BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

MISSOURI NETWORK ALLIANCE, LLC
2005 W. Broadway
Building A, Suite 215
Columbia, MO 65203
(573) 777-4200

Complainant,

v.

SPRINT COMMUNICATIONS COMPANY, L.P.
6450 Sprint Parkway
Overland Park, KS 66251
(202) 730-1328

Defendant.

Proceeding No. 18-236

EB-18-MD-004

REPLY LEGAL ANALYSIS IN SUPPORT OF FORMAL COMPLAINT OF MISSOURI NETWORK ALLIANCE, LLC

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INTRODUCTION

In response to the Formal Complaint of Missouri Network Alliance, LLC ("MNA"), Sprint Communications Company, L.P. ("Sprint") constructs a house of cards in which it seeks to hide from liability for its violations of Section 201(b) of the Communications Act of 1934 ("Act"). But Sprint's card house lacks any legal or factual foundation.

Sprint's position that it gets to unilaterally declare MNA's tariff unlawful and then withhold payments under that tariff – without bothering to seek a determination about the lawfulness of MNA's tandem rates by the Commission or a court – turns the filed tariff doctrine on its head. While conceding – as it must – that it withheld payment to MNA after unilaterally determining MNA's rates to be unlawful, Sprint, in the same breath, insists that it was "uncertain" about the legality of MNA's tariffs, which, according to Sprint, makes its nonpayment "reasonable." Sprint is mistaken. Even assuming there was "uncertainty" about the lawfulness of MNA's tariffs (which is not the case), Sprint was obligated to file a complaint with the Commission or a court instead of unilaterally withholding payment of MNA's tariffed charges. Sprint's approach was recently repudiated by a federal district court in Illinois in a dispute involving another carrier that withheld payment of lawfully tariffed charges based on that carrier's unilateral determination that such charges were unlawful.

By withholding payment of MNA's lawfully tariffed charges, Sprint violated its legal obligations under the Act and the Commission's rules, and Sprint's violations constitute an unjust and unreasonable practice for which Sprint is liable under 47 U.S.C. § 201(b). Sprint does not dispute that the failure to pay compensation required by federal law constitutes an unjust and unreasonable practice cognizable under Section 201(b). Nor does Sprint seriously dispute that the reciprocal compensation requirements under federal law, specifically 47 U.S.C. § 251(b)(5), include an obligation to pay, as the Commission and numerous courts have held.

Instead, Sprint argues that: (1) the Commission did not include any payment obligation in the intercarrier compensation reforms adopted as part of its transition to bill-and-keep set forth in the *USF/ICC Transformation Order*;[1] and (2) any payment obligation that may exist under Section 251(b)(5) does not apply to tariffed rates. Both arguments are wrong.

Section 251(b)(5) is the primary legal authority relied upon by the Commission for its reforms to the intercarrier compensation regime. The Commission cited Section 251(b)(5) repeatedly in its *USF/ICC Transformation Order* and successfully argued to the United States Court of Appeals for the Tenth Circuit that Section 251(b)(5) was sufficiently broad to allow the Commission to impose bill-and-keep for all access traffic and to regulate intrastate as well as interstate access services. Furthermore, the Commission's rules governing the bill-and-keep transition expressly reference "reciprocal compensation" as used in Section 251(b)(5) – a regime that both the Commission and the courts have held includes an obligation to pay. Under the circumstances, Sprint's insistence that the Commission's rules do not include any obligation on Sprint's part to pay charges established consistent with the Commission's intercarrier compensation reforms is nonsensical.

Equally nonsensical is Sprint's position that Section 251(b)(5) only imposes a payment obligation with respect to rates embodied in an interconnection agreement, not a tariff. That the cases holding that Section 251(b)(5) includes an obligation to pay involved interconnection agreements is legally irrelevant because, prior to the *USF/ICC Transformation Order*, Section 251(b)(5) was only implemented pursuant to interconnection agreements. After the *USF/ICC Transformation Order*, however, access charges are subject to the Section 251(b)(5) reciprocal compensation regime, and the Commission permits carriers to comply with their reciprocal

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[1] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 798 (2011) ("*USF/ICC Transformation Order*"), *aff'd Direct Communs Cedar Valley v. FCC*, 753 F.3d 1015 (10th Cir. 2014).

compensation obligations pursuant to either agreements or tariffs. Sprint does not cite any legal authority or offer any public policy that would support restricting the Section 251(b)(5) payment obligation to the former but not the latter.

