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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 WCB Docket Nos. 14-115 and 14-116 regarding *Petitions for Preemption of State Restrictions on Broadband Deployment*.

Dear Ms. Dortch:

On February 9, 2015 Earl Comstock met with Louis Peraertz of Commissioner Clyburn's office to discuss the Commission's Open Internet proceeding. In the course of discussing Congressional intent in the Telecommunications Act of 1996 Mr. Comstock explained that section 706 of the Telecommunications Act[1] is not an independent grant of regulatory authority and directed Mr. Peraertz to the September 15, 2014 Reply Comments Mr. Comstock filed in GN Docket Nos. 10-127 and 14-28 that review in detail the history and statutory construction of the Telecommunications Act and section 706.[2] Mr. Comstock subsequently provided Mr. Peraertz a copy of those reply comments by email,[3] and a copy of those reply comments are submitted for the record of this proceeding as an attachment to this *ex parte*.

In addition, Mr. Comstock explained that the Court of Appeals for the District of Columbia in its decision in *Verizon v. F.C.C.*[4] relied on representations of legislative history by the Commission that were not in fact correct.[5] The correct legislative history shows that the

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[1] 47 U.S.C. § 1302.

[2] A pdf copy of the September 15, 2014 Reply Comments is submitted as an attachment to this ex parte. They can also be found at http://apps.fcc.gov/ecfs/document/view?id=7522672528 (viewed Feb. 10, 2015).

[3] The email is reprinted at the end of this ex parte letter.

[4] 740 F.3d 623 (DC Cir. 2014).

[5] *See Id.* at 639 ("In fact, section 706(a)'s legislative history suggests that Congress may have, somewhat presciently, viewed that provision as an affirmative grant of authority to the Commission whose existence would become necessary if other contemplated grants of statutory authority were for some reason unavailable. The Senate Report describes section 706 as a "necessary fail-safe" "intended to ensure that one of the primary objectives of the [Act]—to accelerate deployment of advanced telecommunications

Conference Committee deleted the "fail-safe" language relied on by the Court, with the result that the enacted language no longer contained the phrase "under this section, and it may preempt State commissions that fail to act to ensure such availability."[6] As the deleted language makes clear, even as originally considered section 706 never provided authority to pre-empt state law; at most it provided authority to pre-empt State commission regulations that restricted the deployment of advanced telecommunications capability.

Finally, a point not discussed in the September 15 Reply Comments but that is directly applicable in this proceeding is section 601(c)(1) of the Telecommunications Act of 1996. Section 601(c)(1) states "No Implied Effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[7] Section 601(c)(1) applies to section 706, which by its plain terms does not expressly provide authority to supersede State law.

Respectfully submitted,

/s/ Earl Comstock

Earl W. Comstock
Eckert Seamans Cherin & Mellott

Cc: Louis Peraertz

Attachment: Sep. 15, 2014 Reply Comments of Earl Comstock (GN Dockets 10-127 and 14-28).

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capability—is achieved." S.Rep. No. 104–23 at 50–51. As the Commission observed in the *Open Internet Order*, it would be "odd ... to characterize Section 706(a) as a 'fail-safe' that 'ensures' the Commission's ability to promote advanced services if it conferred no actual authority." 25 F.C.C.R. at 17970 ¶ 120.").

[6] *See* House Rep. 104-458 (1996) at p. 210 ("The conference agreement adopts the Senate provision with a modification."). The modification was significant in that it replaced "under this section" – a grant of authority – and express preemption language with the phrase "to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." This broad, general language provides no grant of authority; it is a hortatory policy directive. The conferees also added "measures that promote competition in the local telecommunications market" to the list of general measures in section 706(a), a clear reference to new section 251 of the Communications Act. There is no express preemption language as required by section 601(c)(1) of the Telecommunications Act as enacted. *Compare* 141 Cong. Rec. S8587 (Jun. 16, 1995)(showing quoted language in text of section 304, which became section 706, as passed by the Senate) with 47 U.S.C. § 1302(b) (enacted text).

[7] 47 U.S.C. § 152 note.

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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