to “*competition among network providers, application and service providers, and content providers.*”¹⁴ The Commission stated that it would incorporate the *Internet Policy Statement* principles into its ongoing policymaking activities in order to, among other things, “*ensure consumers benefit from the innovation that comes from competition.*”¹⁵ While the *Internet Policy Statement* did not establish rules, the Commission stated that it would continue to monitor “all consumer-related problems” arising in connection with broadband Internet access services.¹⁶

Contemporaneously, the Commission issued an order classifying wireline broadband Internet access as a Title I service.¹⁷ In so doing, the Commission recognized “*the importance of consumer choice and competition in regard to accessing and using the Internet,*”¹⁸ and striving for “[a] regulatory regime that promotes a competitive broadband Internet access services market

¹² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

¹³ Specifically, the *Internet Policy Statement* determined that consumers are entitled to “access the lawful Internet content of their choice[;] ... run applications and use services of their choice, subject to the needs of law enforcement[; and] ... connect their choice of legal devices that do not harm the network.” *Id.* at 14987-88 ¶ 4.

¹⁴ *Id.* (emphasis added). These principles were subject to providers’ need to reasonably manage their networks. *Id.* at 14988 n.15.

¹⁵ *Id.* at 14988 ¶ 5 (emphasis added).

¹⁶ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14929 ¶ 145 (2005) (*Wireline Broadband Order*), *aff’d*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *see id.* at 14915 ¶ 111.

¹⁷ *See supra Wireline Broadband Order.*

¹⁸ *Id.* at 14904 ¶ 96 (emphasis added).

where consumers have a choice of multiple providers.”¹⁹ The Commission noted that while most parts of the country were served by only two established fixed platform providers – cable modem service and digital subscriber line (DSL) service – satellite, wireless, and broadband over power lines (BPL) were “emerging platforms.”²⁰ In his remarks accompanying the release of both the *Internet Policy Statement* and the *Wireline Broadband Order*, Chairman Martin also made clear the critical role of competition in ensuring broadband Internet access.²¹ Indeed, when the Commission clarified in 2007 that wireless broadband Internet access is a Title I information service, Chairman Martin indicated that such action would “promote competition in the broadband market.”²²

Also in 2007, the Commission initiated an industry-wide inquiry regarding broadband Internet access, seeking to obtain “a fuller understanding of the behavior of broadband market participants today.”²³ By 2009, the Commission under Chairman Julius Genachowski commenced a formal open Internet rulemaking out of concern that “[i]n many parts of the United States, customers have limited options for high-speed broadband Internet access service.”²⁴ In

¹⁹ *Id.* at 14885 ¶ 62.

²⁰ *Id.* at 14865 ¶ 19, 14880-85 ¶¶ 50-58.

²¹ News Release, *Chairman Kevin J. Martin Comments on Commission Policy Statement* (Aug. 5, 2005), <http://transition.fcc.gov/meetings/080505/policy.pdf> (“I have long believed that consumers should be able to use their broadband internet access service to access any content on the internet.... In a competitive marketplace, providers must do so. They provide a service that consumers want, or they do not succeed. The steps we take today to place all broadband internet access providers on a level playing field will make this marketplace only more competitive”).

²² *See Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5926 (2007) (*Wireless Broadband Order*).

²³ *See Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894, 7896 ¶ 8 (2007) (*Broadband NOI*).

²⁴ *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13067 ¶ 7 (2009) (*Broadband NPRM*).

seeking comment on whether to adopt rules to preserve an open Internet, the Commission emphasized that “[p]romoting competition for Internet access and Internet content, applications, and services is [a] key goal.”²⁵

When the Commission ultimately adopted rules in 2010, it did so with the “central purpose” of “[p]romoting competition throughout the Internet ecosystem.”²⁶ It explained that “[t]he risk of market power is highest in markets with few competitors, and most residential end users today have only one or two choices for wireline broadband Internet access service.”²⁷ In contrast, the Commission pointed out that “most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband.”²⁸ The Commission recognized that competition among mobile providers, in addition to mobile broadband’s technological differences, merited only “measured steps” for nascent mobile broadband services.²⁹

Finally, although the 2010 rules were largely vacated by the D.C. Circuit,³⁰ the Commission’s 2014 notice is similarly competition-based.³¹ That notice “rests upon over a decade of consistent action by the Commission to protect and promote the Internet” as an open

²⁵ *Id.* at 13085 ¶ 52 (emphasis added).

²⁶ *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936 ¶ 53 (2010) (*Broadband Order*), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (*Verizon*); *see also id.* at 17949 ¶ 78, 17951 n.252.

²⁷ *Id.* at 17923 ¶ 32.

²⁸ *Id.* at 17957 ¶ 95.

²⁹ *See id.* at 17956-58 ¶¶ 94-96; *see infra* discussion Section I.C.

³⁰ *See Verizon*, 740 F.3d 623.

³¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*Open Internet NPRM*).

platform for competition and innovation,³² and sought comment “on the state of competition in broadband Internet access service, and its effect on providers’ incentives to limit openness.”³³ In the wired broadband context, it cited “evidence of limited choice between broadband providers in many areas of the country.”³⁴ By contrast, Chairman Wheeler has remarked about today’s wireless marketplace that “[t]he American consumer has been the beneficiary” of “new pricing and new services that have been spurred by competition.”³⁵ Here again the competitive differences between fixed and mobile markets are well recognized.

B. The Open Internet Debate Has Focused on Competition in the Wired Broadband Market, Not Mobile.

Questions about the state of competition in the fixed wireline broadband market have long driven the open Internet debate. Indeed, the FCC did not begin to meaningfully consider the applicability of its open Internet policies to mobile broadband until roughly four years ago.

For example, in his 2003 article often credited with coining the phrase “network neutrality,” Professor Tim Wu focused on broadband use restrictions among cable and DSL providers in proposing a network neutrality antidiscrimination principle.³⁶ The Internet

³² *Id.* at 5565 ¶ 11.