Sprint makes a critical admission that confirms its liability under Section 201(b). Specifically, while taking issue with the adequacy of MNA's allegations, Sprint concedes that it withheld payment to MNA of undisputed amounts, the effect of which was to recoup retroactively amounts Sprint had paid previously to MNA without dispute. This retroactive claw-back scheme is the very same conduct in which Sprint engaged that two federal courts found constituted an unjust and unreasonable practice in violation of Section 201(b). While Sprint may not agree with those decisions, it offers no principled basis for the Commission to reach a contrary conclusion here.

Desperate to avoid liability for its unjust and unreasonable practices, Sprint predictably clings to *All American Telephone*.[2] At the outset, it is not MNA's position that the Commission has "reversed" *All American Telephone*, as Sprint erroneously claims. Rather, as MNA discussed at length in its Legal Analysis in Support of its Formal Complaint, *All American Telephone* is distinguishable and simply does not apply here.

In contrast to *All American Telephone* and other "collection action" cases upon which Sprint relies, MNA seeks to enforce compensation obligations imposed by Section 251(b)(5) and the Commission's *USF/ICC Transformation Order* and implementing rules. Sprint violated federal law by failing to pay MNA's tariffed rates – a violation that is cognizable under Section 201(b), as the Commission and the courts have recognized. Nothing in *All American Telephone* compels a different result.

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[2] *All American Telephone Co., e-Pinnacle Comm'ns, Inc., and ChaseCom v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd. 723 (2011).

In short, Sprint engaged in unjust and unreasonable practices by: (1) failing to pay lawfully tariffed charges that Sprint was legally obligated to pay under Section 251(b)(5) as well as the Commission's *USF/ICC Transformation Order* and implementing rules; and (2) helping itself to a retroactive refund by withholding payments on invoices from MNA to recoup undisputed charges Sprint had paid previously. Accordingly, the Commission should grant MNA's Formal Complaint and find Sprint in violation of Section 201(b).

I. SPRINT DOES NOT HAVE THE RIGHT TO UNILATERALLY DECLARE MNA'S TARIFFS UNLAWFUL AND WITHHOLD PAYMENT TO MNA, WITHOUT SEEKING A DETERMINATION FROM THE COMMISSION OR A COURT ABOUT THE LAWFULNESS OF MNA'S TARIFFS.

In seeking to excuse its failure to pay MNA's tariffed rates, Sprint insists that "[n]othing requires Sprint to pay unlawful access charges, and it is neither unjust nor unreasonable for Sprint to refuse to pay those unlawful charges."[3] Of course, MNA has a very different view of the lawfulness of its tariffs. Regardless, neither the Commission nor any court has determined that MNA's tandem rates are unlawful; rather Sprint has made that determination itself. There is no legal support – and Sprint offers none – for its position that Sprint gets to declare unilaterally that a tariff is unlawful and withhold payment of tariffed rates on that basis.

Indeed, the federal district court in *Peerless Network, Inc. v. MCI Communs. Servs.*, 2018 U.S. Dist. LEXIS 43044 (N.D. Ill. 2018), considered and rejected this very position in addressing an intercarrier compensation dispute between Verizon and Peerless. In that case, Peerless filed its tariff with the Commission, Verizon received services under that tariff, and Peerless billed Verizon the rates set forth in that tariff. Nevertheless, Verizon "stopped paying Peerless's tariffed charges after determining, *inter alia*, that Peerless was billing for services it was not

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[3] Sprint's Memorandum of Law in Opposition to Missouri Network Alliance's Formal Compliant at 4 ("Sprint Legal Analysis").

providing and was engaging in access stimulation without complying with the FCC's access stimulation rules." *Id.* *14.

The court found that Verizon had a duty to raise a legal challenge to Peerless's tariff, "not simply decide on its own that the Tariff was invalid and refuse for years to make payments under it." *Id.* *45-46. As the court explained, under "[a] straight-forward application of the filed-rate doctrine," which prevents a ratepayer from seeking to invalidate or modify a tariff rate in a collection action brought by a service provider, "Verizon was required to pay the charges invoiced pursuant to the Tariff first. Then, Verizon could challenge those charges by either filing suit in federal court or filing a complaint with the FCC." *Id.* *44-45 (citing *Frontier v. AT&T*, 957 F. Supp. 170 (C.D. Ill. 1997) ("The prevailing rule is that a customer must pay filed rates before contesting them.")).

Sprint's position also is inconsistent with the Commission's refusal to "endorse" the "withholding of payment outside the context of any applicable tariffed dispute resolution provisions."[4] While declining to address the issue in the *USF/ICC Transformation Order*, the Commission admonished parties about "their payment obligations under tariffs and contracts to which they are a party."[5]

Disregarding the filed-tariff doctrine and the Commission's admonition, Sprint has arrogated to itself the power to decide unilaterally the lawfulness of tariffs and the tariffed rates it will and will not pay. By taking the law into its own hands in withholding payment of tariffed

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[4] *USF/ICC Transformation Order* ¶ 700 (quoting *All American Telephone*, 26 FCC Rcd. 723, 728).

