

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT
1229 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN L. WIENER
DEVENDRA ("DAVE") KUMAR
LAURA A. STEFANI

(202) 429-4900
TELECOPIER:
(202) 429-4912
general@g2w2.com

—
HENRIETTA WRIGHT
THOMAS G. GHERARDI, P.C.
COUNSEL

—
THOMAS S. TYCZ*
SENIOR POLICY ADVISOR
*NOT AN ATTORNEY

October 6, 2011

ELECTRONIC FILING

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

**Re: *Ex Parte*, WC Docket Nos. 10-90, 07-135; GN Docket No. 09-51;
CC Docket No. 01-92**

Dear Ms. Dortch:

This is to inform you that on October 5, 2011, David Erickson, Founder and CEO, and Hector De La Torre, Vice President, Regulatory Affairs and Communications, both of Free Conferencing Corporation, Jonathan Mantz of BGR Government Affairs LLC, and the undersigned met with Josh Gottheimer, Senior Counselor to Chairman Genachowski.

We discussed the intercarrier compensation issue in the above-captioned proceeding and summarized the points covered in the presentation previously filed in the record of this proceeding in an *ex parte* letter filed on September 16, 2011. Mr. Erickson made clear that Free Conferencing supports reform of intercarrier compensation, in particular the reasoned reform set out in the State Members' proposal with cost-based access rates and no Subscriber Line Charge increases for consumers.

Marlene H. Dortch
October 6, 2011
Page 2

In addition, the Free Conferencing representatives gave Mr. Gottheimer the attached materials and followed up with the attached two e-mails providing him with information on the declining cost of worldwide conference calling and consumer savings from free toll conferencing.

Please do not hesitate to contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive style with a large, prominent "H" and "G".

Henry Goldberg
Counsel for Free Conferencing Corporation

cc: Josh Gottheimer

Attachment

Attachment A

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

Core Communications, Inc.
v.
Verizon Pennsylvania Inc. and
Verizon North, LLC

Public Meeting September 12, 2011
2253650-OSA
Docket Nos. P-2011-2253650
C-2011-2253750
C-2011-2253787

JOINT MOTION OF
VICE CHAIRMAN JOHN F. COLEMAN, JR. AND
COMMISSIONER JAMES H. CAWLEY

Before the Commission for disposition is a Material Question raised by the August 3, 2011 Order of the presiding Administrative Law Judge denying Core Communications, Inc.'s ("Core") Petition for Interim Emergency Order ("Petition"). The Petition was filed simultaneously with a Formal Complaint against Verizon Pennsylvania Inc. (Verizon PA) and Verizon North LLC (Verizon North - collectively "Verizon" or "Verizon Cos."). In the Complaint, Core alleges that Verizon ceased payment for intercarrier compensation invoices, beginning in May 2011, which were issued in accordance with existing and operative interconnection agreements ("ICAs") between Core and the Verizon Cos. In response, Verizon alleges, among other things, that the traffic at issue is "not in fact compensable to Core." The Petition seeks an order from the Commission directing Verizon to resume immediate payment of the relevant invoices, pending the resolution of the underlying Complaint.

This case is another in the line of intercarrier compensation disputes between certificated Pennsylvania carriers. With the emergency piece of this case, our task, essentially, is to determine whether the Verizon Cos. should be paying Core the monthly disputed amounts (approximately \$75,000 between both Verizon Cos.) during the pendency of the underlying Complaint proceeding at Docket Nos. C-2011-2253750 and C-2011-2253787. The following is the Material Question raised by Core's emergency relief request:

Whether Core has carried its burden to prove that: (1) its right to relief in this matter is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest.

The above Material Question incorporates the 4-part standard established in our regulations¹ and related Commission precedent that Petitioner Core must meet to obtain interim emergency relief. For the reasons set forth below, we believe that Core has met its burden of proof under applicable law for interim emergency relief. Therefore, the Material Question is answered in the Affirmative.

¹ See 52 Pa. Code § 3.6.

In determining whether Petitioner's right to relief is clear, we first note what the legal standard for this inquiry is not; it is not determining the merits of the underlying controversy. Rather, the legal standard is whether Core has raised "substantial legal questions." T.W. Phillips Gas and Oil v. Peoples Natural Gas, 492 A.2d 776 (Pa. Cmwlth. 1985).

