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January 9, 2014

## VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th 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:

On behalf of the National Cable & Telecommunications Association (“NCTA”), I write to respond to the recent *ex parte* letter filed by Google Inc. addressing broadband providers’ pole attachment rights and the potential implications of a decision reclassifying broadband Internet access as a Title II service.<sup>1</sup>

As an initial matter, NCTA agrees with Google that the Commission should not take any action in this proceeding that would interfere with existing pole attachment rights for cable operators and telecommunications carriers under Section 224.<sup>2</sup> As NCTA has explained, pole attachment rights are vital to the goal of promoting the deployment of “advanced telecommunications capability to all Americans” by “removing barriers to infrastructure investment” under Section 706.<sup>3</sup> Courts, Congress, and the Commission have consistently recognized that pole owners would seek to impose monopoly rents in the absence of rate regulation.<sup>4</sup> Eliminating the ability to obtain access to poles at regulated rates—and opening the

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<sup>1</sup> See Letter of Austin Schlick, Google Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (filed Dec. 30, 2014) (“Dec. 30 Google Letter”).

<sup>2</sup> 47 U.S.C. § 224.

<sup>3</sup> *Id.* § 1302; see also Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 21-22 (filed Dec. 23, 2014).

<sup>4</sup> See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (noting that, where pole attachment rates are unregulated, utilities “have found it convenient to charge monopoly rents”); *American Electric Power v. FCC*, 708 F.3d 183,

door for utilities to impose unwarranted rate increases—would have devastating consequences for broadband deployment.<sup>5</sup> The Commission thus should ensure that pole attachment rights under Section 224, which have long been an important part of the existing regulatory framework, remain in place as it adopts new open Internet rules.

However, Google is wrong to the extent it suggests that its desire to take advantage of these rights somehow justifies full-scale reclassification of *all* broadband providers under Title II.<sup>6</sup> To begin with, Google *already* can avail itself of pole attachment rights under Section 224, notwithstanding its assertions to the contrary. Google’s letter states that Google Fiber “lacks federal access rights pursuant to Section 224” because it offers an “Internet Protocol video service that is not traditional cable TV.”<sup>7</sup> But as NCTA has explained on numerous occasions,<sup>8</sup>

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185 (D.C. Cir. 2013); *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 4 (2011) (citing Congress’s finding that, absent regulation of pole attachment rates, utilities “‘are unquestionably in a position to extract monopoly rents in the form of unreasonably high pole attachment rates’” (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, internal alterations omitted)).

<sup>5</sup> To avoid unwarranted increases in pole attachment rates, the Commission should grant NCTA’s pending petition for reconsideration of the Commission’s 2011 pole attachment order if it subjects broadband to Title II regulation. *See* Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTEL, and tw telecom, Inc., WC Docket No. 07-245 (filed Jun. 8, 2011). Granting this petition would benefit all telecommunications carriers by ensuring that the rates they pay for pole attachments are equivalent to the rates paid by cable operators, regardless of the number of attaching parties. As explained in the petition, absent such a decision telecommunications carriers will be forced to pay unnecessarily high rates in situations where a pole owner challenges the Commission’s presumptions regarding the number of attaching parties.

<sup>6</sup> *See* Dec. 30 Google Letter at 1 (suggesting that, “[s]hould the Commission determine that BIAS is a telecommunications service, then Section 224 of the Act would afford *all* BIAS providers, as telecommunications carriers, a statutory right of nondiscriminatory access to utility poles and other essential infrastructure”).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *See, e.g.*, Comments of NCTA, MB Docket No. 09-13, at 8 (filed Mar. 9, 2009); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, WC Docket No. 04-36 (filed Jul. 27, 2007); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, WC Docket No. 04-36 (filed Sep. 1, 2005) (attaching Legal Memorandum on the “Applicability of Title VI to Telco Provision of Video over IP”); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (filed Nov. 1, 2005) (attaching the “Response of the National Cable & Telecommunications Association” to SBC September 14, 2005 *ex parte* filing).

