

Arent Fox

October 16, 2009

VIA ECFS

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

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Re: Ex Parte Presentation: WC Docket Nos. 07-135 and 07-52

Dear Ms. Dortch:

On October 15, 2009, David Erickson and Jeff Holoubek of Free Conferencing Corporation (“Free Conferencing”) and I met with Christine Kurth, Legal Advisor to Commissioner McDowell, Christi Shewman, Legal Advisor to Commissioner Attwell Baker, and Marcus Maher, John Hunter, and Jennifer Prime of the Wireline Competition Bureau to discuss Free Conferencing’s business model and the clients it serves, describe the interexchange carriers’ (“IXCs”) ongoing campaign of unlawful self-help, and rebut the scurrilous accusations made by the IXCs to divert attention away from their illegal refusal to pay their bills. Today Messrs. Erickson and Holoubek and I met with Commissioner Copps, his Legal Advisor Jennifer Schneider, and Carol Simpson, Legal Advisor to Commissioner Clyburn, to discuss the same.

Free Conferencing explained that its product offering allows each participant of a conference call to pay its own way to the conference call by paying an IXC for the ability to place long distance calls and then using the service it paid for to dial a long distance number. Free Conferencing’s service contrasts with the “host pays” 8XX conference call business model, in which the individual or organization hosting the conference call pays the long-distance charges of the call’s participants. This latter model often prices-out certain segments of the conference calling market, *i.e.*, individuals or organizations that would like to host a conference call, but do not have the resources to pay for every participants’ long-distance charges. Free Conferencing detailed the entities that primarily rely on its services, such as nonprofit organizations, entrepreneurs, government agencies, and political campaigns.

In particular, Free Conferencing noted that Obama for America utilized millions of minutes of Free Conferencing’s conferencing service during the President’s campaign to connect with and mobilize Obama’s supporters. Other clients include the Salvation Army, which saves as much as \$10,000 a month utilizing Free Conferencing’s service, and the Kidney Cancer Association, which is able to retain thousands of dollars in savings to contribute to its core mission — fighting cancer, rather than inflating large IXCs’ already hefty profits. These

Arent Fox

organizations are just a few examples out of many that rely on Free Conferencing's product and are ones which — if the IXC's have their way — would have their ability to communicate with supporters curtailed or denied entirely. Thus, despite AT&T's and Google's recent efforts to turn this docket into a referendum on adult chat-lines — which Free Conferencing has never provided; Free Conferencing has always provided a valuable service to individuals and organizations that are underserved and cannot afford the IXC's expensive conference calling alternatives.

This discussion led to Free Conferencing's next point: the IXC's do not deny that *their* subscribers dial the telephone number, avail themselves of Free Conferencing's services, and — this is something the IXC's always fail to mention — the IXC's collect subscription fees from their subscribers for these calls. The IXC's continually claim, however, that they always lose money when their subscribers utilize Free Conferencing's services. Free Conferencing presented evidence that this argument is nonsense. AT&T, for example, charged a woman 30 cents per minute to call a prayer line hosted by Free Conferencing, resulting in this particular subscriber being charged hundreds of dollars in long-distance charges.¹ Clearly, AT&T is making money hand-over-fist when it charges its customers in multiples of even the highest NECA access rate.

Free Conferencing further explained that when the IXC's offer its subscribers long-distance service pursuant to unlimited plans, the results become even more perverse. In this payment model, the IXC's actually become "anti-carriers" — *i.e.*, the IXC's have every incentive to sign up customers for their most expensive "unlimited" plan and then discourage its customers from using the service they purchased. But the unintended consequence of the IXC's current pricing plan is to actually attract the customers who want to talk the most.

The unlimited nature of the plans just further desensitize these customers from the actual costs associated with their calls. Indeed, it is immaterial to the unlimited long distance plan subscriber whether he is calling a number associated with Los Angeles or Fargo, and by definition, he is not sensitive to the duration of the call. If the IXC's operated under a cost-based pricing model, the scarcity of the subscriber's own resources would eventually lead him to find an equilibrium point where his utility of placing another call would be tempered by the marginal cost to him. But as it stands now under the IXC's unlimited long-distance calling plans, there are no constraints facing the caller. Thus, it is the IXC's that have created their own bogeyman — their own customers — and not the other way around.

¹ To protect the privacy of the individuals served by IXC's and charged per minute rates well in excess of any access fees charged by the terminating LEC, their names and numbers are not disclosed in this document. To the extent the Commission would like such information, Free Conferencing would be please to provide it to the Commission, subject to a request for confidential treatment.