³³ *Id.* at 5578 ¶ 47.

³⁴ *Id.* at 5578 ¶ 48.

³⁵ Remarks of Tom Wheeler, Chairman, FCC, 2014 CTIA Show, Las Vegas, NV, at 2 (Sept. 9, 2014) (Wheeler CTIA Show Remarks), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf; *see also* Wheeler 1776 Remarks at 5 (indicating that “competition exists” in the mobile wireless marketplace).

³⁶ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMMS. & HIGH TECH. L. 141, 154, 158-68 (2003). Professor Wu later explained that network neutrality matters because it is a problem “if the gatekeepers of the Internet (in most places, a duopoly of the local phone and cable companies) discriminate between favored and disfavored uses of the Internet.” Tim Wu, *Why You Should Care About Net Neutrality*, SLATE, May 1, 2006, http://www.slate.com/articles/technology/technology/2006/05/why_you_should_care_about_network_neutrality.html.

Freedoms announcement cited Professor Wu's work.³⁷ And shortly thereafter, Chairman Powell explained that "[t]he great regulatory difficulty over the past one hundred years is because we have always had just one wire to the home. And because of that one wire you had enormous difficulties of monopoly control, bottleneck facilities, the pricing of those facilities, and how to get that one wire to every home in the [U.S.]."³⁸ In the case of broadband Internet access, he explained, there is "the opportunity for ... two [wires to the home]: DSL, and cable."³⁹

2005's *Wireline Broadband Order* kept the emphasis on the wireline broadband market: "The Report and Order adopted by the Commission puts *wireline broadband* Internet access service, commonly delivered by [DSL] technology, on an equal regulatory footing with cable modem service, currently the market leader."⁴⁰ There were no concerns expressed regarding the extent of competition among providers of other platforms, including mobile broadband.⁴¹

³⁷ See *Internet Freedoms* at 4 ("A few troubling restrictions have appeared in broadband service plan agreements. Professor Tim Wu ... catalogued some of these restrictions According to Wu, these restrictions have included things such as cable companies' early efforts to impose restrictions on use of virtual private networks, WiFi and home networking equipment and on operation of servers in the home. Moreover, press reports allege that at least one cable company has not provided enough guidance to intensive broadband users regarding the bandwidth limits of their service plans.").

³⁸ Remarks of Michael K. Powell, Chairman, FCC, FCC Wireless Broadband Forum, Washington, DC, at 2 (May 19, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247411A1.pdf.

³⁹ See *id.* at 2. The Chairman noted that the "Holy Grail" is when you get to three or more broadband access competitors, and expressed hope that in the future wireless would be part of that solution. See *id.* at 2-3.

⁴⁰ News Release, *FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services*, at 1 (Aug. 5, 2005) (emphasis added).

⁴¹ *Wireline Broadband Order*, 20 FCC Rcd at 14880-85 ¶¶ 50-59, 14897-98 ¶ 84; see also *id.* at 14885 ¶ 59 ("If more customers adopt satellite and fixed wireless solutions, the relative prices of those solutions could decline, which would make the services more competitive with cable modem and DSL broadband Internet access services. It is unclear in the current developing market which technology or technologies will serve the majority of customers when the market reaches greater maturity.").

Indeed, the *Internet Policy Statement* arguably did not even apply to wireless providers⁴² and was at best unclear on the issue.⁴³ And the *Wireless Broadband Order* discussed only promoting competition between wired and wireless platforms,⁴⁴ though it noted in passing the record highlighting the competitive nature of the mobile market.⁴⁵

In 2006, Senator Barack Obama weighed in on the net neutrality debate, making clear the locus of concern rested with *wireline* platforms:

[T]he big telephone and cable companies want to change the internet as we know it.... Allowing the Bells and cable companies to act as gatekeepers with control over internet access would make the internet like cable.... If there were four or more competitive providers of broadband service to every home, then cable and telephone companies would not be able to create a bidding war for access to the high-speed lanes. But here's the problem. More than 99 percent of households get their broadband services from either cable or a telephone company.... We can't have a situation in which the corporate duopoly dictates the future of the internet and that's why I'm supporting what is called net neutrality.⁴⁶

⁴² See *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17529 ¶¶ 190-91 (2008) (declining request to “extend the principles in the Commission’s *Internet Policy Statement* to wireless broadband services”); see also Comments of CTIA – The Wireless Association®, GN Docket No. 09-51, at 27-28 (June 8, 2009).

⁴³ See *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd 4342, 4359 ¶ 48 n.71 (2009) (declining to “prejudge” the “extent to which the principles in the *Internet Policy Statement* apply to wireless service providers”); see also Comments of CTIA – The Wireless Association®, WT Docket No. 10-4, at 25 (Feb. 5, 2010); Reply Comments of CTIA – The Wireless Association®, RM-11361, at 13-14 (May 15, 2007).

⁴⁴ See *Wireless Broadband Order*, 22 FCC Rcd at 5921 ¶¶ 55-56.

⁴⁵ See *id.* at 5905 ¶ 10.

⁴⁶ Barack Obama, U.S. Senator, Network Neutrality Podcast Transcript (June 8, 2006), <http://obamaspeeches.com/076-Network-Neutrality-Obama-Podcast.htm>.

The following year, Commissioners Jonathan Adelstein and Michael Copps raised similar concerns in the context of the AT&T/BellSouth merger decision,⁴⁷ which accepted a voluntary commitment to maintain network neutrality with respect to the merged entity's *wireline* – not mobile – broadband Internet access service.⁴⁸ The condition was crucial for obtaining the support of both Commissioners, who were concerned that the wireline broadband Internet access market was becoming increasingly concentrated.⁴⁹ As Commissioner Adelstein explained:

[T]he Commission takes a long-awaited and momentous step in this Order by requiring the applicants to maintain neutral network and neutral routing in the provision of their wireline broadband Internet access service. This provision was critical for my support of this merger Given the increase in concentration presented by this transaction – particularly set against the backdrop of a market in which *telephone and cable operators* control nearly 98 percent of the market, with many consumers lacking any meaningful choice of providers – it was critical that the Commission add a principle to address incentives for anti-competitive discrimination.⁵⁰

Commissioner Copps echoed these sentiments in his statement accompanying the 2007

Broadband NOI.⁵¹

⁴⁷ *AT&T Inc. and BellSouth Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5724-27 ¶¶ 117-19 (2007).