[5] *Id.* Although other carriers have engaged in regulatory self-help in dealing with access stimulation schemes that violate the Commission's rules, *see AT&T Servs. Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd 2586 (2015), MNA is not engaged in access stimulation or "traffic pumping," and Sprint does not contend otherwise. *See* Answer of Sprint Communications Company L.P. ¶ 13 ("Sprint Answer").

charges Sprint was legally required to pay – based solely on its unilateral decision not to pay them – Sprint acted unjustly and unreasonably.

Sprint's conduct is particularly egregious in light of its claim to be "uncertain[] about the lawfulness of MNA's tariffs."[6] Although MNA disagrees that any such "uncertainty" exists,[7] Sprint should have brought any concerns about MNA's tariffs to the Commission or a court. Instead, Sprint unilaterally resolved this purported uncertainty in its financial favor by withholding payment of MNA's invoices (and by clawing back payments previously made to MNA, as discussed below). There is nothing "reasonable" about Sprint's conduct.

II. FEDERAL LAW OBLIGATES SPRINT TO PAY MNA'S TARIFFED TANDEM CHARGES, AND SPRINT'S FAILURE TO COMPLY WITH THIS OBLIGATION VIOLATED SECTION 201(B) OF THE ACT

Sprint violated its payment obligations under Section 251(b)(5) of the Act as well as the *USF/ICC Transformation Order* and the Commission's implementing rules by withholding payment of MNA's lawfully tariffed tandem charges, and Sprint's violations constitute an unjust and unreasonable practice for which Sprint is liable under 47 U.S.C. § 201(b). Sprint does not seriously dispute that the reciprocal compensation requirements under Section 251(b)(5) include an obligation to pay. Indeed, given the plain language of the term "reciprocal compensation," it should come as no surprise that the Commission and the courts consistently have found the

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6 Sprint Legal Analysis at 14.

7 The Commission stated plainly that the only tandem rates subject to mandated rate reductions are those of the terminating carrier that also owns the tandem and that tandem rates in other circumstances "are not addressed at this time." *See, e.g., USF/ICC Transformation Order*, ¶ 800; *see also id.* ¶ 1306, n. 2358; Public Notice, *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit*, WC Docket No. 10-90, CC Docket No. 01-92, at 2 (Sept. 8, 2017). As a competitive tandem provider that does not own any end offices directly or indirectly or serve any end users, MNA does not provide terminating switching and thus is not a "terminating carrier."

payment obligation to be a critical component of the Section 251(b)(5) framework.[8] As the Third Circuit Court of Appeals observed in explaining the Section 251(b)(5) reciprocal compensation framework: "[w]hen a customer of carrier A makes a [] call to a customer of carrier B, and carrier B uses its facilities to connect, or 'terminate,' that call to its own customer, the 'originating' carrier A is *ordinarily required to compensate* the 'terminating' carrier B for the use of carrier B's facilities."[9]

Sprint asserts that none of these decisions "say that payments by collaborating carriers are a requirement of the Act."[10] But this assertion elevates form over substance. The payment obligation that is part and parcel of the reciprocal compensation framework is embodied in Section 251(b)(5), which is plainly a "requirement of the Act."

Furthermore, that these decisions involved "negotiated arrangements, not tariffs" is a distinction without a difference.[11] Prior to the *USF/ICC Transformation Order*, reciprocal compensation arrangements under Section 251(b)(5) were implemented pursuant to interconnection agreements, which can be negotiated or arbitrated.[12] However, after the *USF/ICC Transformation Order*, Section 251(b)(5) reciprocal compensation arrangements also

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8 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) ("*Local Competition First Report and Order*") (subsequent history omitted); *see also id.* ¶ 1045 (noting that, pursuant to Section 251(b)(5), CMRS providers will "receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers"); *Southwestern Bell Tele. Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 477 (11th Cir. 2002); *New Cingular Wireless PCS LLC v. Finley*, 674 F.3d 225, 232 (4th Cir. 2012).

9 *SBC Inc. v. FCC*, 414 F.3d 486, 490 (3rd Cir. 2005) (emphasis added).

10 Sprint Legal Analysis at 8, n.17.

11 *Id.*

12 *See, e.g., Local Competition First Report and Order* ¶¶ 1033-1038.

can be implemented pursuant to tariff.[13] In either case, Section 251(b)(5) obligates a carrier like Sprint to pay a carrier like MNA for services provided in jointly serving a customer. Sprint does not advance any legal authority for interpreting the payment obligation under Section 251(b)(5) to apply only to reciprocal compensation arrangements embodied in interconnection agreements but not tariffs.

