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HOUSTON, TEXAS
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The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Q. Abernathy, Commissioner
The Honorable Michael J. Copps, Commissioner
The Honorable Kevin J. Martin, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: VOIP Forum

Dear Mr. Chairman and Commissioners:

UTEX Communications Corp. ("UTEX"), a certificated Texas CLEC, welcomes the chance to add to the very timely discussion on VOIP policy at the FCC during the recent Forum. In particular UTEX will address one issue that was raised by the Commission which it believes the panel did not have the resident expertise to address.

Specifically that issue was: What restrictions, if any, should be placed upon the RBOCs/ILECs with respect to VOIP?

The general consensus of the panel was all players should be treated with the same regulatory "soft touch," including any RBOCs/ILECs that provide such services. This is important because of the announcements of several RBOCs that they have entered or will soon enter into the VOIP "space."

Facility-based CLECs like UTEX cannot agree to "soft touch" regulation of RBOC VOIP services unless an important qualifier is added regarding access charges and inter-carrier compensation between Title II Carriers for VOIP traffic. As this Commission is aware, it is common for a CLEC to provide service to an enhanced service provider ("ESP") that is not a carrier. When an ESP obtains its PSTN connectivity from a CLEC, the ILEC and CLEC jointly handle traffic that goes to or comes from the ESP. The issue UTEX must raise is whether an ILEC is entitled to recover access charges **from the CLEC** whenever one of the RBOC's customers calls a non-carrier ESP serviced by the CLEC, **and** whenever the ESP hands traffic to the CLEC who then hands the traffic to the ILEC for termination to an ILEC user.

Attached is a form letter sent by SBC to UTEX on November 19, 2003 and the

correspondence which has followed. The form letter was sent to multiple CLECs, each of whom has different Interconnection Agreements and different compensation terms. The letter asserts that SBC intends to charge access to the CLEC (not to the ESP and not to any IXC) for all "VOIP" traffic and reserves the right to *back-bill* for such traffic.

What makes this letter particularly egregious is that the UTEX interconnection agreement with SBC has a negotiated provision covering "VOIP" traffic. During a previous dispute on reciprocal compensation, SBC asked that the parties remove prior arbitrated terms providing for reciprocal compensation for traffic destined to the "Internet." The parties voluntarily agreed to eliminate reciprocal compensation for ISP traffic, but also agreed that the bar on compensation would be (1) mutual; and (2) broadened to include traffic to and from Enhanced Service Providers (which include "VOIP" providers). As a result, the interconnection agreement now provides: **No compensation is due or payable to either Party for traffic that is destined for or received from an Enhanced Service Provider ("ESP.")**

SBC is therefore attempting to deny UTEX the benefit of its bargain. Even though the agreement expressly provides for no compensation for traffic to or from ESPs, SBC is now asserting that access compensation is due to SBC for "VOIP" calls to and from ESPs. This cannot be allowed.

The very recent experience of UTEX should raise two flags for policy makers. The first flag surrounds the ability of ILECs to act in bad faith (or at least very carelessly) and impose risk and uncertainty on new business plans and ventures regarding the deployment of new technology. Any firm that receives a threatening letter from SBC that could even remotely lead to expensive litigation and back charge liability notwithstanding voluntary terms in an interconnection agreement will think twice before it expands service or continues to provide service to non-carrier ESPs. The FCC should quickly resolve the ILECs' scare tactics by explicitly stating that the ESP exemption from access charges applied historically to all VOIP providers that are not themselves carriers¹ and will continue to apply prospectively unless and until there is a change to the current rules.

