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October 14, 2008

Via ECFS
Chairman Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **CC Docket Nos. 99-68 and 01-92**
Intercarrier Compensation Reform and ISP Rate Issues

Dear Chairman Martin:

As you know, Sage has previously shared with you and your fellow Commissioners the importance of responding to the direction of the United States Court of Appeals for the District of Columbia Circuit to explain the Commission's rationale for its prescribed rate for traffic bound for Internet service providers ("ISPs") by November 5, 2008.[1]

As the November 5 deadline rapidly approaches, I write to emphasize once again the need to ensure that the Commission adequately explains to the court its authority to have established its pricing regime for ISP-bound traffic in 1999. Sage commends the Commission for its recognition of the need for thorough reform of the intercarrier compensation regime. As other carriers recently have pointed out,[2] however, the Commission must not, in its laudable effort to prospectively reform the entire intercarrier compensation regime, lose sight of the need to explain to the court its authority to adopt the ISP-bound traffic rules on both a retroactive and prospective basis.

As Sage described in its recent ex parte meetings, the Commission has had ample authority to adopt the ISP-bound pricing regime.[3] ISP-bound traffic is unquestionably interstate traffic subject to the Commission's jurisdiction. This conclusion does not undermine the Commission's authority to undertake comprehensive reform, and the Commission certainly is at liberty to adopt a legally sustainable rationale to support the ISP rate rule between 1999 and the

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[1] *See* ex parte from L. Charles Keller, counsel to Sage, CC Docket Nos. 99-68 and 01-92 (filed Aug. 15, 2008); ex parte letters from L. Charles Keller, counsel to Sage, CC Docket Nos. 99-69 and 01-92 (filed May 9, 2008).

[2] *See, e.g.,* ex parte letter from Gary L. Phillips, AT&T, CC Docket Nos. 99-68 and 01-92 (filed may 9, 2008); Supplemental Comments of Verizon and Verizon Wireless on Intercarrier Payments for ISP-Bound Traffic and the *WorldCom* Remand, CC Docket Nos. 99-68, 96-98, and 01-92 (filed Oct. 2, 2008); ex parte letter from Andrew D. Crain, Qwest, CC Docket Nos. 96-98, 99-68, and 01-92 (filed Sept. 24, 2008).

[3] *See supra* note 1.

present, and a different (but also legally sustainable) rationale for its comprehensive reform framework. More important than any specific legal theory, however, is the imperative to ensure that the Commission's action by November 4 includes a specific response to the D.C. Circuit's remand to prevent burdensome and wasteful litigation about the retroactive application of the ISP-bound rate rules. Such litigation inevitably would result from a decision that leaves any question about the basis for the ISP-bound rate rules during the period from 1999 to the present.

In short, the Commission's order must be both appeal-proof and retroactivity-proof. Sage will support the Commission in its efforts to set out and defend any rationale that serves both of these important public policy considerations.

Sincerely,

Robert W. McCausland
Vice President

cc (by email): Hon. Michael Copps
Hon. Jonathan Adelstein
Hon. Deborah Taylor Tate
Hon. Robert McDowell
Dana Shaffer
Donald Stockdale