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October 7, 2008

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**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th St. SW  
Washington, DC 20554

**Re: Ex Parte Written Presentation in: *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 01-092**

Dear Ms. Dortch:

By the attached ex parte written presentation ("Supplemental Reply Comments of Telscape Communications, Inc. and Blue Casa Communications, Inc. on Intercarrier Compensation for ISP-Bound Traffic"), Telscape Communications, Inc. and Blue Casa Communications, Inc. reiterate the need for retrospective and prospective clarification of Commission policies and rules relating to intercarrier compensation for local *and interexchange* ISP-bound traffic exchanged between CLECs.

Very truly yours,



John L. Clark

Attachment

cc w/att: (via email) WCB staff (Dana Shaffer, Don Stockdale, Randy Clarke, Marcus Maher, Victoria Goldberg); Commission legal advisors (Scott Deutchman, Amy Bender, Nick Alexander, Scott Bergmann, Greg Orlando)

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

**SUPPLEMENTAL COMMENTS OF  
TELSCAPE COMMUNICATIONS, INC. AND  
BLUE CASA COMMUNICATIONS, INC. ON  
INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC**

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**SUPPLEMENTAL COMMENTS OF  
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BLUE CASA COMMUNICATIONS, INC. ON  
INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC**

Telscape Communications, Inc. (“Telscape”) and Blue Casa Communications, Inc. (“Blue Casa”), by their undersigned counsel, submit these supplemental comments to underscore the need for the Commission, in responding to the remand order of the U.S. Court of Appeals for the District of Columbia in this combined docket (*Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92), to clarify, retrospectively as well as prospectively, the intercarrier compensation rules or policies that govern the exchange of ISP-bound traffic exchanged between CLECs.

The conversation that has taken place to date on the subject of intercarrier compensation for ISP-bound traffic has focused largely, if not entirely, on arrangements between CLECs, on the one hand, and ILECs, on the other. However, as Telscape and Blue Casa

explained in their August 28, 2008, comments,<sup>1</sup> CLECs, such as Telscape and Blue Casa, who specialize in providing traditional local exchange services to residential customers have been, and continue to be, hard hit by charges for “reciprocal compensation” from other so-called CLECs that are in the business of aggregating and terminating ISP-bound traffic. In Telscape’s and Blue Casa’s experience, the tariffed rates charged for terminating such traffic have been higher than those that apply to traffic originated by ILEC end users and, during the past year, have been nearly *five times* higher than the rates charged to ILECs. On top of the call termination charges, originating CLECs must pay for transport and transit to deliver ISP-bound traffic to the points of indirect interconnection where the traffic is handed off to the terminating carrier.

Telscape, Blue Casa, and a host of other CLECs in proceedings before the California Public Utilities Commission (“CPUC”) have challenged the use of unilaterally-imposed, unreviewed state tariffs to establish rates, terms, and conditions for compensation to be paid for the termination of such traffic, but their challenges have fallen on deaf ears. These cases have been, or will soon be, the subject of appeals to federal courts. However, the federal courts, to a substantial extent, can only guess what the applicable law and federal policy is. Recently, the Federal District Court for the Northern District of California guessed that the Commission’s *ISP Remand Order*<sup>2</sup> does not apply to traffic exchanged between CLECs and that the Commission implicitly has approved the use of state tariffs to impose reciprocal compensation

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<sup>1</sup> Ex Parte Reply Comments of Telscape Communications, Inc. and Blue Casa Communications, Inc., August 28, 2008.

<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 1951 (2001) (“*ISP Remand Order*”).

obligations for ISP-bound traffic exchanged between CLECs.<sup>3</sup> These conclusions by the court may or may not be correct; but, at this point, there is no definitive answer on this subject. The Commission should take the opportunity in the instant combined dockets to put this issue to rest, retrospectively as well as prospectively.

Further, even more importantly, the Commission should confirm that the passage of the Telecommunications Act of 1996 and the issuance of the *ISP Remand Order* did not eliminate or revise the Commission's long-standing policy authorizing the assessment of originating access charges on ISPs, or the interexchange carriers that serve them, when ISP-bound traffic is transmitted over foreign exchange facilities.

As Telscape and Blue Casa explained in their August 28, 2008, comments, "CLECs" that terminate calls to ISPs typically do so over foreign exchange facilities, which, in the case of jurisdictionally-interstate traffic, the Commission has held, since 1984, subjects those "CLECs" (actually, interexchange carriers or "IXCs" in this context) to originating access charges.<sup>4</sup> The ISP-exemption from access charges does not apply because that exemption is effectuated by allowing ISPs to gain access to the local exchange via ordinary business lines. However, if an ISP elects to gain access to a local exchange through switched access arrangements, or foreign exchange arrangements, or other interexchange facilities, access charges do apply. *Id.*

Thus, irrespective of how the Commission otherwise classifies ISP-bound traffic, ISP-bound traffic that is transported over foreign exchange arrangements is excluded from the

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<sup>3</sup> *AT&T Communications v. Pac-West Telecomm, Inc.*, C 06-07271 JSW, Order on Cross-Motions for Summary Judgment [nonpub. opn.], (N.D. Cal. Aug. 12, 2008)

<sup>4</sup> See, *In the Matter of MTS and WATS Market Structure*, 97 FCC 2d 834, ¶¶ 97-101 (1984).

reciprocal compensation regime established by 47 U.S.C. § 251(b)(5) as a matter of law by operation of the carve-out provisions of 47 U.S.C. § 251(g).

Notwithstanding this well-established policy, the CPUC denies that the Commission's access rules and policies apply to such traffic and, instead, has declared that the CPUC is entitled to usurp the Commission's Section 201 ratemaking authority over such traffic by authorizing interexchange carriers who terminate ISP-bound traffic completed over foreign exchange arrangements to establish, in their unreviewed state tariffs, whatever rates they feel are warranted for terminating such traffic and then, relying on the filed rate doctrine, to bill and collect those rates from originating CLECs.

This description of the appalling state of affairs in California is not an exaggeration. It is how, in the absence of a clear, definitive statement from the Commission on the nature and scope of its jurisdiction over ISP-bound traffic, the CPUC apparently assumes it is compelled to act in furtherance of its obligations under state and federal law.

For this reason, if, as Telscape and Blue Casa fervently believe, the manner in which the CPUC is resolving on-going disputes between CLECs and CLEC/IXCs over payment of intercarrier compensation for ISP-bound traffic conflicts with the Commission's exclusive ratemaking authority over jurisdictionally-interstate traffic or otherwise conflicts with policy or law, we urge the Commission to take the opportunity to say so in its response to the remand order of the U.S. Court of Appeals for the District of Columbia in this combined docket. This is, for Telscape and Blue Casa at least, a matter of significant urgency.

Dated: October 7, 2008

Respectfully submitted,



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