⁴⁸ Specifically, the Commission accepted as a formal condition of the merger a commitment by the applicants to “maintain a neutral network and neutral routing in [the merged entity’s] wireline broadband Internet access service.” *See id.*, 22 FCC Rcd at 5573 ¶ 227, 5814 App. F.

⁴⁹ *See id.* at 5829-34 (statement of Commissioner Michael J. Copps); *id.* at 5835-41 (statement of Commissioner Jonathan S. Adelstein).

⁵⁰ *See id.* at 5836-37 (emphasis added) (statement of Commissioner Jonathan S. Adelstein); *see also id.* at 5831 (statement of Commissioner Michael J. Copps).

⁵¹ *Broadband NOI*, 22 FCC Rcd at 7902 (“While we welcome telephone companies and cable providers competing to sell high-speed services, FCC statistics show that together these duopoly operators control some 96 percent of the residential broadband market, with too many consumers lacking a choice even between those two providers.”) (statement of Commissioner Michael J. Copps).

Indeed, even as late as fall 2009, just prior to the FCC’s first proposal for open Internet rules, the nexus of concern with broadband Internet openness continued to focus on the perceived lack of sufficient *wireline* broadband alternatives.⁵² As Chairman Genachowski explained, one of the “compelling reasons to be concerned about the future of openness” is the “limited competition among service providers.”⁵³ According to the Chairman, “[t]he great majority of companies that operate our nation’s broadband pipes rely upon revenue from selling phone service, cable TV subscriptions, or both.”⁵⁴ Chairman Genachowski later assessed the mobile wireless industry and arrived at a far different conclusion:

The massive investment we’ve seen in the mobile sector, the tremendous growth and innovation that benefits us every day, and the value created for consumers – they are all the product of a dynamic mobile marketplace.... [O]ur history with mobile ... demonstrates that competition drives investment in efficiency-enhancing technologies and the evolution of business models to the benefit of consumers and providers alike.⁵⁵

Today, the record before the Commission confirms that competition in the residential fixed wireline market remains a primary concern.⁵⁶ According to Vonage, for example, “the fact

⁵² See Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. & TECH. L. REV. 1, 3 (2009) (*Wireless Net Neutrality Regulation*) (“Previous net neutrality regulation has been directed at traditional Internet services provided by telephone and cable companies.”).

⁵³ Remarks of Julius Genachowski, Chairman, FCC, “Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity,” The Brookings Institution, Washington, DC, at 3 (Sept. 21, 2009).

⁵⁴ *Id.*

⁵⁵ Remarks of Julius Genachowski, Chairman, FCC, International CTIA Wireless 2012, New Orleans, LA, at 5-6 (May 8, 2012), https://apps.fcc.gov/edocs_public/attachmatch/DOC-313945A1.pdf.

⁵⁶ See, e.g., City of Boston Reply Comments at 7 (“[R]ules are particularly important in Boston because of the lack of fixed broadband competition.”); COMTEL Comments at 17 (“[S]ufficient wireline broadband competition barely exists.”); Electronic Frontier Foundation Comments at 20 (“Many U.S. consumers live in areas where the main competition is between one telephone

is that the cable and telephone companies between them constitute a virtual broadband access duopoly.”⁵⁷ Free Press likewise asserts that “[t]he Commission’s policies have produced a

marketplace where all that remains is a duopoly pathway to online information services.”⁵⁸

Indeed, Public Knowledge commissioned Dr. John B. Horrigan to survey consumers about the state of broadband competition, and his report concluded that “most home broadband consumers

find competitive options lacking – in contrast to wireless consumers, where there are typically

more options for providers.”⁵⁹ As Chairman Wheeler recently explained, “meaningful

competition for high-speed *wired* broadband is lacking and Americans need more competitive

company and one cable operator.”); Free Press Comments at 82 (“Commission policy mistakes helped ... favor the incumbent telephone and cable companies’ own vertically integrated businesses.”); U.S. Public Interest Research Group Reply Comments at 5 (“Do not allow the big cable and telephone companies to act as gatekeepers and pick winners and losers.”); Vimeo Comments at 16 (“Nearly three-quarters of U.S. households have broadband Internet access, the majority of which is provided by cable providers.”); Vonage Comments at 4 (“[I]n most markets, consumers have a choice between broadband from the cable company and an inferior substitute.”); *id.* at 50 (“[T]he cable and telephone companies between them constitute a virtual broadband access duopoly ...”); *see also* BroadBand Institute of California Comments at 2 & n.3; Consumers Union Comments at 3; Fandor Reply Comments at 2; Internet Association, Inc. Reply Comments at 3; Meetup, Inc. Comments at 5; NASUCA Comments at 11; People of the State of Illinois and the People of the State of New York Comments at 2-3; Public Knowledge Comments at 12, 85-86; Writers Guild of America Comments at 3-4; Sen. Ron Wyden Comments at 1-2. Unless otherwise noted, references herein to “Comments” and “Reply Comments” refer to those pleadings filed in GN Docket Nos. 14-28 and 10-127 on or around July 18, 2014, and September 15, 2014, respectively.

⁵⁷ Vonage Comments at 4.