In this case, Core has raised substantial legal questions regarding Verizon's decision to engage in a "self-help" remedy and unilaterally cease all payment to Core for intercarrier compensation, beginning with the May 2011 invoices. These substantial legal questions include (1) Verizon's refusal to pay the relevant invoices, in light of the ICAs and applicable law; (2) Verizon's refusal to pay the relevant invoices without a sufficient explanation as to how and why the traffic at issue is non-compensable (Tr. at 85-86, 141-142); and (3) Verizon's failure to invoke the billing dispute provisions of the ICAs with respect to its "non-payment" letter issued to Core.²

Core's need for relief is also immediate. As the record shows, Verizon already has ceased payment of intercarrier compensation to Core, beginning with the May 2011 invoices. And, as the record also shows, Verizon's failure to pay has an adverse financial impact on Core. See Core Ex. 1, paras. 31-34; Tr. 42, 99, 147. This adverse financial impact, in turn, threatens Core's ability to provide reasonably continuous service. The financial impact of Verizon's non-payment will compel Core to shut down at least portions of its Pennsylvania network/operations, which will lead to termination of service to at least some Internet Service Providers ("ISP"). See Core Ex. 1, para. 30.

Core has also made a showing of irreparable harm here. A violation of law is, *per se*, irreparable harm. As noted by the Pennsylvania Supreme Court, when certain conduct is declared to be unlawful, it is tantamount in law to calling it injurious to the public, and for one to continue such unlawful conduct constitutes irreparable injury. Pa. Pub. Util. Comm'n v. Israel, 356 Pa. 400, 52 A.2d 347 (1947). Here, Verizon has instituted what amounts to a "self-help" remedy by unilaterally deciding to withhold payment to Core for the traffic at issue without providing a factual or legal basis for such unilateral action.³ Verizon's conduct appears to violate the spirit, if not the letter, of the Commission-approved ICAs between the parties,⁴ which would, in turn, violate the Telecommunications Act of 1996 ("TA-96").⁵

² The "non-payment" letter is the letter sent by Verizon to Core dated July 5, 2011 informing that Verizon was disputing and withholding payment for the entire amount of Core's May 31, 2011 invoice. Core Ex. 1, TAB B.

³ The testimony in this case establishes that Verizon paid Core's invoices, with few exceptions, on a regular, monthly basis since 2004. Tr. 17-22.

⁴ See, e.g., the provisions of the ICA between Verizon PA and Core regarding payment (Part A, § 4.1), compliance with laws (Part A, § 6.1), dispute resolution (Part A, § 24), good faith performance (Part A, § 42), compensation for local traffic transport and termination (Att. IV, § 2.4.2), and billing disputes (Att. VIII, § 3.1.9) and the provisions of the ICA between Verizon North and Core regarding payment, including good faith performance (§ 5.0), Payment Terms, Disputed Amounts and Audits (§ 11.0), and Reciprocal Compensation Arrangements (§ 2.7).

⁵ Sections 251 and 252 of TA-96, 47 U.S.C. §§ 251 and 252, impose a duty on Verizon PA to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Under the ICAs, which have the full force and effect of law, Verizon is bound by those arrangements.

Moreover, although monetary losses are rarely sufficient to establish irreparable harm, the loss of business in a competitive environment is a form of irrevocable damage that the Commission has found constitutes irreparable harm. And, while the degree of financial harm is important, the Commission also looks to whether the harm cannot be reversed if the request for emergency relief is not granted. Buffalo-Lake-Erie Wireless Systems Co. Petition for Emergency Order, Docket No. P-2009-2150008 (Order entered 1/14/10) (“BLEW”). Here, the injury to Core is irreparable, as Core will lose customers and may not be able to recover such losses. The inability to recover such losses is especially real when they occur within a competitive environment that includes carriers such as the Verizon Cos. and their affiliates who provide Internet service.

In analyzing irreparable harm, our focus, traditionally, is on harm to the Petitioner. Nevertheless, in this particular case, we also recognize the irreparable harm that will occur to Core’s ISP customers and the end-user customers of those ISPs if Core is compelled to shut down portions of its network. See Core Ex. 1, paras. 30, 39. My concern with such a shutdown is that many consumers may be left without any meaningful opportunity to choose ISPs and in some instances, may not have any options.