The second, and much more important, flag is to visualize a world where RBOCs/ILECs can both charge non-cost based access and enter the VOIP market under a regulatory "soft touch." There would be a clear transfer of monopoly power to the VOIP affiliate from the RBOC through non-cost based affiliate transactions -- virtually assuring the RBOC and its affiliate of a monopoly in its home territory. Notwithstanding the SBC/UTEX agreement provision that VOIP traffic to or from ESPs will have no compensation due as between SBC and UTEX, if SBC gained a right to charge access for all VOIP traffic, and UTEX supplied service to a VOIP provider, SBC's access charges to UTEX alone would likely exceed \$35 per month per each interconnected DS-0. This is more than VOIP providers like Vonage bill the end user. Importantly, the cost to SBC and UTEX to establish interconnection is

¹ 47 C.F.R. §§ 69.2(m) and 69.5 expressly exempts entities that are not carriers from access charges. Non-carrier customers are "end users." ESPs are end users and are not subject to access charges. UTEX does not express any opinion on whether carriers like AT&T that are already regulated under Title II and directly provide VOIP are or should be subject to access charges.

identical (and about \$3 per month to each LEC per DS-0 regardless of usage) for both a dial-up internet user and a VOIP subscriber. The delta of \$32 per month imposed by non-cost-based access charges on VOIP traffic would represent a monopoly power subsidy to the “soft touch” unregulated affiliate of SBC.

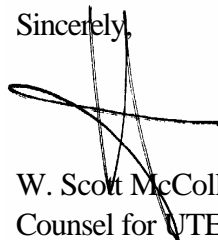
Given the foregoing, UTEX-s answer to the policy question raised during the Forum is:

RBOCs and ILECs should be prohibited from entering the VOIP space in their home markets on a non-regulated basis unless they explicitly agree that no compensation in the form of access charges is due for traffic to or from non-carrier VOIP providers or the CLECs that provide PSTN connectivity to non-carrier VOIP providers.

UTEX recognizes that such a prohibition may seem draconian, but in reality it is no more draconian than what will happen to innovative VOIP providers such as Vonage, 8X8, PointOne, ITXC, CNM and Delta3 if the FCC allows the RBOCs and ILECs to recover access charges from CLECs for non-carrier ESP traffic when it is clear that non-carrier ESPs are exempt from access charges under current rules and are developing and deploying new and different technology as contemplated and encouraged by the ESP exemption.

VOIP is a true intermodal means to communicate in new and exciting ways. Further, VOIP is more than just “voice” in both architecture and its applications. UTEX encourages the FCC to refrain from imposing traditional telephony concepts and rules, including the notion of “local” vs. “toll” wholesale and retail rating. Applying these concepts to VOIP will lower it to merely another way to deliver tired old “phone service.”

Sincerely,

A handwritten signature in black ink, appearing to read "W. Scott McCollough". The signature is written over the printed name and title below it.

W. Scott McCollough
Counsel for UTEX Communications Corp.



November 19, 2003

UTEX Communications Corp.
Lowell Feldman
President
830 Country Lane
Houston, TX 77024

Dear Lowell Feldman:

As you may know, there has been considerable public attention surrounding the artificial traffic routing schemes used by some carriers to avoid lawful access charges. The purpose of this letter is to notify you that SBC Telephone Companies (SBC) expects your company to meet its obligations under its SBC Interconnection Agreements and applicable SBC switched access tariffs relating to the routing, identification, reporting and compensation of long distance traffic. You have the ultimate responsibility to properly route and report the jurisdictional nature of your traffic, including the transmission of accurate signaling information to ensure compliance with your interconnection agreements and applicable tariffs, and to ensure that terminating carriers are properly compensated for the services they provide.

The existing SBC switched access charge tariffs remain the applicable terms and conditions for long distance traffic you deliver to SBC for termination regardless of the method of transmission. All long distance traffic should be transmitted with accurate signaling information and generally should be routed over Feature Group D trunks to apply appropriate tariffed switched access rates, terms and conditions ensuring carrier parity and tariff compliance. In addition, calls routed via Voice over Internet Protocol ("VoIP") and similar IP telephony services that are handed to SBC's telephone network are subject to switched access charges where the end user originating the call is physically located outside of the local calling area of the physical location of the called party. Accordingly, SBC also expects each carrier to appropriately route such traffic over Feature Group D trunks and to pay switched access charges on any such traffic that is transmitted or terminated over the SBC network. SBC reserves all its rights to back-bill and recover any damages that it may have incurred or continues to incur to the extent it is determined that your company has misrouted, mislabeled and/or mis-billed traffic.