⁵⁸ Free Press Comments at 39. Commenters also describe mobile as “at best” an imperfect substitute for wired broadband. *See, e.g.*, City of Boston Reply Comments at 7; COMTEL Comments at 18; Netflix Reply Comments at 10-12; Public Knowledge Comments at 12, 85-86; Vonage Comments at 4; *see also* Letter from John Bergmayer, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No 14-28, at 1-2 (Nov. 13, 2014) (Public Knowledge *Ex Parte*) (citing JOHN B. HERRIGAN, SMARTPHONES AND BROADBAND: TECH USERS SEE THEM AS COMPLEMENTS AND VERY FEW WOULD GIVE UP THEIR HOME BROADBAND SUBSCRIPTION IN FAVOR OF THEIR SMARTPHONE (Nov. 2014)).

⁵⁹ Public Knowledge *Ex Parte* at 1-2 (appending JOHN B. HERRIGAN, CONSUMERS AND CHOICE IN THE BROADBAND AND WIRELESS MARKETS (Nov. 2014)).

choices for faster and better Internet connections, both to take advantage of today’s new services, and to incentivize the development of tomorrow’s innovations.”⁶⁰

C. Competition Among Mobile Broadband Providers Made Mobile Different and Led to a Measured Approach to Mobile Open Internet Rules.

While there has been “considerable discussion and factual development regarding openness issues in the wireline context,”⁶¹ the Commission acknowledged as late as 2010 that the applicability of openness principles to mobile broadband was an “[u]nder-[d]eveloped issue[.]”⁶² Indeed, only in the 2009 *Broadband NPRM* did the Commission develop a factual record on the applicability of open Internet rules to mobile broadband.⁶³ At the time, the Commission acknowledged that in addition to obvious technological differences between wired and wireless networks, factors including “market structure” may “justify differences in how we apply the Internet openness principles” to “the highly dynamic landscape for mobile wireless broadband Internet access.”⁶⁴ When the Commission proceeded to adopt rules in 2010, it recognized that mobile broadband is different and that only “measured steps” were appropriate to apply to mobile broadband Internet access.⁶⁵

⁶⁰ Wheeler 1776 Remarks at 1 (emphasis added).

⁶¹ *Broadband NPRM*, 24 FCC Rcd at 13118 ¶ 154.

⁶² *See Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding*, Public Notice, 25 FCC Rcd 12637, 12641-42 (2010).

⁶³ *See Broadband NPRM*, 24 FCC Rcd at 13068 ¶ 13, 13117-18 ¶ 154 (seeking comment on “how, to what extent, and when” openness principles should apply to mobile wireless platforms); *see also id.* at 13117-24 ¶¶ 154-74; *Wireless Net Neutrality Regulation*, 16 MICH. TELECOMM. & TECH. L. REV. at 3 (noting that by late 2009, “the focus of regulation ha[d] changed from wired access to include wireless access”).

⁶⁴ *Broadband NPRM*, 24 FCC Rcd at 13117-18 ¶ 154, 13119 ¶ 159.

⁶⁵ *Broadband Order*, 25 FCC Rcd at 17958 ¶ 96.

The Commission’s decision to take a measured approach to its open Internet rules for mobile broadband was driven in significant part by competition among mobile providers. Not only did the Commission specifically find that consumers “have more choices for mobile broadband” than for fixed broadband, it also observed that mobile broadband was “rapidly evolving” and recognized “meaningful recent moves toward openness in and on mobile broadband networks.”⁶⁶ As discussed below, the mobile broadband market is even more competitive today than it was in 2010.

II. COMPETITION IN MOBILE BROADBAND BENEFITS CONSUMERS AND OBVIATES THE NEED FOR HARMFUL REGULATION.

The current open Internet debate has included much discussion of the reasons why mobile broadband is different from wired broadband and why any rules need to reflect those differences, just as they did in 2010. There is significant evidence in the record on the technical differences between mobile and fixed,⁶⁷ but the robust competitive conditions in the mobile

⁶⁶ *Broadband NPRM*, 25 FCC Rcd at 17956-57 ¶¶ 94-95. Of course, the Commission also noted that mobile networks “present operational constraints” that fixed broadband networks typically do not encounter. *Id.* at 17957 ¶ 95. As CTIA has previously documented, those technical constraints continue to apply today and have become even more acute as subscribers continue to adopt mobile broadband, mobile broadband data traffic continues to surge, and mobile broadband is integrated into entirely new sectors of our economy, such as mHealth, mobile education, connected vehicles, mCommerce and more. *See infra* note 67.

⁶⁷ The record in response to the *Open Internet NPRM* explains in great depth how mobile broadband presents unique technical challenges that demand far more complex and aggressive network management than fixed broadband requires. *See* CTIA Comments at 14-27; CTIA Reply Comments at 8-14; Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, Net Neutrality and Technical Challenges of Mobile Broadband Networks, at 12-20 (Sept. 4, 2014), *appended to* Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 14-28 & 10-127 (Sept. 4, 2014); *see also* Akamai Comments at 11-12; Alcatel-Lucent Comments at 25; AT&T Reply Comments at 80-83; Cisco Comments at 20-22; Competitive Carriers Ass’n Comments at 4-5; Consumer Electronics Ass’n Comments at 10; Ericsson Comments at 8-10; GSM Ass’n Comments at 4-6; Qualcomm Comments at 2, 8; Telecommunications Industry Ass’n at 2, 14-15, 27; T-Mobile Reply Comments at 9-11; Verizon Reply Comments at 30.

broadband marketplace are a defining differentiator as well. These competitive conditions are delivering massive benefits to consumers, who demand mobile Internet openness, making more restrictive rules unnecessary. Any new open Internet framework should continue to account for the competitive mobile dynamic and avoid rules or standards that would impede the differentiated offerings and choices mobile consumers enjoy today.

