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February 24, 2006

VIA ELECTRONIC FILING

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

Re: Notice of *Ex Parte* Meeting of Bonfire Holdings, Inc.
CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170

Dear Ms. Dortch:

Bonfire Holdings, Inc. ("Bonfire") submits this notice of an *ex parte* meeting. On February 23, 2006, Craig Walker, CEO of Bonfire and William Wilhelm and Douglas Orvis of Swidler Berlin LLP, outside counsel to Bonfire, met with Scott Bergmann, Legal Advisor to Commissioner Adelstein.

At the meeting, Bonfire discussed the issues raised in its February 13, 2006, *ex parte* filing regarding the assessment of USF on free services under a numbers-based contribution methodology. A copy of the letter was provided and is attached to this filing.

Respectfully submitted,

William B. Wilhelm, Jr.
Douglas D. Orvis II

Counsel for Bonfire Holdings, Inc.

Enclosure

cc: Scott Bergmann

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February 13, 2006

EX PARTE

Tom Navin
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: <u>Federal-State Joint Board on Universal Service, CC Docket No. 96-45</u>

Dear Mr. Navin:

Bonfire Holdings, Inc. ("Bonfire") submits this *ex parte* letter to address the methodology the Commission should use in assessing Universal Service Fund ("USF" or "Fund") on services which are provided to customers for free. Bonfire is a venture financed, Silicon Valley based start-up company that plans to provide an entirely new range of innovative communications products. While consumers will be able to obtain several different types of products, the most common level is expected to be Bonfire's entry-level product, which will be provided to the end-user for free. Customers will have the option of upgrading their service to a paid service if they choose.

As detailed below, if the Commission should adopt a "numbers-based" contribution methodology, Bonfire respectfully requests that the Commission *continue its current policy of exempting free services* that may otherwise use telephone numbers. These free services do not constitute "telecommunications services" under Section 254(d) of the Act, and are therefore not covered under the Act's "mandatory contribution" provisions. Bonfire respectfully submits that maintaining the current policy of exempting free services under a "numbers-based" framework is not only legally sound, such policies remain necessary in order continue to foster the twin goals of innovation and universal service in the ever evolving consumer communications services industry.

I. Free Service Is Not Subject to Mandatory Contribution and Should be Specifically Exempted from Contribution Under Section 254(d).

Free services are not telecommunications services, and thus they are not subject to the Act's mandatory contribution requirements. Section 254(d) of the Act provides for so-called "mandatory contribution" when a telecommunications service is provided; it also allows the Commission to exempt mere telecommunications from contributing to the Fund.

Specifically, Section 254(d) of the Act states:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute on a equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service....*Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest requires.*[1]

The Commission can, therefore, specifically exempt providers of telecommunications that do not also provide telecommunications service.

Bonfire's service will not be a telecommunications service. Under the Act, "telecommunications service" means the provision of telecommunications "for a fee to the public."[2] Because this service is provided for free to the customers, it fails the statutory definition of a telecommunications service. As a result, Bonfire's free service is, at most, telecommunications and as a result, it is not covered under the mandatory contribution obligations of Section 254(d).[3]

The conclusion that a free service is not telecommunications service is consistent with prior Commission decisions. In the Commission's *pulver.com* decision, the Commission concluded that the common carriage obligations of Title II did not apply to pulver.com's free computer-to-computer IP service because it was not a telecommunications service as defined by the Act.[4] Similarly, Bonfire's service, while potentially telecommunications,[5] is provided free of charge and does not satisfy the statutory requirements of a telecommunications service.

II. The Continued Exemption of Free Service from USF Contribution Promotes the Policy Goals of Universal Service.

The current revenue-based USF system contains a *de facto* exemption for telecommunications provided for free. Under a numbers-based methodology, any "other provider of telecommunications" who uses numbers could find its telecommunications subjected to USF contribution, even if no fee is charged. If the Commission introduces a "numbers-

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1 47 U.S.C. § 254(d) (emphasis added).

2 47 U.S.C. § 153 (46).

3 *See* 47 U.S.C. § 153(46)(definition of "telecommunications service").

4 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 at ¶¶ 9-10 (rel. Feb. 19, 2004).

5 In *pulver.com*, the Commission also ruled that the service was not telecommunications. Regardless, the Commission also specifically concluded that the service was not telecommunications service because, in part, no fee was charged for the service. *Id*,. at ¶ 10.

based" contribution methodology, this exemption should continue -- but it will need to be made explicit.

The Act specifically provides the Commission the authority to exclude other telecommunications offerings from the Fund. Indeed, the so-called "permissive contribution" mechanism found in Section 254(d)[6] states that such permissive authority should be used only where the public interest so requires.[7]

Bonfire submits that retaining the current implicit exemption for "free services" is in the public interest and furthers the policy goals of universal service. The current exemption should be retained because it facilitates the delivery of no cost telecommunications to consumers, including low-income consumers, and those individuals in rural, insular, and high cost areas. The assessment of USF on a free service that utilizes numbers would likely end the viability of free services in the market. A telecommunications provider who uses telephone numbers, but does not collect revenue from consumers will nonetheless pay USF for those numbers. The resulting loss of the free service will remove a product from the market, thus depriving consumers of a possible telecommunications option. Assessing USF on a free service's use of numbers provides no corresponding benefit to the Fund. If these services are no longer commercially viable, there will be no use of numbers, and as such, there will be no USF contribution on the service. It is thus appropriate and consistent with the statutory charge of promoting the preservation and advancement of Universal Service and the public interest, for innovative telecommunications services such as Bonfire's free offerings to be exempted from contribution.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, one electronic copy of this *ex parte* letter has been filed in the above-referenced proceeding.

Respectfully submitted,

William B. Wilhelm, Jr.

Counsel for Bonfire Holdings, Inc.

cc: Dana Brown-Shaffer, WCB
Best Copy and Printing, Inc.
ECFS

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6 See Section I above for the statutory language.

7 Note that Bonfire does not ask for all telecommunications to be exempt from contribution, only free telecommunications. Services that are telecommunications offered for a fee would continue to contribute to the Fund regardless of the methodology. Similarly, Bonfire does not seek an exemption when it provides other services for a fee since those services will become subject to mandatory contribution.