Please contact your assigned Account Manager should you have questions or require further information.

Sincerely,

Notices Manager
Contract Management

From: Lowell Feldman [mailto:lowellfeld1@yahoo.com]
Sent: Friday, November 21, 2003 3:46 PM
To: JOSEPHSON, DEBBIE (SWBT)
Cc: wsmc@smccollough.com
Subject: Letter From SBC Dated Nov 19, 2003

Debbie,

I received an unsigned letter today from SBC dated November 19, 2003 which instructs me to contact my assigned Account Manager should I have questions or require further information.

I will fax you a copy of the letter as I send this e-mail.

I require further information:

Please send me ALL specific information regarding the UTEX interconnection agreement and all legal authority which was used to substantiate SBC's assertions and positions in its letter.

If I do not receive such information within 10 business days, I will assume that the referenced "Form Letter" does not apply to me or UTEX for the duration of our Interconnection Agreement.

Receipt of such information does not constitute agreement by me or UTEX on the SBC asserted positions.

Lowell Feldman

From: JOSEPHSON, DEBBIE (SWBT) [mailto:da8575@sbc.com]
Sent: Friday, November 21, 2003 4:53 PM
To: 'Lowell Feldman'
Cc: wsmc@smccollough.com
Subject: RE: Letter From SBC Dated Nov 19, 2003

Hi, Lowell. Thanks for the fax. I'm gathering more information; however, I think the letter you received is addressing the Waller Creek agreement; not the UTEX agreement. I'll contact the notices manager and see what this is. Thanks!

Debbie Josephson

Account Manager-Industry Markets
Account Management
Four SBC Plaza, Room 720.03
Dallas, Texas 75202
(214) 464-4438 / ofc.
(214) 464-5150 / fax

From: Lowell Feldman [mailto:lowellfeld1@yahoo.com]
Sent: Monday, December 08, 2003 11:15 AM
To: 'JOSEPHSON, DEBBIE (SWBT)'
Cc: 'wsmc@smccollough.com'
Subject: RE: Letter From SBC Dated Nov 19, 2003

Debbie,

SBC has failed to give UTEX any additional information as it offered in its November 19, 2003 letter on mutual compensation for VOIP traffic.

The UTEX/SBC Interconnection Agreement covers all mutual compensation issues. The agreement expressly excludes compensation for Enhanced Service Provider traffic, which includes both traditional IP traffic (dial-up) and VOIP traffic. UTEX will abide by the interconnection agreement and will also require SBC to abide by the interconnection agreement.

Lowell

From: JOSEPHSON, DEBBIE (SWBT) [mailto:da8575@sbc.com]
Sent: Tuesday, December 09, 2003 3:35 PM
To: 'lowellfeld1@yahoo.com'
Subject: UTEX~Letter From SBC Dated Nov 19, 2003
Importance: High

Hi, Lowell!

SBC is in receipt of your email dated November 21, 2003. You had requested additional information from 10 business days of your email (which should be December 9, 2003).

SBC is investigating your question and looking into the various resources/documents to reference. SBC should be able to respond back to you within the next couple of days.

Debbie Josephson
Account Manager-Industry Markets
Account Management
Four SBC Plaza, Room 720.03
Dallas, Texas 75202
(214) 464-4438 / ofc.
(214) 464-5150 / fax
email:da8575@txmail.sbc.com

(Note as of the date of this filing at the FCC by UTEX, SBC has failed to provide the "further information" it offered. Further, it has failed to acknowledge the plain negotiated language of the existing SBC/UTEX Interconnection Agreement.)