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March 7, 2014

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

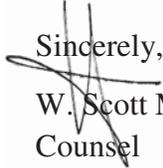
RE: ***Ex Parte Notice***; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28;  
*Preserving the Open Internet*, GN Docket No. 09-191

Dear Ms. Dortch:

Data Foundry, Inc., Golden Frog, Inc., and Giganews, Inc. (“the companies”) give notice that they met with Gigi B. Sohn, Special Counsel for External Affairs, Office of the Chairman and Matthew S. DelNero, Deputy Bureau Chief, Wireline Competition Bureau on March 5, 2014. External Affairs Director Andrew MacFarlane and undersigned counsel attended for the companies.

The purpose of the meeting was to briefly review the events and actions giving rise to the Public Notice establishing GN Docket No. 14-28, describe how the issues impact the companies, and for the companies to make preliminary recommendations on how to proceed. The companies distributed the attached document that served as the basis for discussion during the meeting.

Sincerely,

  
W. Scott McCollough  
Counsel



## PROTECT THE OPEN INTERNET BY RETURNING TO COMMON CARRIER FOR TRANSMISSION

There is little to no competition for broadband transmission facilities used to offer service to the public. In most places there are only one or two “wireline” broadband providers. The cost of constructing duplicative ubiquitous facilities poses high economic and regulatory barriers to new entry.

A mistaken change in regulatory policy beginning in 1998 allowed cable and then fiber transmission providers to bundle transmission and higher-layer functions into a single product and thereby escape regulation. This led inexorably to the removal of telephone company transmission as a reasonably-available, stand-alone service or facility. As a result, the dominant providers have been able to leverage their market power over the “transmission” market into the logically separate and adjacent “Internet access” market. They then have the incentive to block, degrade, discriminate or control prices for access to and use of unaffiliated applications, services and content sources on the Internet as a means to extract monopoly rents from both markets.

The FCC’s last effort (Net Neutrality) suffered from three defects. First, it was premised on an acceptance of duopoly conditions and the bundling they allowed. Net Neutrality merely tried to ameliorate some of the downside effects. Second, it created other problems. Among other things, it functionally required the broadband provider to inspect content and determine what application was being used in order to implement the nondiscrimination and no blocking mandates. Finally, as held by the D.C. Circuit, it does not comport with the Communications Act.

“Net Neutrality” is not “Open Internet.” The FCC must admit the errors committed by past administrations and reinstate *Computer Inquiry* and 251(c) “Open Access” unbundling and interconnection rules on ILECs and their functional equivalent in broadband, the cable operators.

Open Access was in place for over 20 years and led to the creation of a vibrant and competitive market in both long distance and “enhanced services.” Without this policy the Internet would have not emerged and thrived. The FCC (and the states in tandem) should return to the successful policy of requiring dominant transmission facilities owners to offer stand-alone raw transmission on a common carrier basis. Regulators should (1) re-institute the *Computer Inquiry* regime of unbundled transmission for all facility based providers; (2) engage in a §251(h) proceeding to decide whether cable companies’ operations should be treated as incumbent local exchange carriers; and (3) reconsider whether broadband transmission links should be brought back into the §251(c)(3) UNE regime.

The current discussion suggests that the FCC may impose common carrier regulation on “Internet access.” This is a mistake, for several legal and technical reasons. Internet access can be competitive, and does not need to be regulated. Transmission is the bottleneck and that is what must be returned to Title II treatment. The entire purpose of *Computer Inquiry* and the 1996 amendments was to isolate the essential transmission (“telecommunications”) “building blocks”, and regulate them, while deregulating potentially competitive services that rely on transmission. The FCC does not need to regulate “the Internet”; it just needs to reinstitute the Open Access rules that prevailed for more than 20 years prior to 2001.