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November 18, 2014

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: Notice of Ex-Parte Communication in GN Docket No. 10-127, *In the Matter of Framework for Broadband Internet Service*, and GN Docket 14-28, *In the Matter of Protecting and Promoting the Open Internet*.

Dear Ms. Dortch:

On November 17, 2014 Earl Comstock met with Nicholas Degani, legal advisor to Commissioner Pai, to review the legal arguments made in Mr. Comstock's September 15, 2014 Reply Comments in the dockets listed above. A printed copy of the Reply Comments was provided to Mr. Degani.

In addition to the legal arguments made in the written comments, Mr. Comstock pointed out that the case of *Echostar Satellite LLC v. Federal Communications Commission*<sup>1</sup> also demonstrates how the court in the *Verizon* decision failed to conduct a standard statutory analysis or consider how Congress used defined terms in the Telecommunications Act. In *Echostar* the court noted that "Congress was adept at using the terms 'satellite' and 'multichannel video programming distributor' when it so chose. In contrast to cable television technology in *Southwestern Cable*, satellite television was not some new phenomenon Congress had no opportunity to contemplate when enacting § 624A."<sup>2</sup> In a similar manner, information service was not a "new phenomenon" when Congress enacted the Telecommunications Act and Congress was adept at using the term. As a result, Congress's decision not to use the term "information service" in section 706 must be respected by the courts and the FCC.

Mr. Comstock reiterated that Congress had carefully considered the issue of information service in drafting the Telecommunications Act of 1996, and had adopted the Commission's *Computer II* framework, as demonstrated by the definitions Congress added to the Act. Under the Commission's definition of "enhanced service" in its regulations an "enhanced service" could only be provided using a regulated "basic service" building block, and Congress adopted

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<sup>1</sup> 704 F.3d 992 (D.C. Cir. 2013).

<sup>2</sup> *Id.* at 999-1000.

this same approach in the definition of “telecommunications carrier” when it provided that a “telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services,” i.e., the prohibition on common carrier treatment of information services (or any other service offered by a telecommunications carrier) only applies because that entity is already being regulated as common carrier through their provision of telecommunications service. The rights Congress chose to provide – in particular access to rights of way and interconnection which are needed to build a network – are only granted to providers of regulated telecommunications service, and not to information service providers. Congress had the option of providing such rights, but chose not to. Instead Congress protected information service providers from liability for transmitting other people’s content (section 230) and preserved existing access rights (section 251(g)).

Mr. Comstock then turned to the proposals to create a new category of “edge provider” communications that could be regulated under Title II, and warned that such an approach would create significant legal problems due to the definition of “telecommunications” in the Communications Act. The edge provider approach would effectively split the transmission to and from a broadband Internet access user into two one-way transmissions, effectively writing “among” out of the statutory definition and straining the common meaning of “between.” In addition, the definition is clear that the information must be “of the user’s choosing” and sent “between or among points specified by the user” – both of which it would be difficult to say as a factual matter that the edge provider was doing.

Finally, Mr. Comstock explained that the Commission could reinstate the *Computer II* framework by compelling facilities based providers of broadband Internet access service to offer the underlying transmission component as a wholesale telecommunications service, as discussed in more detail in the July 15, 2010 Comments submitted by Data Foundry in this docket (GN 10-127). Mr. Comstock pointed out that section 214 of the Communications Act provides clear authority for the Commission to compel a wholesale offering by wireline providers, and that sections 303 and 332(c) provide this authority for wireless providers. With respect to wireless data services, Mr. Comstock noted that the definition of “commercial mobile service” is broader than “telecommunications service” because it applies to any mobile service that is offered to the public for profit and interconnected with the public switched network. While the Commission currently excludes data service from commercial mobile service by defining “public switched network” to mean the public switched voice telephone network, there is nothing in the legislative history nor statutory language of section 332 that compels such a limitation.

Respectfully submitted,

/s/ Earl Comstock

Earl W. Comstock

Cc: Nicholas Degani