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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 18, 2015 Earl Comstock met with Priscilla Argeris of Commissioner Rosenworcel's office to discuss the February 3 ex parte letter submitted by Full Service Network and TruConnect in the above listed dockets.¹ 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 of 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.²

Mr. Comstock also summarized the February 3 ex parte's explanation of 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 discussed how the Commission found in the *2015 Broadband Progress Report* that "the second most cited reason [for not purchasing

¹ 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).

² See 47 U.S.C. 160 and pages 6 – 10 of the February 3 ex parte.

³ 47 U.S.C. § 153(54). See also *infra*, note 14.

⁴ 47 U.S.C. §§ 251(b) & (c).

broadband Internet access service] was that it was too expensive”⁵ and said 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.⁶ 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.⁷

Mr. Comstock provided Ms. Argeris 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 Administration of the Department of Commerce.⁸ 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.”⁹ 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.¹⁰ 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.¹¹

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 1988.¹² Paragraphs 68 through 74 of

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*) at ¶ 7 (bracketed text added).

⁶ *See* 47 U.S.C. § 10(a)(1) & (2).

⁷ *See op. cit.* at note 314 (showing that at 25 Mbps down and 3 Mbps up only 2% of American households have access to 3 or more providers, 23% have access to two providers, and 55% have access to one provider).

⁸ 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).

⁹ *Id.* at p. 60.

¹⁰ *See* 47 U.S.C. §§ 153(54)(B), 251 and 571.

¹¹ *Op. cit.* at pp. 136 – 151. The table on pages 148 – 149 lists four different fiber to the home deployments.

¹² 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).

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...”¹³

Mr. Comstock provided 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 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.¹⁴

Finally, Mr. Comstock discussed how the Commission cannot justify forbearance from most provisions of the Act by asserting that its authority under another provision of the Act is sufficient to ensure rates are just and reasonable, protect consumers, and promote competition. Congress in 1996 added numerous provisions to the existing provisions of the Act specifically to promote local competition and protect consumers, which certainly implies that Congress did not

¹³ 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; the new standard that is one-fortieth the speed of a commercially available offering is hardly “advanced.”

¹⁴ 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.”).

believe the Commission's then existing authority, for example in sections 201, 202 and 208, was sufficient to accomplish Congress' objective in adopting those new provisions. As a result, the Commission must demonstrate, first in its *prima facie* case as required by 47 CFR § 1.54 and then in the final order after considering the comments received, that the authority it is retaining allows it to accomplish the Congressional purpose behind the sections that are being forborne.

Respectfully submitted,

/s/ Earl Comstock

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Cc: Prescilla Argeris