and as the Commission’s recent NPRM on the definition of MVPD services confirms,<sup>9</sup> the law is clear that facilities-based providers of Internet Protocol television (“IPTV”) services *do* qualify as cable operators under the Communications Act of 1934, as amended (“the Act”). The Act defines “cable operator” as one who “provides cable service over a cable system,” without any reference to the technology (IP-based, QAM-based, or otherwise) used to provide such service.<sup>10</sup> “Cable service,” in turn, is defined as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and . . . subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”<sup>11</sup> Google Fiber’s website describes precisely such a service,<sup>12</sup> and the interactive features of Google Fiber’s video offering are entirely consistent with and expressly contemplated by the statute’s reference to “subscriber interaction.”<sup>13</sup> Moreover, the Act’s technology-neutral definition of “cable system”—as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service . . . to multiple subscribers within a community”—is plainly broad enough to encompass Google Fiber’s facilities-based IPTV system.<sup>14</sup> Notably, courts have rejected attempts by other facilities-based IPTV providers to disclaim their status as cable operators—holding in one case that “[t]he statutory language itself appears to require the conclusion that AT&T’s [IP-based] video programming service does constitute a ‘cable service.’”<sup>15</sup> The Act compels the same conclusion with respect to Google Fiber’s video service.<sup>16</sup>

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<sup>9</sup> *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, FCC 14-210, ¶ 71 (rel. Dec. 19, 2014) (“*MVPD Definition NPRM*”) (noting that an entity that provides “video programming services over its own facilities using IP delivery” is “subject to regulation as a cable operator”); *see also id.* ¶¶ 72-75 (explaining statutory analysis).

<sup>10</sup> 47 U.S.C. § 522(5).

<sup>11</sup> *Id.* § 522(6).

<sup>12</sup> *See* <https://fiber.google.com/about/> (last visited Jan. 7, 2015) (explaining that Google Fiber’s video offering enables users to “[w]atch 150+ channels and tens of thousands of shows and movies on demand—all in one place”).

<sup>13</sup> 47 U.S.C. § 522(6); *see also* H.R. Rep. No. 98-934, at 43 (1984) (“Sometimes – as in some ways of providing pay-per-view service – the selection involves sending a signal from the subscriber premises to the cable operator over the cable system. Such interaction to select video programming is permitted in a cable service.”)

<sup>14</sup> 47 U.S.C. § 522(7); *see also* *Definition of a Cable System*, Report and Order, 5 FCC Rcd 7638 ¶¶ 7, 9 (1990) (holding that “closed transmission paths” include wire, coaxial cable, or fiber optics)

<sup>15</sup> *Office of Consumer Counsel v. Southern New England Telephone Co.*, 515 F. Supp. 2d 269, 276 (D. Conn. 2007), *vacated on other grounds*, 368 F. App’x 244 (2d Cir. 2010) (“The statutory language itself appears to require the conclusion that AT&T’s [IP-based] video programming service does constitute a ‘cable service,’ as defined by the Cable

Google Fiber also could obtain pole attachment rights under Section 224 by choosing to unbundle the transmission component of its broadband Internet access service and operating as a telecommunications carrier subject to the obligations and restrictions of Title II.<sup>17</sup> Tellingly, however, Google Fiber has declined to submit to Title II regulation in exchange for pole attachment rights—a tacit acknowledgment that the significant burdens associated with Title II would far outweigh any benefits that Section 224 could confer. And if Google Fiber is unwilling to accede to burdensome Title II regulation on its own, it would make even less sense to *impose* Title II on the *entire* broadband industry merely to assure Google Fiber of its pole attachment rights.

For all of these reasons, Title II reclassification is entirely unnecessary to ensure that Google Fiber and other ISPs have access to utility poles at reasonable rates.

Sincerely,

/s/ Matthew A. Brill  
Matthew A. Brill  
Counsel for the National Cable &  
Telecommunications Association

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Act.”); *see also MVPD Definition NPRM* ¶ 72 n.203 (citing *Southern New England Telephone* with approval).

<sup>16</sup> *See MVPD Definition NPRM* ¶¶ 71-75; *id.* ¶ 17 (“It seems evident that merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator.”); *Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd 9678 ¶ 5 (referring to “IP delivery of cable service”). Google also suggests that it lacks pole attachment rights because it also makes Internet access service available for subscription without video services. *See* Dec. 30 Google Letter at 1-2. However, because Google’s system also offers cable services, Google has pole attachment rights even if some of its subscribers chose to subscribe only to Internet service.

<sup>17</sup> *See* 47 U.S.C. § 224(f) (affording pole attachment rights to “telecommunications carriers” as well as “cable operators”); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 5 (2005) (“We affirm that neither the statute nor relevant precedent mandates that broadband transmission be a telecommunications service when provided to an ISP, but the provider may choose to offer it as such.”).