Neither is the relief requested injurious to the public at large. Rather, the granted relief is in the public interest and consistent with our past practice that disfavors carriers from engaging in “self-help” to unilaterally resolve intercarrier compensation disputes. In fact, the Commission has repeatedly rejected carrier attempts to engage in “self-help” to address intercarrier compensation disputes. See, e.g., Palmerton Telephone Co. v. Global NAPs Pennsylvania, Inc., et al., C-2009-2093336 (order entered May 5, 2009) (“without an affirmative authorization from this Commission or the FCC to terminate service to Global NAPs, Palmerton must continue to terminate the traffic and is constrained from engaging in a “self-help” remedy.”); Level 3 Communications v. Marianna & Scenery Hill Telephone Co., C-2002811 (Order entered August 8, 2002) (“when M&SH implemented its self-help remedy, it threatened the reasonably continuous service to customers thereby requiring this Commission to take this dramatic action” and grant emergency relief.”).

We note that Core does not necessarily have clean hands here either. Core failed to respond to repeated requests from Verizon to provide Call Detail Records (“CDRs”) relevant to the billings implicated here.⁶ Core’s explanation for failing to provide the information is that Verizon already had the information from its own records.⁷ To the extent that it has not done so already, we direct Core to provide the CDRs that Verizon previously requested. Nevertheless, we do not believe that Core’s failure to provide the information rises to the level that it should invalidate its request for emergency relief.

⁶ Tr. at 58-61; Verizon Cross Ex. 3.

⁷ Tr. at 60-61, 62.

Finally, it appears that the parties in this case have yet to engage in any meaningful settlement discussions in this matter. Of note, Core alleges that Verizon has not followed the dispute resolution procedures in the ICAs, and Verizon has made the same allegation against Core. Therefore, in an attempt to amicably resolve the underlying Core Complaint, we direct the parties to participate in mediation before the Commission's mediation unit for a period not to exceed 45 days. During the mediation, Core's Complaint is hereby stayed. If the underlying Complaint cannot be resolved through mediation, we further direct that the stay be lifted, and the Complaint be fully adjudicated by the Commission's Office of Administrative Law Judge. With the adjudication, the Complaint is to be considered on an expedited basis, with the parties and Presiding Officer to determine the specific schedule. Nevertheless, any schedule should allow sufficient time for the parties to submit **pre-filed** testimony for all rounds of testimony (direct, rebuttal, and surrebuttal).

THEREFORE, we move that:

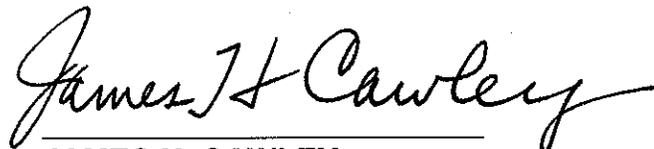
1. The Material Question certified to this Commission based on the August 3, 2011 Order of the Presiding Officer is hereby answered in the AFFIRMATIVE.
2. With the May and June 2011 invoices issued by Core to Verizon referenced in this proceeding, Verizon is directed to pay such invoices in the same ratio by which Verizon was previously paying Core within 5 days of the entry of the Order, noting that any payments are subject to refund should Verizon prevail in the underlying Complaint proceeding.
3. Beginning with the July 2011 invoice and continuing through the completion of this proceeding, Verizon is directed to make timely monthly payments to Core in accordance with the invoices provided by Core and in the same ratio by which Verizon was previously paying Core, noting that any payments are subject to refund should Verizon prevail in the underlying Complaint proceeding.
4. Within 10 days of the entry of the Order, Core shall provide the Call Detail Records to Verizon that were previously requested.
5. Within 5 days of the entry of the Order, the underlying matter shall be referred to the Commission's mediation unit for possible resolution for a period no longer than 45 days.
6. During the pendency of the mediation, Core's underlying Formal Complaint, at Docket Nos. C-2011-2253750 and C-2011-2253787, is stayed.
7. In the event that Core's underlying Formal Complaint is not resolved through mediation, the stay of the Complaint shall be lifted and the matter shall be adjudicated by the Office of Administrative Law Judge.
8. The presiding Officer shall schedule the underlying matter for expedited consideration.

