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February 19, 2015

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 February 19, 2015 Earl Comstock met with Claude Aiken of the Wireline Communications Bureau and Marcus Maher of the Office of General Counsel to discuss the February 3 ex parte letter submitted by Full Service Network and TruConnect in the above listed dockets.<sup>1</sup> The February 3 ex parte explained in detail why the Commission could not forbear from applying Title II to “broadband Internet access service”<sup>2</sup> when it is properly classified as a “telecommunications service”<sup>3</sup> under the Communications Act. In particular, Mr. Comstock discussed how the courts have long held that agencies must follow their own rules, that the Commission had failed to meet its own requirements at 47 CFR § 1.54, and that there is nothing in the plain language section 10 of the Act to suggest Congress intended the agency to be held to a lesser standard than that to which the agency holds the public.<sup>4</sup>

Further, the February 3 ex parte explained why broadband Internet access service is a “telephone exchange service” under the Act,<sup>5</sup> and that therefore sections 251(b) and 251(c) of the Act apply to broadband Internet access service providers.<sup>6</sup> Congress added section 251 expressly

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<sup>1</sup> The Full Service Network and TruConnect February 3, 2015 ex parte letter (February 3 ex parte) is available through ECFS at <http://apps.fcc.gov/ecfs/comment/view?id=60001013497> (viewed Feb. 19, 2015).

<sup>2</sup> 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.

<sup>3</sup> 47 U.S.C. § 153(53).

<sup>4</sup> See 47 U.S.C. 160 and pages 6 – 10 of the February 3 ex parte.

<sup>5</sup> 47 U.S.C. § 153(54). See also *infra*, note 7.

<sup>6</sup> 47 U.S.C. §§ 251(b) & (c).

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 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 21<sup>st</sup> Century.<sup>7</sup> Mr. Comstock explained how the statute confirms Congress adopted the Commission’s *Computer II* framework regulating transmission networks but not enhanced offerings reselling transmission over those networks because Congress directed that a “telecommunications carrier” – i.e. a regulated entity – may only be treated as a common carrier to the extent of its telecommunications service; the statute does not prohibit the common carrier treatment of information services offered by an entity that is not a telecommunications carrier.<sup>8</sup>

Also discussed was how the Commission’s February 4 release of the *2015 Broadband Progress Report*<sup>9</sup> 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. Mr. Comstock reiterated that section 10 makes clear that the Commission may not grant blanket forbearance, but rather must conduct a provision by provision analysis, with the market determined by how Congress defined the scope of each provision.<sup>10</sup>

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<sup>7</sup> Mr. Comstock pointed out that 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.”).

<sup>8</sup> 47 U.S.C. § 153(51)(definition of “telecommunications carrier”). *See* note 21 of the February 3 ex parte for further discussion of *Computer II* and the definition.

<sup>9</sup> *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*).

<sup>10</sup> *See* February 3 ex parte at pages 14 – 16.

In response to questions, Mr. Comstock explained that the definitions of “telephone exchange service” and “local exchange carrier” in the Act are self-executing and are not dependent on a Commission determination before they can be applied. Broadband Internet access service, as defined by the Commission at 47 CFR 8.11(a), allows a user to “transmit data to and receive data from” points chosen by the user, i.e., to “originate and terminate a telecommunications service” as required under the definition of “telephone exchange service.”<sup>11</sup>

A second question was whether or not the Commission could justify forbearance from a particular provision of the Act by deciding that another provision of the Act provided authority to meet the three standards in section 10(a). Mr. Comstock responded that the Commission in general could not, because such an argument implies that the provision being forborne from is redundant or surplus. Supporting such an argument would require that the Commission examine the purpose for which Congress put each provision in place, and the Commission would need to explain how the provision they argue provides a sufficient safeguard in fact provides authority to address the specific purposes for which Congress adopted the provision being forborne. For example, section 201 was in existence and had been extensively litigated at the time section 251 was added by Congress to promote local competition. Clearly Congress did not consider section 201 to be sufficient to promote local competition in 1996, and the Commission would need to demonstrate why it is now. The Commission has not done so in the NRPM. As pointed out in the February 3 ex parte, the record before the Commission demonstrates that the Commission’s decision not to apply section 251 to broadband Internet access service for the past 10 years has resulted in fewer choices for consumers, higher prices, and inadequate broadband deployment.<sup>12</sup>

Mr. Comstock followed up the meeting with an email providing additional thoughts on the last point. A copy of the email is provided on the following two pages.

