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February 10, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th 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 February 9, 2015 Earl Comstock met with Nicholas Degani of Commissioner Pai's office to discuss the February 3 ex parte letter submitted by Full Service Network and TruConnect in the above listed dockets. The February 3 ex parte explained in detail why the Commission could not forbear from applying Title II to broadband Internet access service¹ when it is properly classified as a "telecommunications service" under the Communications Act.² Further, the February 3 ex parte explained why broadband Internet access service is a "telephone exchange service" under the Act,³ and that therefore sections 251(b) and 251(c) of the Act apply to broadband Internet access service providers.⁴ Congress added section 251 expressly to promote competition and the Commission needs to allow consumers to benefit from resale and unbundled access so that competition can reduce the price of broadband Internet access service.

A particular focus of the discussion was how the Commission's February 4 release of the *2015 Broadband Progress Report*⁵ impacts the Commission's analysis of local market conditions and competition that is a required pre-condition for any forbearance under section 10 of the Act. In the *2015 Broadband Progress Report* the Commission determined that fixed broadband

¹ See 47 CFR § 8.11(a). See also *In the Matter of Protecting and Promoting the Open Internet*, GN Docket 14-28, Notice of Proposed Rulemaking (rel. May 15, 2014) at ¶¶ 54 – 55.

² 47 U.S.C. § 153(53).

³ 47 U.S.C. § 153(54). See also *infra*, note 17.

⁴ 47 U.S.C. §§ 251(b) & (c).

⁵ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket 14-126, 2015 Broadband Progress Report and Notice of Inquiry (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*).

service providing 25 megabits per second (Mbps) down and 3 Mbps is the minimum transport capability needed to for American households to be able to engage successfully with the digital economy.⁶ Using this standard, the Commission also found that, at best, “only 2% of housing units have access to 3 or more providers, 23% have access to two providers, 55% have access to one provider....”⁷ This data provides further proof that the Commission’s policy of “light touch” regulation has not resulted in competition or broadband deployment, and it is time for the Commission to apply section 251 to broadband Internet access service so that consumers get the benefit of all three competitive entry models – resale, unbundled network elements, and interconnection – that Congress adopted in 1996. It is simply not possible for the Commission to conclude that forbearance from section 251 for broadband Internet access service would promote competition.⁸

Further, as the Commission noted, “the second most cited reason [for not purchasing broadband Internet access service] was that it was too expensive”⁹ so it is difficult to see how the Commission could determine under section 10(a) of the Act that application of the resale requirement in section 251(b) and the resale and unbundling requirements in section 251(c) are not necessary to ensure prices are just and reasonable or protect consumers.¹⁰ Providing intra-modal competition over the broadband facilities that are deployed to 80% of American households would lower prices and provide better service to those Americans.

Mr. Comstock also provided Mr. Degani copies of two reports from 1988 to demonstrate that the Federal government was focused on broadband deployment using a common carrier model for years prior to the enactment of the Telecommunications Act of 1996 (1996 Act). The first report was “Video Program Distribution and Cable Television: Current Policy Issues and Recommendations” published by the National Telecommunications and Information

⁶ See *2015 Broadband Progress Report* at ¶¶ 37 – 55. It should be noted that the Commission’s new definition is still *less* than what the European Union defines as “basic broadband.” *Id.* at ¶ 22. One doubts Congress would consider “advanced” what the European Union defines as “basic” even allowing for translation difficulties.

⁷ *Id.* at note 314. Even including business only providers and fixed wireless the data still demonstrate that competition is available in most areas of the Nation. See *Id.* at ¶ 83.

⁸ Further, as discussed in Full Service Network and TruConnect’s February 3 *ex parte* letter in these dockets, Congress prohibited the Commission from forbearing from section 251(c) until it has been “fully implemented” with respect to a particular telecommunications service or telecommunications carrier. 47 U.S.C. 160(d).

⁹ *Id.* at ¶ 7 (bracketed text added).

¹⁰ See 47 U.S.C. § 10(a)(1) & (2).