Arent Fox

Free Conferencing also explained the fallacy in the IXCs' argument that they are losing money on calls to rural areas, and that they cannot recover their costs, because of section 254(g). This argument misses the fact that the Commission already considered and addressed the 254(g) concerns raised by the IXCs when it established the CLEC benchmarking and rural exemptions when it undertook CLEC access charge reform. Specifically, when Congress enacted 254(g), it was doing nothing more than formally adopting the Commission's then existing rate averaging policy -- it was not intending to create any new obligations. As the Commission made clear when it was implementing 254(g), its long-standing policy recognized that different rate structures could satisfy the requirements of 254(g) and that these rates structures could appropriately take into consideration reasonable differences in duration, time of day, and mileage bands while still satisfying the geographically averaged rates requirement. The Commission has also held that IXCs are permitted to offer certain discounts and incentives to customers in some areas without offering those discounts or incentives to other parts of their service areas. As a result, because IXCs can create different rate structures with different mileage bands and otherwise offer incentives to customers in urban areas, IXCs can effectively recover any alleged additional costs associated with calls to high cost areas.

More importantly, perhaps, this entire line of argument simply misses the fact that the Commission already considered the impact of 254(g) when it established the CLEC benchmarks and rural exemption for originating and terminating access charges. In the *Seventh Report and Order*, the Commission stated that because 254(g) requires IXCs to average their rates and spread the cost of both originating and terminating access charges over all their end users, that implementing a safe harbor benchmarking rule for CLECs (with the rural exemption) was appropriate to ensure that CLECs and IXCs knew when *conclusively* reasonable and just rates could be tariffed. The Commission therefore concluded that IXCs were legally obligated to pay the tariffed the benchmarked rates set by the FCC and that IXCs were required to discontinue their unlawful self-help practices (i.e., withholding payment, call blocking, call choking, etc. — in other words, the very same practices the IXCs are still unlawfully using today to try to avoid competition in the conference call market).

With regard to rural exchanges, the Commission also set a benchmark for these exchanges (the rates found in the NECA tariff). Here again, the Commission concluded that these NECA rates were conclusively just and reasonable for rural areas and that there can be no lawful basis for the IXCs to refuse to pay these rates. Indeed, they found that *rate averaging actually worked to the advantage of the IXCs* and that higher rural access rates for rural CLECs "merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas."

Arent Fox

The Commission also considered the IXCs' argument that this rural exception might cause a proliferation of chat line providers in these rural areas. The Commission was appropriately skeptical of this argument then (as we all should be now) because of the insignificant amount of total traffic that is directed to and terminated with chat line and conference call providers in rural areas. **Indeed, the average Free Conferencing user uses only 21 minutes of Free Conferencing's service per month.** Thus, despite all of its accusations, AT&T continues to make record profits and climb the Fortune 500 ladder, recently rising to number 8 on the Fortune 500 list. This is perhaps why the IXCs refuse to substantiate their claims in access charge dispute cases occurring across the country that they are losing money when their customers who have unlimited long-distance plans use Free Conferencing's product. The IXCs routinely seek to suppress discovery regarding their alleged losses or cost increases — most recently before the Iowa Utilities Board — yet IXCs like AT&T are reporting billions of dollars in free cash flow to the SEC, belying the IXCs' claims that conference calls are destroying the profit margins of their highly priced unlimited long distance plans. Thus, the IXCs are either misrepresenting facts to the FCC or to Congress, the courts and the SEC. They cannot have it both ways.

In sum, Free Conferencing urged the Commission to enforce their existing rules regarding payment of access charges. If an IXC chooses to offer unlimited long distance plans as a marketing strategy to capture a greater market share, that is certainly its prerogative. But such a business model entirely divorces usage from the cost of service. Ultimately what this docket boils down to is the IXCs attempting to avoid the consequences of their own actions and shift the risks they created onto other carriers and their own customers, forcing the latter to accept poor quality service or no service at all when the IXCs deem fit.

The attached PowerPoint further summarizes Free Conferencing's presentation to the Commission.

Respectfully submitted,



Ross A. Buntrock,
Counsel to Free Conferencing Corporation

cc: Commissioner Michael J. Copps
Christine Kurth, Legal Advisor to Commissioner McDowell
Carol Simpson, Legal Advisor to Commissioner Clyburn
Jennifer Schneider, Legal Advisor to Commissioner Copps
Christi Shewman, Acting Legal Advisor to Commissioner Baker

Marlene Dortch,
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October 16, 2009
Page 5

Arent Fox

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John Hunter, WCB
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