Sprint asserts that "the refusal to pay [] tariffed charges" can never constitute "an unjust and reasonable practice under 47 U.S.C. § 201," without citing a single court case or Commission decision in support of this assertion.[14] Sprint's position also makes no sense. Assume a price cap carrier entered into an agreement with Sprint that included the $0.0007 rate for terminating switched end office and reciprocal compensation effective July 1, 2016, consistent with the *USF/ICC Transformation Order*. If the price cap carrier provides services to Sprint for which it invoiced Sprint the $0.0007 rate, Sprint presumably would concede that it violated its Section 251(b)(5) payment obligation by unilaterally withholding payment. Sprint's violation of its payment obligation under Section 251(b)(5) is not magically excused if Sprint were to withhold payment of the price cap carrier's invoices for services provided at the same $0.0007 rate pursuant to tariff.

Sprint's argument that Section 251(b)(5) only requires the establishment of reciprocal compensation arrangements and only applies to LECs represents a fundamental misunderstanding of the *USF/ICC Transformation Order*.[15] As the Commission explained in

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13 *USF/ICC Transformation Order* ¶ 828 (permitting "carriers to negotiate alternative intercarrier compensation arrangements to the default rates specified in the tariffs"); *see also id.* ¶ 812 ("this new regime will facilitate the benefits that can arise from negotiated arrangements, while also allowing for revenue predictability that has been associated with tariffing").

14 Sprint Legal Analysis at 5.

15 *Id.* at 9.

bringing "all traffic within the section 251(b)(5) regime,"[16] "when a LEC is a party to the transport and termination of access traffic, the exchange of traffic is subject to regulation under the reciprocal compensation framework" under the "express terms of section 251(b)(5)."[17] Thus, when a Sprint customer makes a long-distance call that is routed through MNA's tandem to the terminating LEC, the "exchange" of that call between Sprint, MNA, and the terminating LEC is "subject to regulation" under the Section 251(b)(5) reciprocal compensation framework.[18]

Indeed, the Commission has long made clear that the Section 251(b)(5) framework is not limited to LECs. For example, under Section 251(b)(5), CMRS providers "must compensate the LEC for terminating traffic originating on the CMRS provider's network."[19] CMRS providers are not LECs; yet they are subject to the Section 251(b)(5) payment obligation that Sprint is so eager to avoid.

There is no merit to Sprint's claim that the Commission merely maintained the status quo when it retained "the tariffed access charge regime to effect the glide path to bill-and-keep" and did nothing to "modify" or "change[] anything in practice about the tariffed access regime."[20] Sprint's claims are belied by the plain language of the *USF/ICC Transformation Order* by which

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16 *USF/ICC Transformation Order* ¶ 764.

17 *Id.* ¶ 762.

18 MNA has never said that the *USF/ICC Transformation Order* "does not affect MNA itself," Sprint Legal Analysis at 7, and Sprint's claim otherwise cannot be reconciled with MNA's filings in this proceeding. Even though it is not a LEC, MNA has acknowledged that, under the *USF/ICC Transformation Order*, MNA's interstate tandem rates are capped and will eventually be subject to bill-and-keep, even though the Commission has yet to establish the mechanism for competitive tandem providers such as MNA to reduce their tandem rates or the timeframe by which such reductions must be implemented. Formal Complaint of Missouri Network Alliance LLC ¶¶ 19-21 ("MNA Complaint"); Legal Analysis in Support of Formal Complaint of Missouri Network Alliance LLC at 6-8 ("MNA Legal Analysis").

19 *USF/ICC Transformation Order* ¶ 976 (citing *Local Competition First Report and Order* ¶¶ 1041-45).

20 Sprint Legal Analysis at 7.

the Commission expressly "supersede[d] the preexisting access charge regime" and brought all access "traffic into the section 251(b)(5) reciprocal compensation framework ...."[21] The Commission also extended its regulatory reach over intrastate access charges, relying upon Section 251(b)(5) as the legal authority to do so. Thus, while tariffs have not changed in any mechanical sense, the Commission's authority over – and the federal legal obligations that attach to – tariffed access rates changed significantly with the *USF/ICC Transformation Order*.

Equally without merit is Sprint's attempt to sidestep its Section 251(b)(5) reciprocal compensation obligations by arguing that the *USF/ICC Transformation Order* "creates *no* obligation to pay reciprocal compensation to LECs during the transition period."[22] The Section 251(b)(5) reciprocal compensation framework creates the payment obligation as explained above. The *USF/ICC Transformation Order* relies upon Section 251(b)(5) as the legal authority for the Commission's intercarrier compensation reforms, and the Commission's implementing rules incorporate the Section 251(b)(5) reciprocal compensation requirements – including the obligation to pay reciprocal compensation – by recasting access traffic as "Access Reciprocal Compensation" subject to Section 251(b)(5).[23] Indeed, the Commission's rules plainly state that "the provisions of [Subpart J – Transitional Access Service Pricing] apply to *reciprocal compensation* for telecommunications traffic exchanged between telecommunications providers that is interstate or intrastate exchange access, information access, or exchange services for such

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21 *USF/ICC Transformation Order* ¶ 828; *see also id.* ¶ 762.

