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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 Gigi Sohn, Daniel Alvarez, and Eric Feigenbaum of Chairman Wheeler's staff to discuss the February 3 ex parte letter submitted by Full Service Network and TruConnect in the above listed dockets.¹ The February 3 ex parte explained in detail why the Commission could not forbear from applying Title II to "broadband Internet access service"² when it is properly classified as a "telecommunications service"³ 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.⁴

There followed a discussion of the Commission's forbearance order⁵ and how the Commission might address the problem. Mr. Comstock said that the Commission should

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 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.

³ 47 U.S.C. § 153(53).

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

⁵ *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act*, WC Docket No. 07-267, Report and Order (rel. Jun. 29, 2009).

proceed with the reclassification of broadband Internet access service, which is on solid legal ground under Title II of the Communications Act, and address any forbearance through a further notice of proposed rulemaking that sets forth the Commission's *prima facie* case and market analysis for each provision of law or regulation proposed for forbearance, as required by the Commission's regulations.

Another focus of the discussion was how the Commission's February 4 release of the *2015 Broadband Progress Report*⁶ 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 up is the minimum transport capability needed for American households to be able to engage successfully with the digital economy.⁷ 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...."⁸ 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 on the record before the Commission for the Commission to conclude that forbearance from section 251 for broadband Internet access service would promote competition.⁹

Further, as the Commission noted, "the second most cited reason [for not purchasing broadband Internet access service] was that it was too expensive"¹⁰ so it is difficult to see how the Commission could determine under section 10(a) of the Act that application of the resale

⁶ *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*).

⁷ 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.

⁸ *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.

⁹ 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).

¹⁰ *Id.* at ¶ 7 (bracketed text added).

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.¹¹ 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.

Mr. Comstock also discussed how the February 3 ex parte showed that broadband Internet access service is a “telephone exchange service” under the Act,¹² and that therefore sections 251(b) and 251(c) of the Act apply to broadband Internet access service providers.¹³ 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 emphasized 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

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.¹⁵ Addressing a question raised in an earlier meeting with Claude Aiken and Marcus Maher, regarding whether or not the Commission could justify forbearance from a particular provision of the Act by deciding that

¹¹ See 47 U.S.C. § 10(a)(1) & (2). See also *infra*, note 18 and accompanying text.

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

¹³ 47 U.S.C. §§ 251(b) & (c).

¹⁴ 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.”).

¹⁵ See February 3 ex parte at pages 14 – 16.

another provision of the Act provided authority to meet the three standards in section 10(a), Mr. Comstock said that the Commission in general could not for two reasons. One reason is because such an argument implies that the provision being forborne is redundant or surplus, and the Commission would bear the burden of demonstrating that was the case. The second reason is that the Commission's general grant of authority is limited to *interstate* communications, while broadband Internet access service – providing the on-ramps and off-ramps to the information superhighway – is an *intrastate* telephone exchange service.¹⁶

In conclusion, Mr. Comstock referred again to the February 3 ex parte, which discusses how 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.¹⁷ To illustrate the extent to which resale was understood to be a key element in the successful long distance competition that Congress was using as a model for designing the local exchange competition provisions of the 1996 Act, Mr. Comstock provided excerpts of testimony to Congress by Assistant Secretary of Commerce Larry Irving and MCI Chairman Bert Roberts from 1994 and 1995, respectively, copies of which are submitted as a pdf document along with this ex parte. He also provided a copy of a 1998 order in which the Commission discussed its long history of using resale for promoting competition under the Act.¹⁸

Respectfully submitted,

/s/ Earl Comstock

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Counsel for Full Service Network and TruConnect

Cc: Gigi Sohn
Daniel Alvarez
Eric Feigenbaum

¹⁶ To support this point Mr. Comstock provided a copy of an email he 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. A copy of that email is included as the final two pages of this ex parte.

¹⁷ 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).

¹⁸ *In the Matter of Personal Communications Industry Association Petition for Forbearance*, 13 FCC Rcd 16857 (1998). Attention was drawn to ¶ 35 and note 100.

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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