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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

October 29, 2008

RE: Notice of *Ex Parte* Presentation in: WC Docket 05-337; CC Docket 96-45; CC Docket 01-92; WC Docket 06-122; WC 04-36

Dear Ms. Dortch,

This letter is to advise you, in accordance with Section 1.1206(b) of the Commission's rules, that on Tuesday, **October 28, 2008**, Ben Scott and Derek Turner of Free Press met with Chairman Kevin Martin and Dan Gonzalez.

We discussed the status of the aforementioned proceedings regarding reforms to the Universal Service Fund (USF) programs and the system of intercarrier compensation (ICC). We discussed the broad scope of the policies needed to ensure that changes to these regulatory structures are fair, reasonable, and consumer friendly. During this meeting, we again discussed the details of the written *ex parte* letter that we filed with the Commission on October 24th.

We specifically discussed our concerns about a classification of VoIP-to-PSTN traffic as an information service. We expressed our fear that such a move would have many unintended consequences, including creating substantial uncertainty as to the interconnection rights of providers of such traffic. On this point, we are in alignment with filings by CLECs as well as the cable industry.¹ If the Commission determines that its policy should be to move toward an information service classification, we reiterate our belief that this decision should be put into an FNPRM.

Further consideration of this subject suggests an alternative course for the Commission—which we described in this meeting. We reiterated our belief in the basic principle that like-traffic should be treated alike. We stressed that the calling-party-pays principle means that all carriers who physically terminate traffic onto a local exchange network should pay their fair share of the costs of that service, regardless of the nature of the origination protocol. In short, our belief is that the market functions at its best when carriers that have interconnection rights and are subject to a coherent access charge régime. That is to say, carriers that avail themselves of the benefits of nondiscriminatory interconnection rights should also be subject to the obligations of paying

¹ See e.g. Letter from Mary C. Albert, Assistant General Counsel, COMPTTEL, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, 04-36, CC Docket No. 01-92 (filed Oct. 2, 2008); see also e.g. Letter from Kyle McSlarrow, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, 04-36, CC Docket No. 01-92 (filed Oct. 28, 2008); see also e.g. Letter from Brad E. Mutschelknaus (on behalf of XO Communications), to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, 04-36, CC Docket No. 01-92 (filed Oct. 3, 2008).

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access charges. This is the most consistent position the Commission could adopt, a decision that also has the virtue of codifying the typical, status-quo practice in the marketplace today.

Therefore, we suggested that the Commission should not make any determinations or classifications on the question of making VoIP an information service versus telecommunications service. We suggested that the companies who are purchasers of access services from third-party telecommunications carriers are irrelevant to the matter at hand, as they do not participate in call termination. They are simply aggregators of IP traffic that pay for IP transport—a practice that is not implicated in this Order. We asked that the Commission simply clarify the matter by creating a new rule stating that the carriers who terminate VoIP-originated traffic on a local exchange network are subject to the interconnection and access provisions in Title II of the Act. Such a rule is consistent with Commission policy regarding VoIP and its treatment for purposes of law enforcement, customers with disabilities, and public safety. This declaration would also put VoIP-to-PSTN traffic on the same “phase-down” access rate path that the Commission is currently considering for all other PSTN terminating traffic. This move would also preclude any claims to retroactive payments, since this would be a new rule. We are sensitive to concerns that putting VoIP-to-PSTN traffic into the access regime blurs the data/voice distinction (although this traffic has been converted to TDM prior to termination), but we see no other consistent policy around this problem which does not create more arbitrage than it resolves.

If the Commission takes this action, it will then be necessary to determine the access rate that VoIP-to-PSTN traffic should pay. It is our understanding that the CLECs that handle the vast majority of this type of traffic at the point of interconnection with a terminating carrier pay a wide variety of rates. In many cases, the traffic is blended and the rates are negotiated. In other cases, the traffic is booked at reciprocal compensation rates. In still other cases it is booked at levels ranging from zero up to interstate rates or even intrastate rates. Our view is that the Commission should include rate setting for this type of traffic in its phase down. The states would ultimately set the rate at an appropriate level. In some cases, that may result in a temporary increase in access rates prior to the glide path reducing all rates beneath interstate levels. In other cases, that may result in a reduction in access rates. In any event, the purpose of this policy decision would be to normalize and rationalize the access regime for VoIP-to-PSTN traffic as the industry heads toward a cost-based rate structure. In this context, it may be wise to consider some flexibility as to the length of the time-table for the first phase of ICC rate reduction.

We urged the Commission to consider adopting this solution -- a solution which addresses, in a fair and efficient manner, the arbitrage created by the current uncertainty over the regulatory status of VoIP-to-PSTN traffic. This solution brings parity to the access régime obligations and interconnection rights; ensures everyone is paying their fair share for use of the PSTN; and protects carriers and their customers from retroactive compensation claims.

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Sincerely,

A handwritten signature in black ink, appearing to read "B. Scott", with a long horizontal line extending to the right from the end of the signature.

Ben Scott, Policy Director
Free Press, Washington Office
bscott@freepress.net