22 Sprint Legal Analysis at 8.

23 *See, e.g.,* 47 C.F.R. § 51.903(h); *see also USF/ICC Transformation Order* ¶ 762 (concluding "that section 251(b)(5) applies to traffic that traditionally has been classified as access traffic").

access ...."[24] It is hard to imagine how the Commission could have made the reciprocal compensation payment obligation any more clear.

To be sure, the Commission implemented the Section 251(b)(5) payment obligation under the access charge regime differently than the payphone per-call compensation obligation at issue in *Global Crossing Tele., Inc. v. Metrophones Tele., Inc.,* 550 U.S. 45 (2007). However, that the Commission incorporated the payment obligation embodied in the reciprocal compensation framework under Section 251(b)(5) by reference in the Commission's *USF/ICC Transformation Order* and implementing rules does not make that payment obligation any less binding as a matter of federal law, notwithstanding Sprint's claims to the contrary. Indeed, in its Legal Analysis, MNA explained at length why the Supreme Court's reasoning in *Metrophones* fully supports a finding that Sprint's failure to pay MNA's tandem charges contrary to its obligations under Section 251(b)(5) is an unjust and unreasonable practice in violation of Section 201(b) – an explanation that Sprint did not bother to address, let alone refute.

Sprint is certainly correct – and MNA has expressly acknowledged – that "[n]ot every violation of Commission regulations is an unjust and unreasonable practice."[25] However, Sprint is incorrect in arguing that Sprint's nonpayment of MNA's tariffed charges is not an unjust or unreasonable practice under Section 201(b) because it did not directly violate "Commission rules" and did not "undermine[] the attainment of an express Congressional goal."[26]

First, as explained at length in its Legal Analysis and above, the Section 251(b)(5) reciprocal compensation framework upon which the Commission's intercarrier compensation reforms are predicated includes an obligation to pay. That payment obligation is incorporated by

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24 47 C.F.R. § 51.901(b) (emphasis added).

25 Sprint Legal Analysis at 13; MNA Legal Analysis at 12.

26 Sprint Legal Analysis at 13 (citing *APCC Services, Inc. v. NetworkIP, LLC,* Order on Review, 21 FCC Rcd 10488, ¶ 15 (2006)).

reference in the Commission's rules implementing those reforms, and Sprint violated its obligation by withholding payment of MNA's tariffed charges that comply fully with the Commission's *USF/ICC Transformation Order*. Thus, Sprint has violated not only the Commission's rules but a federal statute as well.

Second, in adopting "a bill-and-keep methodology as the default framework and end state for all intercarrier compensation traffic,"[27] the Commission found that its intercarrier compensation reforms help "fulfill the direction from Congress in the 1996 Act ...."[28] Specifically, the Commission's reforms achieve Congress's goals of: (1) making "support explicit rather than implicit"; (2) unifying the treatment of all access traffic under the broad scope of the "term 'telecommunications' used in section 251(b)(5)"; and (3) permitting carriers "to enter into negotiated agreements that differ from the default rates established [by the Commission], consistent with the negotiated agreement framework that Congress envisioned for the section 251(b)(5) regime to which access traffic is transitioned."[29]

In achieving these congressional goals, the Commission deferred establishment of a transition plan for "tandem switching and tandem transport" of competitive tandem providers like MNA that do not own the end office and "preserve[d] a role for tariffing charges for toll traffic during the transition."[30] Because it apparently cannot be bothered with either the timing or substance of the Commission's reforms, Sprint engaged in regulatory self-help by withholding payment of MNA's tandem charges, effectively getting the benefit of bill-and-keep and unilaterally disregarding MNA's tariffs. Sprint's conduct is inimical to the Commission's policy

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27 *USF/ICC Transformation Order* ¶ 741.

28 *Id.* ¶ 747.

29 *Id.* ¶¶ 747, 765 & 812.

30 *Id.* ¶¶ 812 & 1297.

decisions in implementing its intercarrier compensation reforms, and Sprint is hard-pressed to argue otherwise.