Administration of the Department of Commerce.¹¹ Chapter 3 of that report discusses in detail the benefits of “video common carriage” and concludes “[f]acilitating local telephone companies to provide video common carriage will result in more competitiveness and diversity in the video market.”¹² This is precisely what Congress did in the 1996 Act by amending the definition of “telephone exchange service” and adding sections 251 and 651 to the Act.¹³ Appendix B of the report discusses how telephone exchange networks and cable systems, including fiber to the home, were being used *in 1988* to provide broadband service.¹⁴

The second report is the Commission’s own Office of Plans and Policy Working Paper 24, entitled “Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy, and Institutional Change” that was released in November 1988.¹⁵ Paragraphs 68 through 74 of that report discussed “appropriate safeguards against anti-competitive behavior “ and included the observation – as relevant today as it was then – that “the regulatory and competitive concern is how to minimize the possibility of unwarranted cross-subsidies and discrimination against some customers – the content/information service providers... As long a LEC has substantial market power, whether or not it is a content/information provider, it should be required to offer broadband transport on its integrated broadband network on a common carrier basis...”¹⁶

Mr. Comstock used the two reports to illustrate the point that Congress was well aware of broadband networks in 1996. Mr. Comstock reiterated that Congress reaffirmed the application of common carriage in 1996 by directing that telecommunications service “shall” be subject to the then existing common carrier requirements in what is now Part I of Title II, and further expanded those requirements by adding Parts II and III. As a result it cannot be argued that

¹¹ NTIA Report 88-233 (Jun. 1988). The NTIA report can be found online at <http://www.its.bldrdoc.gov/publications/88-233.aspx> (viewed Feb. 10, 2015).

¹² *Id.* at p. 60.

¹³ *See* 47 U.S.C. §§ 153(54)(B), 251 and 571.

¹⁴ *Op. cit.* at pp. 136 – 151. The table on pages 148 – 149 lists four different fiber to the home deployments.

¹⁵ FCC Office of Plans and Policy Working Paper 24 (Nov. 1988) (OPP Working Paper 24). The paper is available at http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp24.pdf (viewed Feb. 10, 2015).

¹⁶ OPP Working Paper 24 at ¶¶ 68-69. It should also be noted that the “integrated broadband networks” discussed in the paper in 1988 were defined as “a fiber optic transmission network with a minimum transmission rate of 150 Mbps permitting voice, data, and video transmission on the same system.” *Id.* at ¶ 8. It seems far more likely that 150 Mbps or more is what Congress was thinking when it adopted the definition of “advanced telecommunications capability” in 1996 rather than the anemic 25 Mbps definition just adopted by the Commission nearly 20 years later. Indeed, the *2015 Broadband Progress Report* in ¶ 28 recognizes that gigabit service is being offered to residential customers in some areas – a standard that is one-fortieth the speed of a commercially available offering is hardly “advanced.”

application of Title II to broadband Internet access service is imposing outdated requirements adopted in 1887 or 1934; to the contrary, those Title II requirements were debated, modified, reaffirmed and expanded in 1996 specifically to bring competition in new broadband services to consumers in the 21st Century.¹⁷ Finally, Mr. Comstock pointed out that the oft cited “deregulatory” statements in the 1996 Act – found in the bill’s description and the policy statement in section 230 of the Act – do not in any way trump the statutory commands found throughout the rest of the amendments made in the 1996 Act. Section 10 of the Act permits forbearance only if the statutory criteria are met, and section 706 of the Telecommunications Act lists regulatory acts as well as forbearance in its hortatory instructions to the Commission.¹⁸

Finally, Mr. Comstock discussed how section 251(h) of the Act¹⁹ could be used by the Commission to designate a cable operator as the incumbent local exchange carrier in those areas where the existing local exchange carrier has decided not to upgrade its network to fiber facilities. This would allow the Commission to apply the resale and unbundling requirements Congress adopted in 1996 expressly to promote competition in the local transmission market in order to bring the benefits of competition to the 55% of households that currently have only one provider of 25 Mbps broadband, and to enhance competition to the other 30% who have a choice of only two or three providers.

¹⁷ The Commission came to this very conclusion shortly after adoption of the 1996 Act. *See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 13 FCC Rcd 24011, 24032, ¶¶ 41-42 (August 6, 1998) (“We conclude that advanced services offered by incumbent LECs are either ‘telephone exchange service’ or ‘exchange access.’ ... Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. Indeed, Congress in the 1996 Act expanded the scope of the “telephone exchange service” definition to include, for the first time, “comparable service” provided by a telecommunications carrier. The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology. Consequently, we reject U. S. WEST’s contention that those terms refer only to local circuit-switched voice telephone service or close substitutes, and the provision of access to such services.”).

¹⁸ 47 U.S.C. §§ 10 and 1302, respectively.

¹⁹ 47 U.S.C. § 251(h).

Respectfully submitted,

/s/ Earl Comstock

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Cc: Nicholas Degani