A. The Competitive Mobile Broadband Market Demands Openness and Is Delivering Massive Benefits to Consumers.

The simple reality is that “consumers expect and demand openness from their mobile broadband service provider.”⁶⁸ Given the many good things happening in the wireless marketplace, as described below, mobile providers are and can be expected to act in reasonable ways for the same reasons that companies in hundreds of other ultra-competitive markets do – consumers and the competitive market command it. Conversely, providers that fail to act in reasonable manner will see their customers go elsewhere, and this competitive reality makes mobile wireless different.⁶⁹ A quick snapshot of the mobile broadband market shows the following:

Unprecedented consumer choice. Nowhere is consumer choice more evident than recent statistics showing the extent of competitive alternatives available to mobile broadband subscribers. As of January 2014, more than 93% of Americans have the ability to choose among three or more mobile broadband providers, while 82% can choose among four or more mobile

⁶⁸ Sprint Reply Comments at 7; *see also* AT&T Reply Comments at 74; T-Mobile Reply Comments at 16; Verizon Reply Comments at 62.

⁶⁹ *See* AT&T Reply Comments at 74 (“Th[e] ability of consumers to vote with their feet serves as a powerful deterrent to any effort to limit Internet openness in the mobile ecosystem.”); T-Mobile Reply Comments at 2 (“Robust retail competition in the mobile broadband market already effectively constrains mobile provider behavior.”); Verizon Reply Comments at 25 (“Competition has led mobile wireless broadband providers to embrace openness, even absent prescriptive regulation.”).

broadband providers.⁷⁰ And as noted above, President Obama indicated during his time as a senator that the existence of four or more competitors would obviate the need for net neutrality regulation.⁷¹ By contrast, only 15% of U.S. homes have three or more wired broadband providers.⁷²

Faster speeds and robust LTE deployment. Other metrics confirm the benefits the competitive mobile broadband market is delivering to consumers. For example, due to massive investments in mobile wireless infrastructure⁷³ – including a record \$33 billion in 2013⁷⁴ – 97.5% of Americans have access to mobile broadband download speeds of greater than 10 Mbps as of December 2013.⁷⁵ U.S. smartphone speeds have also increased eight times since 2010.⁷⁶

⁷⁰ See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Seventeenth Report, DA 14-1862, ¶ 51 Chart III.A.2 (WTB rel. Dec. 18, 2014) (*Seventeenth Report*).

⁷¹ See *supra* note 46 and accompanying text.

⁷² See Remarks of Tom Wheeler, Chairman, FCC, “The Facts and Future of Broadband Competition,” 1776 Headquarters, Washington, DC, at 2 (Sept. 4, 2014) (Wheeler 1776 Remarks), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf.

⁷³ U.S. carriers in 2013 spent about four times more on network infrastructure per subscriber than the rest of the world. See DIDIER SCÉMAMA, *ET AL.*, 2014 WIRELESS CAPEX: BRICS & EUROPE TO PICK UP THE SLACK, BANK OF AMERICA MERRILL LYNCH, GLOBAL TELECOM EQUIPMENT, at Table 2 (Jan. 13, 2014); see also GLEN CAMPBELL, 2014: THE YEAR AHEAD, BANK OF AMERICA MERRILL LYNCH, GLOBAL WIRELESS MATRIX 4Q13, at Tables 1 and 2 (Jan. 8, 2014).

⁷⁴ See CTIA, Annual Wireless Industry Survey, Year-End U.S. Figures from CTIA’s Annual Survey Report (June 2014), <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

⁷⁵ See BROADBAND STATISTICS REPORT: ACCESS TO BROADBAND TECHNOLOGY BY SPEED, at 3 (July 2014), <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>.

⁷⁶ See CTIA, Since 2010, U.S. Smartphone Speeds Increased Eight Fold (Sept. 30, 2014), <http://www.ctia.org/resource-library/facts-and-infographics/archive/since-2010-us-smartphone-speeds-increased-eight-fold> (citing Cisco, VNI Forecast Highlights, United States - Accelerating Network Speeds (Mobile Speed), http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (last visited Jan. 9, 2015)); CISCO, CISCO VISUAL NETWORKING INDEX (VNI) GLOBAL IP TRAFFIC FORECAST, 2010–2015, Table 8 (2010)).

And the U.S. registers 47% of the world's LTE subscribers despite having only 5% of its overall mobile subscribers,⁷⁷ and 30% of U.S. subscribers have LTE service compared to only 4% of Europeans.⁷⁸

Declining prices. Meanwhile, prices in the U.S. keep dropping. Overall, the wireless Consumer Price Index (CPI) fell again in 2013.⁷⁹ Since December 1997, the wireless CPI fell nearly 43%, while the overall CPI for all items increased 34%.⁸⁰ In fact, price declines for mobile broadband services have “accelerated dramatically in recent months,” as carriers introduce ever-more innovative data plans and promotions that are “shaking up the industry.”⁸¹

For example:

- Sprint is cutting in half the monthly bills of Verizon and AT&T customers who switch to Sprint.⁸² Specifically, Sprint offers these customers unlimited talk and text within the U.S. over its network, and matches customers' data allowance for half the cost of their current data plan, as long as they buy an unsubsidized smartphone.⁸³
- Sprint has also engaged in a campaign of aggressive pricing plans since the start of the third quarter of 2014. Most recently, Sprint reduced the data access charges on its \$80 (12 GB) and \$90 (16 GB) *Family Share Pack* plans to \$15 per month per line

⁷⁷ INFORMA TELECOMS & MEDIA GROUP, WCIS + DATABASE, SUBSCRIPTIONS & KPIS (4Q2013).

⁷⁸ *Id.*

⁷⁹ *See Seventeenth Report* at ¶ 41.

⁸⁰ *See id.*

⁸¹ *See AT&T Reply Comments* at 60-64.

⁸² Sprint, Press Release, *Sprint's Offer: Cut Your Wireless Bill in Half Event* (Dec. 2, 2014), <http://newsroom.sprint.com/news-releases/sprints-offer-cut-your-wireless-bill-in-half-event.htm>. The offer excludes current T-Mobile customers.