In short, Sprint has engaged in a practice by which it has violated its payment obligation under Section 251(b)(5) and the Commission's rules by withholding payment of MNA's tariffed charges. To paraphrase the question posed by the Supreme Court in *Metrophones*, Sprint's practice "would seem fairly characterized in ordinary English as an 'unjust practice,' so why should the FCC not call it the same under §201(b)?"[31] The answer is obvious – the Commission should find that Sprint engaged in an unjust and unreasonable practice in violation of Section 201(b) and should grant MNA's Formal Complaint.

III. SPRINT'S SCHEME TO CLAW BACK AMOUNTS PREVIOUSLY PAID TO MNA VIOLATES SECTION 201(B), JUST AS THE COURTS FOUND IN *CENTURYTEL OF CHATHAM.*

In attempting to defend its claw-back scheme, Sprint attacks the adequacy of MNA's allegations and the competency of the two federal courts that held that such a scheme constitutes an unjust and unreasonable practice in violation of Section 201(b). Neither defense has merit.

Sprint's assertion that "MNA fails to allege any acts by Sprint that would recoup past payments to MNA" ignores both MNA's allegations and Sprint's admissions.[32] Specifically, MNA alleged – and Sprint admitted – that:

- Sprint first complained about MNA's intrastate tandem rates in a June 2014 letter in which it asserted that MNA had failed to reduce its intrastate tandem rates to "parity" with interstate rates and disputed the difference between MNA's invoiced rates and the rates Sprint claims MNA should have invoiced (MNA Complaint ¶ 24; Sprint Answer ¶ 24);

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31 *See Metrophones Tele., Inc.,* 550 U.S. at 61.

32 Sprint Legal Analysis at 14; *see also* Answer of Sprint Communications, L.P. ("Sprint Answer").

- In the June 2014 letter, Sprint requested a refund of $10,296, which purported to represent the difference between the intrastate tandem rates charged by MNA from June 21, 2012 through April 20, 2014 and the intrastate tandem rates Sprint asserted MNA should have charged during this time period (MNA Complaint ¶ 25; Sprint Answer ¶ 25);

- After MNA denied Sprint's dispute, Sprint withheld payment of the $10,296 for which it had sought a refund from MNA's invoice dated December 1, 2014 (MNA Complaint ¶¶ 26-27; Sprint Answer ¶¶ 26-27)

- Sprint withheld an additional $2,947 from MNA's invoice dated January 1, 2015, which also related to alleged overpayments of intrastate tandem charges from June 21, 2012 through April 30, 2014 (MNA Complaint ¶ 28; Sprint Answer ¶ 28).

Sprint admits that it withheld payments from MNA's December 2014 and January 2015 invoices in amounts it had requested that MNA refund based on alleged overpayments between June 2012 and April 2014. Sprint does not claim anywhere in its Answer (or Legal Analysis) that these withholdings constituted anything other than a retroactive recoupment of amounts Sprint had paid to MNA previously without dispute. Importantly, Sprint does not allege that the $10,296 it withheld from MNA's December 2014 invoice or the $2,947 it withheld from MNA's January 2015 invoice corresponded to or otherwise related to disputed charges in either invoice.

In short, MNA has alleged – and Sprint has admitted – that Sprint withheld payment of undisputed amounts in MNA's December 2014 and January 2015 invoices to "recoup past overpayments" allegedly made by Sprint between June 2012 and April 2014.[33] This claw-back tactic is no different than Sprint's scheme that the federal district court and the Fifth Circuit held constituted an unjust and unreasonable practice in violation of Section 201(b) in *Centurytel of Chatham*.[34]

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[33] Sprint Legal Analysis at 17.

[34] *Centurytel of Chatham v. Sprint Communs. Co.*, 185 F. Supp. 3d 932 (W.D. La. 2016), *aff'd* 861 F.3d 566, 577 (5th Cir. 2017).

Sprint's attempt to distinguish *Centurytel of Chatham* by claiming that the case involved different "classes of payment" is unpersuasive.[35] The Fifth Circuit's decision was predicated on Sprint taking "the extraordinary measure of acting on its own to recoup money it had already paid without any judicial or administrative intervention," which, according to the court, constituted "unlawful self help, in violation of 47 U.S.C. § 201(b)."[36] The same is true here – without bothering to go to the Commission or a court, Sprint acted on its own to recoup money it had already paid MNA from June 2012 to April 2014 by withholding payment from MNA's December 2014 and January 2015 invoices.

Furthermore, MNA also has alleged (MNA Complaint ¶ 47) that "Sprint has helped itself to a retroactive refund when it effectively stopped paying MNA's invoices from March 2017 until it discontinued using MNA's tandem in May 2018," which "allowed Sprint to recoup charges that Sprint belatedly disputed but nonetheless paid to MNA." While denying these allegations, Sprint Answer ¶ 47, Sprint admits that, on or about March 30, 2017, it sent MNA more than 100 letters disputing MNA's invoices for the preceding eight years (which Sprint subsequently amended to only dispute invoices back to August 2012). MNA Complaint ¶ 30; Sprint Answer ¶ 30.

