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August 25, 2010

VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Notice of Ex Parte Communication in GN Docket No. 10-127, *In the Matter of Framework for Broadband Internet Service*, and WT Docket No. 05-265, *In the Matter of Reexamination of Roaming Obligations for Commercial Mobile Radio Service Providers*.

Dear Ms. Dortch:

Yesterday Earl Comstock, representing Data Foundry, met with FCC General Counsel Austin Schlick, FCC Deputy General Counsel Julie Veach, and Chris Killion, Royce Sherlock, and David Tannenbaum of the General Counsel's office to discuss Data Foundry's Comments and Reply Comments in GN Docket No. 10-127.

Mr. Comstock began the discussion by reiterating Data Foundry's strong concerns about the adverse impact that Deep Packet Inspection by broadband Internet access providers will have on business' and consumers' use of the Internet for accessing and conveying confidential information like medical records, trade secrets, and privileged communications. Mr. Comstock conveyed that Data Foundry, which offers Internet based services to clients who must obtain broadband Internet access from facilities based providers, has already seen some clients stop using the Internet for transmission of confidential information due to concerns about the forced waiver of privacy in broadband Internet service providers' terms of service. In particular, he reiterated the point that broadband Internet access providers are the third party *carriers* of a user's information and not the intended *recipients* of the user's information.<sup>1</sup>

Mr. Comstock pointed out that the National Broadband Plan stresses the importance of privacy, and that the Administration's goals of increased use of the Internet for health care, education, government, and e-commerce all depend on users' confidence that their communications will remain private.<sup>2</sup> There is an expectation of privacy that has been recognized by the courts for letters and phone conversations, and users' naturally believe they

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<sup>1</sup> See Data Foundry Reply Comments in GN Docket No. 10-127 (August 12, 2010) (*Data Foundry Reply Comments*) at 17 – 19.

<sup>2</sup> See Data Foundry Comments in GN Docket No. 10-127 (July 15, 2010) (*Data Foundry Comments*) at 32 – 33.

have the same expectation with their communications over the Internet. However, the current terms of service by broadband Internet access providers require users to consent to inspection of the content of their communications, and at least one court has held that this consent (even though forced) destroys any legal claim to privacy.<sup>3</sup>

Absent action by the Commission to protect user privacy, Mr. Comstock pointed out that users would have no choice but to either stop using the Internet for confidential transmissions or else resort to encryption products like those offered by Data Foundry's sister company Golden Frog, which could pose problems for other government objectives. To protect users' privacy and achieve the goals for expanded Internet use put forward by the Commission in the National Broadband Plan, Mr. Comstock urged adoption of Data Foundry's proposal in GN Docket 10-127 that the Commission compel all facilities based broadband Internet access providers to offer the transmission component of that service as a wholesale common carrier offering. This proposal would provide authority for the Commission to adopt an opt-in requirement for inspection of user content by third party carriers.<sup>4</sup>

Mr. Comstock reiterated that Data Foundry is in strong support of the Commission taking action to re-instate Title II requirements on the telecommunications component of broadband Internet access. Turning to the specifics of Data Foundry's proposal, Mr. Comstock pointed out that numerous comments and reply comments in GN Docket No. 10-127 make it clear that that the Commission's past statements regarding Title II after the 1996 Act, the nature of Domain Name Service (DNS), and how Internet access is provided, though factually wrong,<sup>5</sup> make it difficult for the Commission to now reclassify broadband Internet access service as a telecommunications service without engaging in a detailed repudiation of those misstatements. Further, even were the Commission to successfully do so, it would still be faced with the problem of having to identify the telecommunications service component based on what the providers were actually offering – an approach that would likely lead to regulation of a larger class than the Commission seems to intend from the NOI.<sup>6</sup>

An alternative means to achieve the Commission's goals would be for the Commission to compel facility based broadband Internet access providers to offer the transmission component of Internet access as a wholesale telecommunications service. This approach would promote competition and protect consumers while limiting the need for regulation.<sup>7</sup> Mr. Comstock reiterated that the courts and the Commission both have stated that the Commission could compel such an offering,<sup>8</sup> and pointed out that AT&T and NCTA had conceded as much in their

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<sup>3</sup> See *Data Foundry Comments* at 27 – 28.

<sup>4</sup> See *Data Foundry Reply Comments* at 19 – 22.

<sup>5</sup> See *Data Foundry Reply Comments* at 12 – 13.

<sup>6</sup> See *Data Foundry Comments* at 15 – 19 and *Data Foundry Reply Comments* at 6 – 7.

