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December 30, 2014

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

Re: *Protecting and Promoting the Open Internet (GN Docket No. 14-28)*

Dear Ms. Dortch:

As the Commission considers regulatory classification of broadband Internet access service ("BIAS"), the question of forbearance pursuant to Section 10 of the Communications Act also arises.[1] Should the Commission determine that BIAS is a telecommunications service, then Section 224 of the Act[2] would afford *all* BIAS providers, as telecommunications carriers, a statutory right of nondiscriminatory access to utility poles and other essential infrastructure. Cable systems and telephone companies have long had this right. Consistent with Section 10's public interest test, equal treatment of BIAS providers that are not cable system operators or telephone companies would promote competition as well as broadband investment and deployment.

1. Application of Section 224.

Section 224 confers upon cable system operators and telecommunications carriers the right of "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled" by a utility.[3] Currently, therefore, a BIAS provider that does not offer its broadband access service on a common-carriage basis, and does not offer other cable television or telecommunications services over its network, lacks the federal protection Section 224 affords to traditional cable systems and telecommunications carriers. Google Fiber, for instance, offers its Basic Internet service on a standalone

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[1] *See* 47 U.S.C. § 160; *In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, ¶ 148 (2014) (seeking comment on "whether and how the Commission should exercise its authority under [S]ection 10… to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service").

[2] 47 U.S.C. § 224.

[3] *Id.* § 224(f)(1).

basis and its Gigabit Internet service alone or in conjunction with an Internet Protocol video service that is not traditional cable TV, so it lacks federal access rights pursuant to Section 224.[4] If BIAS were classified as a telecommunications service, however, then the statutory right of access to utility infrastructure would extend to all providers of BIAS, regardless of what services they otherwise provide.

Timely and affordable access to available utility infrastructure is essential for rapid, widespread broadband deployment. The *National Broadband Plan* identified providers' access to infrastructure as key to further deployment of high-quality, high-speed broadband.[5] Shared use of existing infrastructure pursuant to Section 224 also helps to minimize the aesthetic and public safety concerns that arise when new entrants must deploy duplicative poles or dig their own, redundant trenches to build a network.

Importantly, should the Commission classify BIAS as a telecommunications service and thus extend Section 224's benefit to all BIAS providers, neither the category of utilities required to make infrastructure available, nor the responsibilities of those utilities, would change. Section 224 requires certain local exchange carriers and "electric, gas, water, steam, or other public utilit[ies]" to provide access to infrastructure for an appropriate fee.[6] The classification of BIAS as a telecommunications service would not render BIAS providers local exchange carriers or public utilities for purposes of Section 224, and thus would not newly extend the law's access obligations to any entity.[7] As the Commission explained, "an incumbent LEC is a utility and not a

[4] *See* https://fiber.google.com/about/ (last visited Dec. 29, 2014).

[5] *See Connecting America: The National Broadband Plan* at 109-118 (2010), *available at* download.broadband.gov/plan/national-broadband-plan.pdf ("*National Broadband Plan*").

[6] 47 U.S.C. § 224(a)(1).

[7] *See id*. § 153(32) ("The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access."); *see also In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets et al*, First Report and Order and Further Notice of Proposed Rulemaking *et al*., 15 FCC Rcd. 22983, App. D (2000) (anticipating that, to the extent the FCC's "legal interpretation of Section 224 affects non-LEC utilities, the effect would be concentrated on electric utilities."); *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶¶ 120-134 (2000) (listing, as utilities that could be affected by the Commission's rulemaking, electric utilities, gas production and distribution utilities, water supply utilities, sanitary system utilities, steam and air conditioning supply utilities, and providers of irrigation systems). *Cf.* 42 U.S.C. § 16451(13) (defining "public utility" as "any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce.").

telecommunications carrier for purposes of [S]ection 224," and it is from that utility classification that infrastructure access obligations arise.[8]

2. Application of Section 10.

Because the requirements of Section 224 apply to a congressionally defined class of local exchange carriers and public utilities rather than to "telecommunications carriers," the classification of BIAS as a telecommunications service would not change the reach of those requirements. Thus, there would be no basis for considering forbearance in this context.

Although the Commission theoretically could entertain whether to forbear from conferring the *benefits* of Section 224 on BIAS providers, it should not do so. As noted, the Commission has recognized that access to poles, ducts, conduits, and rights-of-way owned or controlled by utilities is essential for broadband deployment. In its *2011 Pole Attachment Order*, for instance, the Commission explained that "lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying … wireline services[,]" including broadband services.[9] The Commission would have no reason to limit pole access rights that Congress conveyed precisely to ease this burden.

Indeed, forbearing from enforcing BIAS providers' rights under Section 224, after telecommunications classification, would fail the three-part test for forbearance. Section 10 requires that to forbear from applying a provision of the Act the Commission must find, among other things, that "forbearance from applying such provision or regulation is consistent with the public interest."[10] In determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance would "promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[11] Forbearance from allowing BIAS providers access to available infrastructure under Section 224 would have the exact opposite effect, maintaining a substantial barrier to network deployment by new providers such as Google Fiber, that telecommunications classification otherwise would remove.

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[8] *See In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, n.243 (2005).

[9] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶ 3 (2011) ("*2011 Pole Attachment Order*").

[10] 47 U.S.C. § 160(a)(3).

[11] *Id.* § 160(b).

In addition to this lost opportunity to promote broadband deployment and competition, forbearance could force competitors to build duplicative infrastructure when they do enter a market. Installing new poles and conduits when existing facilities have available capacity entails unnecessary construction, unjustified risks to public safety, unwanted burdens on municipal governments, and unattractive landscapes that displease residents and local business owners. Shared use of infrastructure pursuant to Section 224, by contrast, ensures that existing poles and conduits are used to capacity before additional ones are installed, thus minimizing inconvenience, safety risks, noise, and aesthetic harms for communities.

Thus, should the Commission classify BIAS as a telecommunications service, it should not forbear from applying Section 224 to BIAS providers. Application of Section 224 in this situation would promote broadband deployment and competition without creating a new burden on any infrastructure owner.

Please do not hesitate to contact me with any questions.

Sincerely,

Austin C. Schlick
Director, Communications Law