9. The Office of Special Assistants prepare an Order, consistent with this Joint Motion.

DATE: September 12, 2011



JOHN F. COLEMAN, JR.
VICE CHAIRMAN



JAMES H. CAWLEY
COMMISSIONER

Attachment B

What Are They Saying? Intercarrier Compensation and US Telecom's ABC Plan

American Association Retired Persons (AARP), National Consumer Law Center, Consumer Federation of America, Consumer's Union, et. al.:

(T)he proposal will increase the burden on consumers, especially at a time when they can least afford the extra costs. The ABC Plan advocates for national increases in the Subscriber Line Charge (SLC). The increases in the SLC are meant to offset reductions in revenue gained from Intercarrier Compensation (ICC) payments. However, neither the ABC Plan nor the Further Inquiry demonstrates that this revenue recovery, via the SLC, is justified. It is apparent, based on other proposals in the record, that reform is possible without increasing the burdens on consumers, especially in an already difficult economy. We urge the Commission to reform USF and ICC in a manner that will not increase the SLC. If a company can prove cost recovery is justified, we urge the Commission look at a more narrow approach to raise revenue rather than allowing companies to raise the SLC on a nation-wide basis.

(T)he proposal does not allow for consumer protections or accountability. The ABC Plan proposes that all Eligible Telecommunications Carrier requirements, Carrier of Last Resort obligations, and regulation of price cap carriers be eliminated, leaving consumers with no rights or protections when it comes to broadband service. Moreover, the ABC Plan does not provide for any mechanisms to ensure that USF funds would be used to provide affordable and high quality service. We urge the Commission to reform USF in a manner that will ensure that these public funds are in fact being used to provide affordable universal service.(ex parte to FCC, 10-4-11)

Rural Broadband Association (representing over 60 rural carriers):

The stability of these companies will be threatened if the FCC provides a windfall to long distance companies in the form of (sic) reduced access charges without ensuring that these rural carriers are provided with revenue cost recovery to offset the losses resulting from reduced rates.(Comments to FCC, 8-22-11)

State Members of the Joint Universal Service Board:

An increase in the SLC to offset losses in traffic-sensitive access revenue contradicts the basic principle of FCC subsidy policy because it requires a non-traffic sensitive rate element to pay for a traffic sensitive cost – effectively creating a subsidy. Moreover, the USTA plan to increase the SLC squeezes consumers between ballooning revenue replacement demands caused by artificially low access charges and a narrow contribution base of legacy phone customers.(ex parte to FCC, 7-14-11)

Comptel (representing over 100 competitive communications providers):

Contrary to the claim in the White Paper, setting a cap – particularly a cap *below* the cost-based rates defined by the Commission's own rules - is not the same as establishing a methodology...State commissions that have conducted cost proceedings have argued that the terminating rate of \$0.0007, proposed by the ABC Plan, has no basis in cost and is in fact not a cost-based rate.(Comments to FCC, 8-24-11)

National Association of Regulatory Utility Commissioners (NARUC):

The industry proposal, which is centered on a nationally uniform intercarrier compensation rate of \$0.0007/MOU and annual increases to the federal subscriber line charge is inimical to end-user consumers and ultimately undermines the FCC's stated goals. The \$0.0007 rate is not compensatory, will unquestionably have detrimental effects on the financial stability and network reliability of providers with carrier of last resort obligations serving rural areas that have already, and will continue to, invest in broadband deployment. It will also place unmanageable pressure on limited federal USF funding resources.(ex parte to FCC, 7-20-11)

(T)here will not be enough time for anyone, including the FCC's own experts, to conduct an adequate analysis of the model (for the ABC Plan)- given the anticipated effort to get an order ready by the October 2011 Agenda meeting.(Comments to FCC, 8-23-11; *as of late September, the models were still not publicly available*)

National Association of State Utility Consumer Advocates (NASUCA):

The charges that long distance companies owned by AT&T and Verizon pay to local phone companies for completing calls would decrease to levels that **do not even cover the direct cost of the access service (not to mention contributing to joint and common costs)**, and the difference would be made up through subscriber line charge ("SLC") increases, which customers could not avoid. This would create an improper cross-subsidy in violation of § 254(k) of the Act, and would harm universal service by making telephone service less affordable, contrary to § 254(b).(Comments to FCC, 8-24-11)