⁸³ *See id.* The half-off rate from Sprint is based on the customer's current Verizon or AT&T bill. There is a \$10 minimum monthly rate charge and the discount does not apply to taxes, surcharges, add-ons, apps, premium content, international services, devices, partial charges, or additional lines. *See id.* at n.1.

(previously \$25 per month) for up to ten lines.⁸⁴ The *Family Share Pack* also includes unlimited minutes and messaging while on the Sprint network.⁸⁵

- T-Mobile's *Simple Choice Plan* offers multi-line and family customers an alternative to sharing minutes, messages, and data. Under the *Simple Choice Plan*, every line has unlimited data, talk, and text, "a dedicated bucket of LTE data starting at up to 1 GB,"⁸⁶ unlimited data and text in 120+ countries and destinations, and unlimited music streaming.⁸⁷ The *Simple Choice Plan* starts at \$80 for two lines, and increases by \$10 with every additional line (amounting to \$100 for a family of four).⁸⁸
- Verizon recently upped the amount of shared data included in its *MORE Everything Plan* to 10 GB (previously 6 GB) for \$80 per month, or 15 GB (previously 10 GB) for \$100.⁸⁹ Also included in the *MORE Everything Plan*: unlimited minutes, unlimited text messages (including international messaging from the U.S.), mobile Wi-Fi hotspot access, and 25 GB of cloud storage for up to 10 devices (there is a monthly access fee for each device).⁹⁰
- AT&T recently enhanced its \$40 and \$70 *Mobile Share Value* single-line plans to include 3 GB of data (previously 2 GB) and 6 GB (previously 4 GB), respectively (plus device access charges).⁹¹ All *Mobile Share Value* plans also include unlimited talk and text, as well as unlimited international messaging from the U.S. to select countries. For families, AT&T is offering promotional *Mobile Share Value* plans

⁸⁴ Sprint, Press Release, *Sprint Offers New Value on \$80 and \$90 Sprint Family Share Pack Plans* (Nov. 8, 2014), <http://newsroom.sprint.com/news-releases/sprint-offers-new-value-on-80-and-90-sprint-family-share-pack-plans.htm>.

⁸⁵ *Id.*

⁸⁶ T-Mobile, Press Release, *T-Mobile Expands Industry-Leading Family Plan* (Aug. 26, 2014), <http://newsroom.t-mobile.com/news/10-line-family-plan.htm>.

⁸⁷ *Id.*

⁸⁸ See T-Mobile, *Simple Choice Family Plans 4 for 100*, http://www.t-mobile.com/offer/simple-choice-family-plans-4-for-100.html?icid=WMM_TM_4FR10010GB_J4M387KCLM519 (last visited Jan. 9, 2015).

⁸⁹ Verizon, Press Release, *More Data and Port-in Credits for Verizon Customers* (Dec. 29, 2014), <http://www.verizonwireless.com/news/article/2014/10/more-data-and-port-in-credits-for-verizon-customers.html>.

⁹⁰ Verizon, *The MORE Everything Plan FAQs*, <http://www.verizonwireless.com/support/more-everything-plan-faqs> (last visited Jan. 9, 2015).

⁹¹ AT&T, Press Release, *More Choice, More Data. AT&T Adds More Data to New Mobile Share Value Plans on the Nation's Most Reliable 4G LTE Network* (Oct. 31, 2014), http://about.att.com/story/att_adds_more_data_to_new_mobile_Share_value_plans_on_the_nations_most_reliable_4g_lte_network.html.

starting at 30 GB of shareable data for \$130 (plus device access charges) – double the amount of data previously offered for the same price. Consumers can share data on up to 10 lines.

- U.S. Cellular has lowered the cost of its *Shared Connect* plans for customers who bring their own device or choose the company’s device installment option. The plans allow a family of four to have unlimited voice and messaging and share 10 GB of data for \$140 per month, and a business with five employees to have unlimited voice and messaging and 10 GB of data for \$150 per month.⁹²

Consumers are benefitting from this price competition, as some providers are providing consumers with more data for their money, while others are cutting prices in the highly competitive market.

Differentiated service offerings. The FCC record also demonstrates that differentiation in service is at the core of the mobile broadband experience today, and that it is providing extraordinary benefits for consumers.⁹³ In 2013 alone, the four major carriers offered nearly 700 combinations of smartphone plans, and a family of five had in excess of 250 choices to select from.⁹⁴ Innovation abounds as providers offer unique services to attract and retain customers:

- T-Mobile’s *Music Freedom* program allows users to stream unlimited amounts of music from a wide range of platforms without counting towards a plan’s data limits.⁹⁵

⁹² U.S. Cellular, Press Release, *U.S. Cellular Announces Lower Prices on Shared Connect Plans* (May 20, 2014), <http://www.uscellular.com/about/press-room/2014/USCellular-Announces-Lower-Prices-on-Shared-Connect-Plans.html>.

⁹³ See CTIA Reply Comments at 2, 16-19; see also T-Mobile Reply Comments at 3; *Wireless Carrier Executives Say They Need Flexibility to Manage Networks*, TR DAILY, Oct. 14, 2014 (quoting T-Mobile Chief Technology Officer and Executive Vice President, Neville Ray, as stating, “It’s very, very difficult to predict what’s going to happen over the next 12, 18, 24 months, and we need all the flexibility we can possibly have”).

⁹⁴ Thomas Gryta, *Inside the Phone-Plan Pricing Puzzle*, WALL ST. J., July 31, 2013, <http://online.wsj.com/articles/SB10001424127887324110404578630110732955422>.

⁹⁵ T-Mobile, Press Release, *T-Mobile Sets Your Music Free* (June 18, 2014), <http://newsroom.t-mobile.com/news/t-mobile-sets-your-music-free.htm>; see also T-Mobile Reply Comments at 17-19; *T-Mobile Adds Rdio, Songza Grooveshark to Free Data Program*, BILLBOARD, Aug. 28, 2014, <http://www.billboard.com/biz/articles/news/digital-and-mobile/6236386/t-mobile-adds-rdio-songza-grooveshark-to-free-data>.

