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February 20, 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 19, 2015 Earl Comstock met with Amy Bender of Commissioner O’Rielly’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

Also discussed in the context of why the Commission could not forbear was an email Mr. Comstock sent on February 19 to Commission staff members Claude Aiken and Marcus Maher explaining how the Commission could not use section 201 of the Act to justify forbearing from sections 251, 252, and 253 of the Act. Mr. Comstock provided Ms. Bender a copy of that email, which is included as the final two pages of this ex parte.

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

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). 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

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. As the Commission noted in the *2015 Broadband Progress Report*, “the second most cited reason [for not purchasing broadband Internet access service] was that it was too expensive”⁵ 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.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

Respectfully submitted,

/s/ Earl Comstock

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Cc: Amy Bender

‘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.”).

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*) 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).

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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