Rural Independent Competitive Alliance (RICA):

(RICA) has cautioned against precipitous actions that are contrary to the Act, including preemption of state regulation of intrastate services. For statutory and purely pragmatic purposes, state regulatory authorities remain uniquely positioned to consider purely local issues.(Comments to FCC, 8-24-11)

American Cable Association (ACA) and National Cable and Telecommunications Association (NCTA):

The incumbent LEC proposals (the ABC Plan) take some steps in the right direction, but fall short in a number of significant ways. For example, the proposal to provide price cap LECs a right of first refusal, rather than distributing support through competitive bidding, is an unwarranted departure from market-driven policies. We also have concerns regarding the ABC proposal to prematurely deregulate tandem switching and transport services that the largest incumbent LECs currently provide to all competitive providers pursuant to regulated tariffs and agreements. The provision of those services on a regulated basis is a critical component of the Section 251 interconnection and traffic exchange regime that has served as the foundation for a competitive voice market.(ex parte to FCC, 8-23-11)

Public Knowledge:

(T)his market dynamic means that underserved communities nominally within the service area of a large carrier will often remain underserved...Even after all of the meticulously catalogued waste, fraud, and abuse in the ICC/USF system is eliminated, and after every high-cost carrier upgrades its network to more efficient equipment, that the subsidy function of ICC is still necessary to keep networks running....it may be better, in the case of voice traffic, to keep the current general ICC framework in place (with much-needed improvements to address specific abuses) than to phase it out entirely.(Comments to FCC, 4-18-11)

The White House:

White House memorandum directing federal agencies to avoid preemptive rules except when explicitly intended by Congress.(<http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption>)

National Telecommunications Cooperative Association (NTCA) - *before signing on to support ABC Plan in return for a \$300 million annual fund, a guaranteed 10% rate of return, and an additional \$4.50 per month Subscriber Line Charge:*

(The Commission) does not have legal authority to set state access rates and reciprocal compensation rates for voice traffic on the PSTN, and the existing access charge and reciprocal compensation arrangements pose no obstacle to the telecommunications industry, so there is no need for a uniform rate...a uniform rate will drastically impact small rate-of-return rural LECs and the consumers they serve, and Verizon's factual and legal bases to justify a uniform terminating access rate of \$.0007 are false, misleading, and without merit.(ex parte to FCC, 10-17-08)

* Voice Communications in the United States as of June 2010:

122 million wireline customers

29 million VoIP customers

279 million wireless customers

* AT&T/Verizon/CenturyLink (with recently purchased Qwest) control ~90% of wireline customers

* AT&T/Verizon/Sprint/T Mobile control ~80% of wireless customers

* Current Universal Service Fund (USF) surcharge to each wireline and wireless customer is 15.3% of billed usage (for federal USF, some states have an additional surcharge).

Attachment C

From: Hector De La Torre [hector@freeconferencecall.com]
Sent: Thursday, October 06, 2011 12:00 AM
To: Henry Goldberg
Cc: Dave Kumar
Subject: Fwd: Conferencing Effects
Attachments: PastedGraphic-1.pdf; ATT00001.htm

Begin forwarded message:

From: Hector De La Torre <hector@freeconferencecall.com>
Date: October 5, 2011 8:38:49 PM PDT
To: josh.gottheimer@fcc.gov
Subject: **Conferencing Effects**

