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November 19, 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 18, 2014 Earl Comstock met with Rebekah Goodheart, legal advisor to Commissioner Clyburn, and Christine Sandquist and Ben Friedman, legal interns for Commissioner Clyburn, to review the legal arguments made in Mr. Comstock's September 15, 2014 Reply Comments in the dockets listed above.

Mr. Comstock reviewed the points made in his Reply Comments, in particular that Section 706 does not apply to "information service" and does not grant rulemaking or enforcement authority. Mr. Comstock also discussed at some length the fact that the FCC and the *Verizon* court relied heavily on language from the Senate Committee Report to support the conclusion that Congress intended to grant rulemaking authority. However, the legislative language described in the Senate Committee Report was not the same language that was adopted by Congress nearly a year later. The Senate reported language which said "under this section" and that gave the Commission authority to preempt States was deleted in conference, so the "fail-safe" language relied on by the court was not adopted.

Mr. Comstock pointed out that neither the *Verizon* court nor the 10<sup>th</sup> Circuit court in *In re FCC 11-161* conducted a thorough statutory analysis comparable to that used by the Supreme Court in *Utility Air Group v. EPA*, and that such an analysis would almost certainly conclude that no rulemaking authority was intended or granted by Congress. In support of this conclusion Mr. Comstock pointed out that in the *Comcast* case the D.C. Circuit had reached the opposite conclusion regarding rulemaking authority the FCC claimed in Section 257,<sup>1</sup> a similar provision to Section 706 that was also part of the Telecommunications Act, yet had not explained nor even mentioned the discrepancy in the *Verizon* decision. Further, in 250 plus pages of comments and

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<sup>1</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).

reply comments in this proceeding Verizon provided no statutory analysis or case law in support of Section 706. Given that the entities the Commission is seeking to regulate are now the strongest supporters of Section 706, it should raise a red flag that not one of them has provided a substantive statutory analysis or rebutted (let alone mentioned) the legal arguments raised in the September 15 Reply Comments.

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.

Respectfully submitted,

/s/ Earl Comstock

Earl W. Comstock

Cc: Rebekah Goodheart