T-Mobile views *Music Freedom* as an opportunity to win customers from rivals such as Verizon Wireless and AT&T.⁹⁶ T-Mobile also just announced *Data Stash*, a program that allows users to roll over their unused data from month-to-month.⁹⁷

- AT&T's *Sponsored Data* service allows edge providers to reach consumers and new audiences without impacting consumers' individual data allowance.⁹⁸ With the service, data charges resulting from eligible AT&T customers are billed directly to the sponsoring company, and consumers' access to other edge providers is unaffected.⁹⁹
- Sprint's *Virgin Mobile Custom* is a no-contract plan that allows for customization of talk, text, and data options for up to five lines.¹⁰⁰ To participate, customers purchase a designated *Custom* phone and activate it on either the base plan, which includes 20 texts and 20 voice minutes, or the unlimited talk and text plan. Customers can then choose "add-on[]" options providing, for example, unlimited access to apps such as Facebook and Pandora.
- In a recent promotion, Verizon dropped its \$5 monthly fee to stream NFL games for *MORE Everything Plan* customers.¹⁰¹ Verizon has also announced an exclusive partnership with Slacker Radio: For \$2 per month, Verizon customers can subscribe to Slacker Radio Tones, which provides access to an extensive music library of ring tones and ringback tones.¹⁰²

⁹⁶ See Hayley Tsukayama, *T-Mobile gives customers free access to 14 more music streaming sites*, WASH. POST, Nov. 25, 2014, at A12.

⁹⁷ See Hayley Tsukayama, *T-Mobile to let you roll over unused data*, WASH. POST, Dec. 17, 2014, at A18. The program is available to *Simple Choice* 4G LTE plan customers who buy smartphone plans (with at least 3GB of data) or tablet plans (with at least 1 GB of data). *Id.*; T-Mobile, Press Release, *T-Mobile Unveils Data Stash - Now Your Unused Data Rolls Forward* (Dec. 16, 2014), <http://newsroom.t-mobile.com/news/uncarrier-8.htm>.

⁹⁸ See AT&T, *Sponsored Data*, <http://www.att.com/att/sponsoreddata> (last visited Jan. 9, 2015).

⁹⁹ See AT&T, *Sponsored Data FAQs*, <http://www.att.com/att/sponsoreddata/en/index.html#fbid=qoIdiREM6yV> (last visited Jan. 9, 2015).

¹⁰⁰ See Virgin Mobile, Press Release, *Virgin Mobile USA Launches Virgin Mobile Custom – Fully Customizable Cell Phone Plan with Rich Parental Controls*, (July 30, 2014), <http://newsroom.virginmobileusa.com/press-release/handsets/virgin-mobile-usa-launches-virgin-mobile-custom---fully-customizable-cell-pho>.

¹⁰¹ Don Reisinger, *Verizon's More Everything customers get free NFL Mobile*, CNET, July 24, 2014, <http://www.cnet.com/news/verizons-more-everything-customers-get-free-nfl-mobile>.

¹⁰² David Samberg, *Verizon Wireless Delivers More Customizable User Music Options with Slacker® Radio*, VERIZON WIRELESS, Oct. 9, 2014, <http://www.verizonwireless.com/>

Indeed, differentiation is becoming especially crucial as Americans embrace the “Connected Life”: From vehicle-to-vehicle, real-time traffic and weather, and other helpful updates to keep drivers and passengers safer when on the road, to banking, healthcare, and connected homes – connected life innovations are either available or will soon be reality, as 50 billion connected devices will be sharing information with each other by 2020.¹⁰³

* * *

Recent statements by regulators confirm what the facts and data clearly show: The U.S. mobile wireless market is a vibrant and competitive industry delivering welfare-enhancing benefits to consumers across the nation.¹⁰⁴ As noted above, Chairman Wheeler recently remarked that “[t]he American consumer has been the beneficiary” of “new pricing and new services that have been spurred by competition” in today’s wireless marketplace.¹⁰⁵ Likewise, after looking “long and hard at the wireless industry,” Department of Justice Assistant Attorney General for Antitrust Bill Baer has found that “the [wireless] market is thriving and consumers are benefitting from the current competitive dynamic.”¹⁰⁶

news/article/2014/10/verizon-wireless-delivers-more-customizable-user-music-options-with-slacker-radio.html.

¹⁰³ See CTIA Reply Comments at 6.

¹⁰⁴ See also T-Mobile Reply Comments at 3 (“In the absence of rules and in the face of strong competition, wireless providers have developed innovative offerings consumers want.”).

¹⁰⁵ Wheeler CTIA Show Remarks at 2; see also Wheeler 1776 Remarks at 5.

¹⁰⁶ Edward Wyatt, *Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says*, N.Y. TIMES, Jan. 30, 2014, at B3 (emphasis added), http://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says/?_php=true&_type=blogs&r=0; see also Remarks of Bill Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, “Reflections on Antitrust Enforcement in the Obama Administration,” New York State Bar Association, at 17 (Jan. 30, 2014) (“Competition today is driving enormous benefits in the direction of the American Consumer.”), <http://www.justice.gov/atr/public/speeches/303269.pdf>.

B. Burdensome Regulation Will Harm Consumers and Limit Competitive Differentiation.

The record in response to the *Open Internet NPRM* confirms that there is no reliable evidence of a threat to mobile broadband openness.¹⁰⁷ As a result, as Sprint has explained, “expansive open Internet regulations are less crucial for, and would be unnecessarily harmful to, mobile broadband providers in light of market forces that foster openness.”¹⁰⁸ The Commission should steer clear of undermining the very consumer experience it is seeking to protect.¹⁰⁹ Intrusive regulation of mobile broadband providers would limit the competitive differentiation that lies at the heart of the mobile broadband ecosystem and would thus harm consumers.¹¹⁰ As T-Mobile explained, “[t]he Commission needs to preserve the ability of mobile broadband carriers to differentiate themselves from their competitors,”¹¹¹ and should retain a mobile-specific approach to any rules or standards. Moreover, Professor Janusz Ordover, former Deputy Assistant Attorney General for Economics in the Department of Justice’s Antitrust Division, and Dr. Andres Lerner recently demonstrated that the case for Title II regulation of mobile

¹⁰⁷ See CTIA Reply Comments at 17.