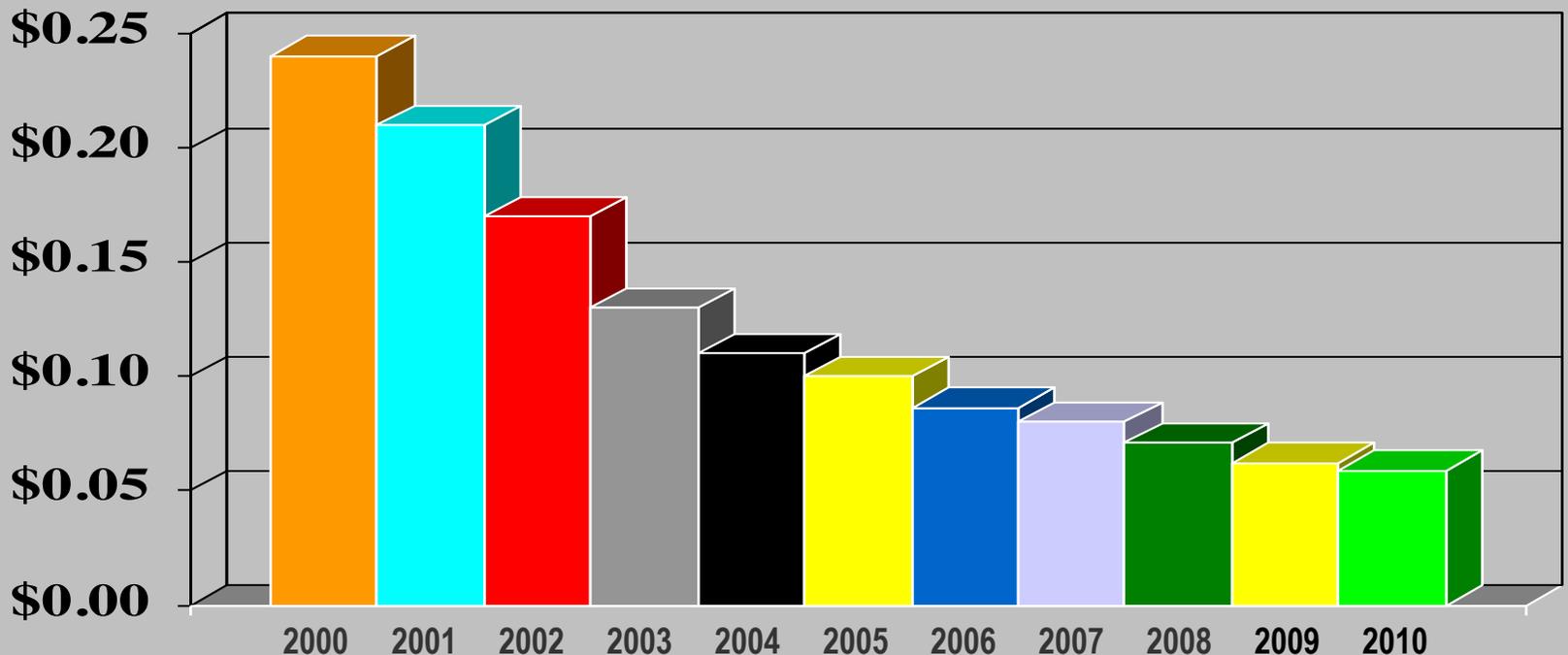
Josh,
Thank you for taking the time to meet this afternoon.

Sorry for the delay in getting this to you, but I've been waiting for some job figures from Elliot Gold at Telespan, the only independent analyst of toll conferencing that we know of.

Here is the pricing of worldwide conferencing--keep in mind that most conferencing takes place in the United States and that free conferencing started just over 10 years ago (coinciding with the price drop):

Average prices have fallen globally

Average prices have fallen from around a quarter to under six cents (without counting the “free” minutes)



Attachment D

From: Hector De La Torre [hector@freeconferencecall.com]
Sent: Thursday, October 06, 2011 12:01 AM
To: Henry Goldberg
Cc: Dave Kumar
Subject: Fwd: Consumer Savings
Attachments: telespan.pptx; ATT00001.htm

2nd email to Josh Gottheimer in follow up to his request...

Begin forwarded message:

From: Hector De La Torre <hector@freeconferencecall.com>
Date: October 5, 2011 8:54:20 PM PDT
To: josh.gottheimer@fcc.gov
Subject: **Consumer Savings**

Josh,

Again, while waiting for a response to the job figures for free conferencing overall, here is another data set from Elliot Gold at Telespan--on this slide, the top three bullets come from his analysis of the toll conferencing (surcharge and free) in the United States. We just did the arithmetic on the bottom two points:

Free Toll Conferencing: Consumer Savings

- 54.6 billion total minutes of conferencing
- 9.3 billion minutes of FREE toll conferencing
- \$3.2 billion in conference organizer/per minute fees (not including terminating access)

- 45.3 billion of pay minutes at \$3.2b=\$.0706 average per minute
- 9.3 billion of free toll minutes at \$.0706 average per minute=\$656m in consumer savings on conference organizer fees

Source: Elliot M. Gold, *Telespan State of the Industry*, March 17, 2011



FreeConferenceCall.com®