As reflected in these March 2017 dispute letters, the amounts Sprint disputed on MNA's invoices rendered from January 1, 2011 through February 1, 2017 – invoices that (with some limited exception) Sprint paid without dispute – represented approximately 53 percent of MNA's invoiced charges during this time period.[37] However, for the invoices rendered by MNA after the March 2017 dispute letters, MNA has alleged – and Sprint concedes – that Sprint effectively

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35 Sprint Legal Analysis at 16.

36 861 F.3d at 577-78.

37 Declaration of Chris Bach ("Bach Decl.") ¶ 22.

stopped paying MNA's invoices, as Sprint paid less than two percent of the invoiced amount from March 1, 2017 through April 1, 2018 (after which Sprint stopped purchasing tandem services from MNA). MNA Complaint ¶ 33; Sprint Answer ¶ 33.

Importantly, the basis of Sprint's dispute of all MNA's invoices as set forth in the March 2017 dispute letters was the same – the purported lack of a valid tariff. However, for invoices that MNA rendered from January 1, 2011 through February 1, 2017, Sprint did not dispute and paid approximately 47 percent of the charges MNA invoiced. By contrast, for invoices that MNA rendered from March 1, 2017 through April 1, 2018, Sprint did not dispute – and paid – less than two percent of the charges MNA invoiced. Sprint does not explain the reason for this discrepancy in its Answer or Legal Analysis.

MNA alleges that Sprint engaged in a claw-back tactic by effectively stopping payment to MNA to "recoup charges that Sprint belatedly disputed but nonetheless paid to MNA." Formal Complaint ¶ 47. Although Sprint denies MNA's allegations, this only creates a factual dispute that the Commission must resolve. At this juncture, MNA sufficiently alleges an unlawful claw-back scheme by Sprint that constitutes a Section 201(b) violation consistent with *Centurytel of Chatham*, notwithstanding Sprint's claims otherwise.

Sprint's desire to avoid a repeat of the outcome in *Centurytel of Chatham*, in which Sprint was ordered to pay almost $900,000 in attorneys' fees for its Section 201(b) violation, is understandable.[38] But other than calling the Fifth Circuit "wrong" and its conclusions

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[38] *See* July 25, 2016 Ruling at 23, *CenturyTel of Chatham, LLC v. Sprint Communications Co., L.P.*, 185 F. Supp. 3d 932 (W.D. La. 2016) (No. 3:09-cv-01951-RGJ-MLH); August 1, 2017 Order at 1, *CenturyTel of Chatham, LLC v. Sprint Communications Co., L.P.*, 861 F.3d 566 (5th Cir. 2017) (No. 16-30634).

"incoherent[],"[39] Sprint provides no persuasive basis for the Commission to diverge from *Centurytel of Chatham.*

Even assuming Sprint were correct that a carrier can violate with impunity its payment obligations under Section 251(b)(5) and the Commission's rules (which MNA does not agree is the case), a fundamental difference exists between withholding payment of disputed amounts, on the one hand, and withholding payments of undisputed amounts as part of a claw-back scheme to obtain a retroactive refund, on the other hand. That the Commission has never held that the latter conduct violates Section 201(b) is of no consequence.[40] As the Fifth Circuit correctly pointed out, the Commission had not addressed the claw-back issue previously.

Sprint's desire for broad immunity from Section 201(b) liability cannot be squared with the Commission's intercarrier compensation reforms, which were intended, in part, to "facilitate predictability and stability."[41] A carrier would enjoy neither predictability nor stability if Sprint could lawfully withhold payment of undisputed amounts for any reason or no reason at all.[42] Indeed, taken to its illogical extreme, Sprint's position would permit a carrier to withhold payment of undisputed amounts for an anticompetitive purpose (*e.g.*, drive a competitor out of business) without such conduct constituting an unjust or unreasonable practice in violation of Section 201(b). That is not and cannot be the law.

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39 Sprint Legal Analysis at 2.

40 Sprint Legal Analysis at 17.

41 *USF/ICC Transformation Order* ¶ 35.

42 Sprint Legal Analysis at 17 (whether non-payment of tariffed charges constitutes a Section 201(b) violation does not "hinge on whether the non-payment was justified").

While it may disagree with the Fifth Circuit's holding in *Centurytel of Chatham*, Sprint was unsuccessful in persuading the Supreme Court to review that decision.[43] Sprint's attack on the Fifth Circuit's decision in this proceeding is no more persuasive.