¹⁰⁸ Sprint Reply Comments at 17.

¹⁰⁹ See CTIA Reply Comments at 2, 54; T-Mobile Reply Comments at 3.

¹¹⁰ See CTIA Reply Comments at 27.

¹¹¹ T-Mobile Reply Comments at 3; see *Wireless Carrier Executives Say They Need Flexibility to Manage Networks*, TR DAILY, Oct. 14, 2014 (noting that Sprint’s Vice President-Technology Innovation & Architecture, Ron Marquardt, highlighted the “impact on competitiveness” of net neutrality regulations); Sprint Reply Comments at 7; see also AT&T Reply Comments at 74; T-Mobile Reply Comments at 16; Verizon Reply Comments at 62.

broadband is both inconsistent with the competitive reality of the mobile broadband marketplace and deeply flawed as a matter of economic theory.¹¹²

Some have suggested that differences related to mobile broadband can be addressed through the Commission’s reasonable network management exception. The exception is important, as is the definition’s recognition that “particular network architecture and technology” must be taken into account. That exception, however, cannot capture the competitive or dynamic differences related to mobile broadband. Simply allowing for a reasonable network management “exception” for mobile broadband will not overcome the risk that across-the-board rules would stifle innovation and result in homogenized mobile services, causing substantially more consumer harm in the mobile context where the market already deters any consideration of limits on Internet openness. A genuine mobile-specific approach to open Internet is needed to preserve the ability of mobile operators to provide the innovations, differentiation, and experimentation Americans have come to expect.

It has been suggested that competition may not assure Internet openness because “walled garden[s]” existed in the early years of mobile broadband – despite “multi-carrier competition” – due to carriers’ “control over the last mile.”¹¹³ Technological restraints, however, and not control over last mile connections, led to walled gardens in the early mobile Internet. At the time, device manufacturers used their own operating systems, which meant that apps had to be designed to work with specific devices on each carrier’s 2G network and rigorously tested to

¹¹² Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 14-28, at 1-2 (Jan. 15, 2015) (appending ANDRES V. LERNER AND JANUSZ A. ORDOVER, THE “TERMINATING ACCESS MONOPOLY” THEORY AND THE PROVISION OF BROADBAND INTERNET ACCESS (Jan. 15, 2015) (confirming that there is no “terminating access monopoly” for wireless broadband).

¹¹³ See Wheeler CTIA Show Remarks at 3.

ensure proper functionality. With the introduction of the iPhone in 2007 and the evolution to more robust 3G networks, consumer demand and data usage exploded,¹¹⁴ other manufacturers developed competing devices using common interfaces, and providers invested billions to upgrade their networks to keep pace with the mobile market.¹¹⁵ Thus, “wireless competition itself created the virtuous circle of innovation and investment in wireless networks, handsets, operating systems, and applications that created the ‘abundance of an open [Internet] ecosystem.’”¹¹⁶ As Sprint has explained, the mobile market reality is that “[p]roviders who do not keep pace with consumer demand for Internet openness will inevitably suffer and may not survive.”¹¹⁷

C. The FCC Got It Right in 2010: Wireless Is Different and Deserves a Mobile-Specific Regulatory Approach.

The proposal to apply new requirements to mobile broadband providers fails to reflect that wireless is different – a fact that the Commission recognized in 2010 when it declined to impose a non-discrimination standard for wireless based on a track record of vibrant competition, innovation, and openness in mobile wireless.¹¹⁸ These differences are even more pronounced today, and compel the Commission to decline to impose new rules on mobile broadband

¹¹⁴ For example, global total monthly data traffic in mobile networks expanded from well below 50 Petabytes in 2007 to approximately 1,500 Petabytes by 2013. *See* ERICSSON, ERICSSON MOBILITY REPORT, at 9 Fig. 9 (June 2013), <http://www.ericsson.com/res/docs/2013/ericsson-mobility-report-june-2013.pdf>.

¹¹⁵ *See* AT&T Reply Comments at 75-77.

¹¹⁶ *Id.* at 76-77 (quoting Wheeler CTIA Show Remarks at 3).

¹¹⁷ Sprint Reply Comments at 5; *see also* T-Mobile Reply Comments at 14 (“Imposing rigid new net neutrality rules on mobile broadband providers would deprive consumers of the enhanced choice, control, and features that they enjoy today, and would harm competition by limiting the ability of mobile providers to distinguish themselves in the marketplace.”).

¹¹⁸ *See Broadband Order*, 25 FCC Rcd 17956-62 ¶¶ 94-105.

providers. As Chairman Wheeler has stated, competition is “[o]ne of the most effective tools for ensuring Internet openness,”¹¹⁹ and “when competition is high, regulation can be low.”¹²⁰

The Commission should put this philosophy into practice as it considers mobile broadband and open Internet policy. Mobile broadband remains an early-stage technology that is nascent as compared to wired broadband, and it continues to evolve from 1G through 4G and beyond. Continued flexibility will encourage further innovation and development. Accordingly, the Commission should maintain the mobile-specific approach that the Commission embraced in 2010 and allow all Americans to continue to benefit from the significant degree of competitive differentiation and experimentation in the mobile industry.

CONCLUSION

In short, any new open Internet framework should account for the competitive mobile dynamic and avoid rules or standards that would impede the differentiated offerings and choices mobile consumers enjoy today.

¹¹⁹ Wheeler NCTA Remarks at 4.

¹²⁰ Wheeler Ohio State Remarks at 4.