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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 Louis Peraertz of Commissioner Clyburn'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.

Mr. Comstock provided Mr. Peraertz 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

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

⁴ 47 U.S.C. §§ 251(b) & (c).

Administration of the Department of Commerce.⁵ 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.”⁶ 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.⁷ 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.⁸

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 1988.⁹ 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...”¹⁰

In addition, Mr. Comstock discussed the 1992 FCC Working Paper 28 on Personal Communications Services, which he provided in a follow up email to Mr. Peraertz later that same day.¹¹ The email highlighted the prescient observation in the paper that “economies of

⁵ NTIA Report 88-233 (Jun. 1988). The NTIA report can be found online at <http://www.its.blrdoc.gov/publications/88-233.aspx> (viewed Feb. 10, 2015).

⁶ *Id.* at p. 60.

⁷ See 47 U.S.C. §§ 153(54)(B), 251 and 571.

⁸ *Op. cit.* at pp. 136 – 151. The table on pages 148 – 149 lists four different fiber to the home deployments.

⁹ 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).

¹⁰ 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.”

¹¹ A copy of the email is attached at the end of this letter. FCC Office of Plans and Policy Working Paper 28, “Putting It All Together: The Cost Structure of Personal Communications Services” (Nov.

scope exist between PCS and telephone, cable television, and cellular services for the technologies assumed in this paper” and “one implication of these findings is that an independent firm – an entrepreneur or small company that obtains a PCS license but does not own any existing infrastructure in the subscriber loop – probably would not chose to construct its own separate PCS network.”¹² The facts since certainly have borne out this observation and are another reason the Commission cannot find that forbearance from section 251 and other provisions of Title II will promote competition.

Mr. Comstock used the three 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 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.¹³ 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.¹⁴

1992)(OPP Working Paper 28). OPP Working Paper 28 can be found at http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp28.pdf (viewed Feb. 10, 2015).

¹² *Id.* at p. vii.

¹³ 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.”).

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

Also discussed was how the Commission's February 4 release of the *2015 Broadband Progress Report*¹⁵ 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 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.¹⁶ 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...."¹⁷ 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.¹⁸

Further, as the Commission noted, "the second most cited reason [for not purchasing broadband Internet access service] was that it was too expensive"¹⁹ 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.²⁰ 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.

¹⁵ *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*).

¹⁶ 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.

¹⁷ *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.

¹⁸ 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).

¹⁹ *Id.* at ¶ 7 (bracketed text added).

²⁰ See 47 U.S.C. § 10(a)(1) & (2).

Finally, Mr. Comstock discussed how the legislative history and statutory structure of the Telecommunications Act shows that section 706 does not grant independent regulatory authority to the Commission. When asked about the *Verizon* court holding to the contrary,²¹ Mr. Comstock explained that the court had relied on Commission representations regarding the legislative history that are not correct and referred Mr. Peraertz to Mr. Comstock's September 15, 2014 Reply Comments in the above referenced dockets.²²

Respectfully submitted,

/s/ Earl Comstock

Earl W. Comstock
Eckert Seamans Cherin & Mellott
Counsel for Full Service Network and TruConnect

Cc: Louis Peraertz

²¹ *Verizon v. F.C.C.*, 740 F.3d 623 (DC Cir. 2014).

²² A copy of the Sep. 15, 2014 Reply Comments of Earl Comstock in GN Dockets 10-127 and 14-28 was provided to Mr. Peraertz via the email shown at the end of this ex parte. The Reply Comments can be found at <http://apps.fcc.gov/ecfs/document/view?id=7522672528> (viewed Feb. 10, 2015).

From: Earl Comstock
Sent: Monday, February 9, 2015 1:36:37 PM
To: Louis Peraertz (louis.peraertz@fcc.gov)
Subject: PCS Document

Hi Louis –

It was a pleasure to meet with you today. I very much enjoyed the conversation.

Attached is the 1992 FCC Working Paper 28 on PCS that I mentioned. You may find it interesting – in particular the prescient observation that “economies of scope exist between PCS and telephone, cable television, and cellular services for the technologies assumed in this paper” and “[o]ne implication of these findings is that an independent firm – an entrepreneur or small company that obtains a PCS license but does not own any existing infrastructure in the subscriber loop – probably would not choose to construct its own separate PCS network.” Executive Summary, page vii. The facts have certainly borne out the correctness of this observation, and in the context of our discussion regarding forbearance, are yet another reason the Commission should not forbear.

Also attached are the September 15 Reply Comments I filed in GN Dockets 14-28 and 10-127 that analyze in detail how Section 706 is not an independent grant of regulatory authority. I will include both of these documents and my point above in the ex parte I file on our meeting.

Thanks again for your time. Please feel free to contact me any time if I can provide more historical insight or any questions for you.

Earl

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