<sup>7</sup> See *Data Foundry Comments* at 14 – 15.

<sup>8</sup> See *Data Foundry Comments* at 4 – 6.

comments.<sup>9</sup> He observed that, despite Data Foundry's detailed treatment of the issue in its comments, in their reply comments NCTA did not respond and AT&T simply reiterated the analysis in its comments, which was that the rationale the Commission used in *Computer II* – protection of regulated ratepayers – was no longer available to the Commission.<sup>10</sup> Mr. Comstock stated that the lack of the *Computer II* rationale is not an issue, because the Commission can now justify the compulsion as necessary to achieve the universal service goals Congress set forth in section 254.<sup>11</sup>

Mr. Comstock pointed out that the Commission is presently considering whether to compel wireless broadband Internet access providers to provide roaming in WT Docket No. 05-265, in recognition of the fact that the Internet is increasingly the primary medium for communication in the United States. Much like the present NOI, the Commission finds itself in a dilemma because of its failure to recognize that Congress intended its amendments in 1993 and 1996 to apply to 21<sup>st</sup> century services, and not simply legacy services.<sup>12</sup> He noted in the roaming proceeding the Commission had requested comment on whether they should require roaming as a telecommunications service under Title II or using the Commission's authority under section 303.<sup>13</sup> This is a similar analysis to the one that Data Foundry is suggesting the Commission use with respect to broadband Internet access to compel the offering of the transmission component as a telecommunications service.

In response to questions, Mr. Comstock said that the Data Foundry approach would address many of the concerns raised in the comments and replies. In particular, compelling the provision of the transmission component as a telecommunications service would allow the Commission to limit that requirement to facilities based carriers, both wireless and wireline (including cable based providers) on the basis that those carriers all are able to engage in their public offering solely based on the benefits provided by access to public rights of way under section 214; access to poles, ducts, and conduits under 224; and access to public spectrum under Title III.<sup>14</sup> This limitation would allow the Commission to retain the benefits of the tried and tested *Computer II* model, namely that the retail provision of broadband Internet access service

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<sup>9</sup> See *Data Foundry Reply Comments* at 8.

<sup>10</sup> See *AT&T Reply Comments* in GN Docket No. 10-127 (August 12, 2010) at 33 (“Finally, for the reasons discussed in our opening comments, the Commission could not lawfully sidestep that impediment to Title II reclassification by trying to revive the *Computer Inquiry* rules or otherwise force broadband Internet access providers to offer a standalone transmission service on a common carrier basis.... See *AT&T Comments* at 102-06.”).

<sup>11</sup> See *Data Foundry Reply Comments* at 9 – 12.

<sup>12</sup> See *Data Foundry Reply Comments* at 4 – 5.

<sup>13</sup> See *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, WT Docket No. 05-265 (Rel. April 21, 2010) at ¶¶ 67 and 68. The Commission could proceed under the authority of both titles. The court found in *MCI Telecom. Corp. v. FCC*, 561 F.2d 365 (App. DC 1977) at 376 that “[s]ection 214(c) would provide a power over individual carriers in all respects identical to its power over classes of carriers under section 303(b)....”.

<sup>14</sup> See *Data Foundry Comments* at 7 – 11 and *Data Foundry Reply Comments* at 2.

by any provider (including a facility based provider) could remain an unregulated information service. This approach would not deter investment. Similar concerns were raised by incumbents in the *Computer Inquiry* proceedings and during enactment of the 1996 Act. In both cases the exact opposite proved to be true – the unbundling requirements adopted by the Commission and Congress in both cases led to greater innovation and investment. If the Commission needs further proof, it should look closely at the situation in Europe and Asia, where investment and innovation are continuing today in spite of pro-competitive requirements that go far beyond the *Computer II* type wholesale requirement Data Foundry is proposing the Commission adopt.

With respect to concerns raised about new State or local taxes, the protections afforded to broadband Internet access service by the Internet Tax Freedom Act would remain intact under the Data Foundry approach. And, to the extent any taxes were applied the telecommunications service component, those taxes would be limited to a much smaller number of providers (than under the Third Way approach). all of whom already have to comply with state and local taxes on their existing Title II, III, and VI service offerings. Finally, with respect to the privacy concerns discussed earlier, adoption of the framework advocated by Data Foundry would mean that the retail information service offerings of facility based carriers, including Internet access service, would be subject to the same Federal Trade Commission oversight and rules as non-facility based providers, but users' privacy could be protected by an FCC prohibition on non-consensual inspection of content by telecommunications service providers.

Respectfully submitted,



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