Respectfully submitted,

/s/ Earl Comstock

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

Cc: Claude Aiken  
Marcus Maher

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<sup>11</sup> Compare 47 CFR §8.11(a) and 47 U.S.C. § 153(53).

<sup>12</sup> See February 3 ex parte at pages 16 – 29. See also 2015 Broadband Progress Report at ¶¶ 4 – 7 (concluding broadband is not being deployed in a reasonable and timely fashion and noting that many subscribers are not able to get broadband because the price is too high).

From: Earl Comstock  
Sent: Thursday, February 19, 2015 12:10 PM  
To: 'Claude.Aiken@fcc.gov'; 'Marcus.Maher@fcc.gov'  
Subject: Response to Question Yesterday

Hi Claude and Marcus –

In thinking further about the question raised in yesterday's meeting regarding the extent to which the Commission could rely on one provision of the Communications Act to justify forbearing from another, I wanted to bring to your attention an additional important point. That point is that the Commission cannot use its interstate authority under section 201 to regulate broadband Internet access service that is an intrastate "telephone exchange service" under the Act. "Telephone exchange service" is by definition intrastate under the plain language of the Act. 47 U.S.C. 153(54). See also *North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036, 1045 (1977) ("The term 'telephone exchange service' is a statutory term of art, and means service within a discrete local exchange system..."). As a result the Commission cannot argue that it can ensure rates are just and reasonable, protect consumers, or promote competition for broadband Internet access service unless it preserves its express authority over telephone exchange service provided by sections 251, 252, and 253. 47 U.S.C. 251, 252, & 253.

The Commission's general grant of jurisdiction in section 2 of the Act is expressly limited by Congress to "all interstate and foreign communication by wire and radio..." 47 U.S.C. 2(a)(emphasis added). "Interstate communication" is defined by Congress to mean "communication or transmission (A) from any State... to any other State... but shall not, with respect to the provisions of [Title II], include wire or radio communications between points in the same State... through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. 153(28)(emphasis added). The italicized language regarding "through any place outside thereof" pre-empts any Commission attempt to claim that IP communications between points in the same State are "interstate" simply because they are switched at a router located outside the State or obtain address information from a DNS server located in a different State or country.

Congress backed up the express limitation on the Commission's authority provided by the definition of "interstate communication" with the express reservation of State commission authority in section 2(b), 47 U.S.C. 152(b), which Congress considered amending in 1996 but in the end did not do so. Further, section 221(b) states that "nothing in this Act shall be construed to apply, or to give the Commission jurisdiction with respect to... telephone exchange service... even if a portion of such service constitutes interstate or foreign communication... where such matters are subject to regulation by a State commission..." 47 U.S.C. 221(b)(emphasis added). See also *North Carolina*, 552 F. 2d 1045 ("the purpose of section 221(b) is to enable state commission to regulate local exchange service..."). Congress clearly considered section 221 in

the 1996 Act because Congress repealed section 221(a), but it left section 221(b) intact. 47 U.S.C. 221 note. Instead, Congress included section 601(c)(1) in the Telecommunications Act of 1996, which states in plain language that “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.” 47 U.S.C. 152 note.

It is in Parts II and III of Title II that Congress “expressly so provided” that the Commission has authority over certain aspects of “telephone exchange service” – in particular those aspects necessary to promote competition in the provision of local telecommunications services, including broadband Internet access service once it is reclassified. The “savings provision” that Congress included in section 251(i) regarding section 201 does not expand the authority granted in section 201 to include “intrastate” matters – it simply foreclosed arguments that the addition of section 251 – which does expressly address intrastate communications – undid prior actions upheld by the courts granting the Commission authority over mixed interstate/intrastate facilities and services.

Finally, it needs to be emphasized that in the 1996 Act Congress made State commissions, and not the FCC, the primary party responsible for implementing local competition. The FCC may only act to arbitrate resale, unbundling, and interconnection disputes for telephone exchange service if a State commission abdicates its role under section 252. See 47 U.S.C. 252(e)(5) (“If a State commission fails to act...”). Then Congress directed that the FCC stand in the shoes of the State commission for that particular dispute. So if the Commission forbears from sections 251, 252, and 253 it cannot claim authority to ensure rates are just and reasonable, protect consumers, or promote competition for intrastate broadband Internet access service, which is the local on-ramp to the Internet.

This email will be included with the ex parte I file on our meeting yesterday.

Earl

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