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EX PARTE OR LATE FILED

October 23, 1998

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Notification of Ex Parte Presentations; CC Docket No. 96-98; CCB/CPD No. 97-30; CC Docket Nos. 98-79; 98-103; 98-161; 98-168

Dear Ms. Salas:

On behalf of e.spire Communications, Inc. and pursuant to Section 1.1206(b)(1) of the Commission's rules, enclosed are an original and one copy of this *ex parte* notification, which includes duplicates of October 21, 1998 and October 22, 1998 Letters from Brad E. Mutschelknaus to Jim Casserly, for inclusion in the record of each of the above-captioned proceedings.

Respectfully submitted,

John J. Heitmann

John J. Heitmann, Esq.

cc: Jim Casserly

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October 21, 1998

BY HAND DELIVERY AND E-MAIL <jcasserly@fcc.gov>

Mr. James Casserly
Senior Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
191 M Street, N.W. 20554

Re: *Ex Parte* Presentation of e.spire Communications, Inc. re ILEC DSL Tariff Filings

Dear Mr. Casserly:

On Monday, October 19, 1998, during a presentation made by me and Riley Murphy of e.spire Communications, Inc. ("e.spire"), you asked us to send an e-mail to you with support for the proposition (contained in e.spire's *ex parte* presentation) that the "FCC has specifically permitted ISPs to order service under local exchange tariffs". In response to your request, I respectfully direct your attention to the following excerpts from the Commission's First Report and Order in the *Access Charge Reform* rulemaking.

> "As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users." *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 342.

> "ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs

> may address their concerns with state regulators." *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 345-46.

You also questioned the legal basis for the so-called "two call" theory. In this regard, I respectfully direct your attention to the following excerpts from the Commission's (First) Report and Order in the *Universal Service* rulemaking.

> "We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network component, which is the connection over an LEC network from a subscriber to an Internet Service Provider, in addition to the underlying information service." *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 ¶ 83 (rel. May 8, 1997).

> "When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and it is distinguishable from the Interstate service provider's service offering." *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 ¶ 789 (rel. May 8, 1997).

While the foregoing is not an exhaustive compilation on either point, I believe that ample support is provided for the propositions set forth. As always, I am available at your convenience to answer any questions you may have. Please do not hesitate to contact me at 202/955-9765.

Respectfully submitted,

Brad E. Mutschelknaus /

Brad E. Mutschelknaus

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October 22, 1998

BY E-MAIL <JCASSERL@fcc.gov>

Mr. James Casserly
Senior Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
191 M Street, N.W. 20554

Re: *Ex Parte* Presentation of e.spire Communications, Inc. re ILEC DSL Tariff Filings

Dear Mr. Casserly:

This letter is submitted as a follow-up to e.spire Communications, Inc.'s ("e.spire"), *ex parte* letter to you dated October 21, 1998, in which e.spire provided excerpts and cites to various Commission orders to support the proposition that the "FCC has specifically permitted ISPs to order service under local exchange tariffs". In yesterday's letter, I directed your attention to the Commission's *Access Charge Reform Order* and *Universal Service Order* which accurately reflect the Commission's historical treatment of dial-up ISP traffic as being local in nature. I write today to provide you with additional historical context and, in so doing, I note that, in its 1997 *Access Charge Reform Order*, the Commission traces this regulatory treatment to its 1983 *Access Charge Reconsideration Order*.[1]

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[1] *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 342 (1997) ("As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users." (citing *MTS and WATS Market Structure*, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (1983) (*Access Charge Reconsideration Order*) and *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*)).

In addition to those sources cited yesterday, the Commission has touched on the local nature of calls to ISPs – as opposed to the interstate nature of ISP transmissions over the Internet – in several other contexts. For example, in 1989, the Commission again confirmed that "ESP traffic over local business lines is classified as local traffic for separations purposes", so that "[traffic sensitive] costs associated with ESP traffic are apportioned to the intrastate jurisdiction, and are recovered through intrastate charges paid by ESPs and other purchasers of intrastate services."[2]

In 1996, the Commission also observed that, even though an end user might obtain access via an ISP to an information service across LATA boundaries, the service is not deemed interLATA.[3] Indeed, mindful of the restrictions of Sections 271 and 272, the RBOCs themselves argued that they their Internet access services should be classified as intraLATA traffic.[4] Here, too, the Commission acknowledged that two separate transmissions are involved when an end user seeks access to the Internet.[5]

Notably, the Commission also has determined that reciprocal compensation obligations and access charge arrangements are mutually exclusive. In its 1996 *Local Competition Order*, the Commission explained that access charges apply only in the long distance setting, where *three carriers* are involved. By contrast, the FCC reported that the Act's reciprocal compensation obligation applies only in the local exchange setting, where there are *two carriers.*[6] As the FCC confirmed in its *Access Charge Reform Order*, and consistently has found, ISPs are end users and not carriers.[7] Thus, in cases where an ILEC hands ISP-bound traffic to a CLEC for termination, or vice versa, there are only two carriers involved and the reciprocal compensation obligation must apply.

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2 *Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture,* Notice of Proposed Rulemaking, 4 FCC Rcd 3983, 3987-88 (1989).

3 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 119 (1996).

4 *Id.* ¶ 126.

5 *Id.* ¶ 127 n.291; *see also Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, CC Docket No. 96-45, ¶¶ 83, 789 (rel. May 8, 1997).

6 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1033-34 (1996).

7 *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982, ¶ 348 (1997).

I also direct your attention to the Commission's *Report to Congress* regarding universal service issues where the Commission again acknowledged the local nature of calls terminated to ISPs by noting that "[w]here users rely on the public switched network to reach the information service provider, it is the telephone company, not the information service provider that is offering to the public transmission over the public switched network."[8] This distinction is reinforced by the Commission's pronouncement that "telecommunications" and "information service" are mutually exclusive categories.[9] This being the case, calls to ISPs must be local in nature, as the jurisdictional nature of telecommunications services cannot be determined by the termination point of an information service (Internet access) that uses various telecommunications services as inputs.[10]

It also is instructive to note that, in its *Report to Congress,* the Commission also reported that ISPs purchase thousands of business lines in order to provide Internet connectivity to their end users.[11] As noted in yesterday's letter, ISPs purchase those business lines pursuant to state tariffs. Describing the availability of such services, the Commission noted that "[a] recent study found that at least 87% of the U.S. population has access to a commercial Internet service provider through a *local call,* and that three-fourth[s] of Americans live in *local calling* areas with at least three Internet service provider points of presence." *Id.* (emphasis added).

Once again, I appreciate the opportunity to provide you with additional information on the Commission's treatment of calls terminated to ISPs. As always, I am available at your convenience to answer any questions you may have. Please do not hesitate to contact me at 202/955-9765.

Respectfully submitted,

Brad E. Mutschelknaus /gh

Brad E. Mutschelknaus

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8 *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, ¶ 40 n.78 (rel. Apr. 10, 1998).

9 *Id.* ¶¶ 33, 39.

10 *See id.* ¶¶ 39, 41 (ISPs make information available via telecommunications – in providing Internet access, for example, an ISP does not provide telecommunications, it uses telecommunications), ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.'"), and ¶ 73.

11 *Id.* ¶ 97.