IV. THE COMMISSION'S *ALL AMERICAN TELEPHONE* DECISION DOES NOT INSULATE SPRINT FROM SECTION 201(B) LIABILITY.

As MNA predicted, Sprint tries to escape liability under Section 201(b) by relying upon the Commission's decision in *All American Telephone*. Such reliance is misplaced.

Notwithstanding Sprint's assertions to the contrary, MNA does not contend that *All American Telephone* "no longer holds any force," nor has MNA ever claimed that the Commission "reversed" *All American Telephone* "without telling anyone."[44] *All American Telephone* remains valid Commission precedent and continues to foreclose "collection actions" based solely on a failure to pay tariffed rates for non-switched access services, and MNA has never said or suggested otherwise.

To avoid the confusion under which Sprint appears to be operating, if a carrier files a complaint alleging a violation of Section 201(b) (or Section 203(c)) due to the failure to pay tariffed rates for services not impacted by the intercarrier compensation reforms in the *USF/ICC Transformation Order*, such a complaint would remain foreclosed by *All American Telephone*. Thus, *All American Telephone* continues to bar claims that a carrier violated Section 201(b) or Section 201(c) by failing, for example, to pay tariffed charges for special access or operator services, as such claims would constitute "exactly the kind of 'collection action' that the Commission has repeatedly held fails to state a claim for violation of the Act."[45]

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43 *See* January 8, 2018 Order denying Petition for a Writ of Certiorari, *Sprint Communications Co., L.P. v. CenturyTel of Chatham, L.L.C., et al.*, (No. 17-627).

44 Sprint Legal Analysis at 2, 12.

45 *All American Telephone* ¶ 11.

Here, however, MNA's claims under Section 201(b) are not based solely on Sprint's failure to pay MNA's tariffed rates. Rather, MNA has alleged that Sprint violated its reciprocal compensation obligations explicitly imposed on Sprint by Section 251(b)(5) as well as the *USF/ICC Transformation Order* and the Commission's rules when it withheld payment of MNA's tariffed charges (and clawed back payments previously made to MNA, as discussed above). *All American Telephone* does not insulate Sprint from such Section 201(b) claims.[46]

While carriers may have always "collaborate[d] to complete a long distance call,"[47] such collaboration was neither mandated by nor regulated under federal law or Commission rule prior to the *USF/ICC Transformation Order*. Based on the Commission's decision to bring "all traffic within the section 251(b)(5) regime" and to regulate all traffic exchanged with a LEC under the "express terms of section 251(b)(5),"[48] the collaboration between carriers in completing a long-distance call is now governed by federal law. Sprint violated its obligations under federal law when it withheld payment to MNA and clawed back payments previously made to MNA – violations that are actionable under Section 201(b).

Sprint misleadingly suggests that the Commission considered the impact of its intercarrier compensation reforms when "it affirmed *All American Telephone* on rehearing over a year *after* the *Transformation Order*."[49] Unless the parties seeking reconsideration of *All American Telephone* possessed the predictive abilities of Nostradamus, they could hardly have

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46 *See, e.g., Contel of the South, Inc. v. Operator Communications, Inc.,* Memorandum Opinion and Order, 23 FCC Rcd 548, ¶ 7 (2008) (finding that that Verizon may bring a Section 201(b) claim that "seeks to enforce compensation obligations explicitly imposed upon IXCs by Commission rules …"); *In re Empire One Telecommunications, Inc.*, 48 B.R. 692, 701 (Bankr. S.D.N.Y. 2011).

47 Sprint Legal Analysis at 12 (quoting *Local Competition First Report and Order* ¶ 1034).

48 *USF/ICC Transformation Order* ¶¶ 762 & 764.

49 Sprint Legal Analysis at 11.

addressed the *USF/ICC Transformation Order* in a petition for reconsideration filed in February 2011 – some nine months *before* the Commission's *USF/ICC Transformation Order*.[50] Furthermore, Sprint either intentionally or conveniently overlooks that the Commission never mentioned the *USF/ICC Transformation Order* in its March 2013 order denying reconsideration of *All American Telephone*, nor did it address the implications of its intercarrier compensation reforms.[51]

In short, *All American Telephone* does not undermine or foreclose MNA's claim that Sprint violated Section 201(b) by failing to comply with its payment obligations under Section 251(b)(5) as well as the *USF/ICC Transformation Order* and the Commission's implementing rules when it withheld payment to MNA and clawed back payments previously made to MNA.

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Respectfully submitted,

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50 Petition for Reconsideration or Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed Feb. 22, 2011).

51 *All American Telephone Co. v. AT&T*, Order on Reconsideration, 28 FCC Rcd 3469 (2013).

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, I caused a copy of the foregoing Reply Legal Analysis to be served by hand delivery (*) or electronic mail (+) to the following:

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