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January 27, 2005

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

Re: Sprint Corp. Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by LECs,
CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic,
CC Docket No. 99-68
Developing a Unified Intercarrier Compensation Regime,
CC Docket No. 01-92

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits this ex parte to respond to various claims made recently in the above-captioned proceedings.

The Commission should expeditiously grant Sprint's Petition for Declaratory Ruling.[1] Sprint's Petition addresses a situation that is increasingly common: cases in which a non-incumbent LEC has established an NXX code identified with the local calling area of a rural ILEC (or other carrier serving an area, *e.g.*, CLECs and CMRS providers) for the purpose of offering local services that terminate to telephone numbers associated with that calling area. Rural LECs (RLECs), CLECs and CMRS providers typically cannot afford the costs of negotiating and deploying direct interconnections to complete the small number of local and intraLATA toll calls passing between their networks within such calling areas. Accordingly, such carriers typically route such calls to the tandem switch of another ILEC in the same LATA with which both carriers have established interconnection (usually an RBOC).

[1] Sprint Corp. Petition for Declaratory Ruling, CC Docket No. 01-92, filed May 9, 2002.

Sprint's Petition was precipitated by BellSouth's blatantly anticompetitive refusal to load Sprint's RLEC NXX codes into BellSouth tandems for routing to rural ILECs' local calling areas. As most commenters recognize, however, Sprint's Petition actually raises much more important and fundamental issues concerning the obligations of all carriers under the Act and the Commission's rules to provide "transiting." Indeed, after Sprint filed its Petition, BellSouth and other ILECs relented in many cases and "voluntarily" agreed to provide transiting and to load such NXX codes into their tandems.[2] The Bells continue to argue, however, that they have no legal obligation to provide transiting at all, and that they can charge whatever rate they like for such services. Moreover, many rural LECs insist that they can charge CLECs and CMRS carriers *both* originating *and* terminating access charges for such transited calls.

The Commission should act quickly to clarify both the ILECs' and the RLECs' obligations. In particular, the Commission should clarify: (1) that the statute unequivocally requires all LECs to provide transiting to other carriers; (2) that ILECs may charge only the originating carrier for transiting; (3) that the reciprocal compensation regime (and not the access charge regime) applies to transit traffic exchanged between competitive carriers and between a competitive carrier (or CMRS provider) and an RLEC; and (4) in the absence of an interconnection agreement between those two carriers, the default bill and keep rule applies to the exchanged traffic. The need to clarify the rules regarding transiting is increasingly urgent. The Commission's silence has led to substantial litigation before state commissions, and there is a desperate need for a rational and predictable regime to govern interconnection and compensation whenever three local carriers collaborate to complete a call.

*The Statute Requires the ILECs To Provide Transiting.* The ILECs' principal contention in this proceeding is that ILECs have no legal obligation under either the statute or the Commission's rules to provide transiting to other competitive LECs.[3] Under the ILECs' view, although an ILEC may graciously agree to provide transiting, the ILEC may withdraw the offer at any moment and it may charge whatever it pleases for such service.

The statute flatly refutes the Bells' contentions. Section 251(a) gives the Commission authority to regulate *all* transit traffic, including intrastate traffic.[4] Section 251(a) requires all

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[2] AT&T has also experienced such refusals to load NXX codes (*e.g.*, from BellSouth and SBC), but ILECs have relented in many cases following complaints to state commissions.

[3] *See, e.g.*, BellSouth 1/11/05 Ex Parte; SBC Comments, CC Docket No. 01-92, filed August 8, 2002.

[4] Section 201 also independently authorizes the Commission to regulate transit traffic to the extent that it is interstate, and to ensure that the charges are just and reasonable, and the Commission has long used that authority to order such "through routes." 47 U.S.C. § 201(a) (requiring interstate common carriers to establish through routes); 47 U.S.C. § 201(b) (requiring rates and practices to be just and reasonable); Memorandum Opinion and Order, *Elkhart Tel. Co.*

telecommunications carriers to "interconnect directly or indirectly" with all other telecommunications carrier networks.[5] This provision empowers the Commission to require and regulate transiting. It requires interconnection of all carriers, but expressly gives carriers the option of relying on *indirect* interconnection to accomplish that end. This is essential to efficient networking, because direct interconnection between each carrier and every other would be neither cost-efficient nor technically feasible. Thus, Congress required carriers both to accept and to enable one another to establish technically feasible *indirect* interconnection – *i.e.*, transiting – to ensure that the telecommunications network remains fully interconnected, as Congress envisioned.

As the Commission has observed, the "fundamental purpose" of section 251(a) is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers."[6] *Indirect* interconnection under § 251(a) thus plainly encompasses the obligation of the "middle" carrier (or carriers) to provide transit between the two indirectly interconnected carriers. Indeed, Congress's requirement that all carriers "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" would be meaningless if that requirement did not also encompass the requirement to maintain, where technically feasible, an open connection between two indirectly interconnected carriers. The Commission itself has repeatedly recognized that transit *is* that "open pipe" and thus is a fundamental component of indirect interconnection.[7]

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*v. SWBT*, 11 FCC Rcd 1051, 1056-57 ¶¶ 34, 37; *see, e.g.*, Report and Order, *MTS and WATS Market Structure Policies and Requirements*, 100 F.C.C.2d 860 (1985).

[5] 47 U.S.C. § 251(a)(1).

[6] Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15,435, 15,478 ¶ 84 (2001) ("*Collocation Remand Order*"), *aff'd sub nom. Verizon Telephone Cos.* v. *FCC*, 292 F.3d 903 (D.C. Cir. 2002); *see also* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499, 15,591 ¶ 997 (1996), *aff'd in relevant part, Competitive Telecommunications Ass'n* v. *FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part, vacated in part, Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, reversed in part, AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999) (subsequent history omitted) ("*Local Competition Order*") (noting that "the [section 251] duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives.").

[7] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, 17 FCC Rcd 27,039, 27,101-02 ¶ 118 (2002) (finding that transit was key to WorldCom's "ability to interconnect indirectly with other carriers" and serve the "interests of all end users in connectivity to the public switched network."); Report and Further Order on

Incumbent LECs have a special duty to provide transiting services under both § 251(a) and § 251(c)(2). Section 251(c)(2) requires incumbent LECs to interconnect with requesting carriers for the "transmission and routing of telephone exchange services and exchange access." 47 U.S.C. § 251(c)(2). Nothing in the language of § 251(c)(2) limits this duty to traffic exchanged solely between the requesting carrier and the ILEC. Thus, this section should be interpreted to require incumbent LECs also to provide interconnection for the transmission and routing of traffic between a requesting carrier and other third party carriers. Moreover, in the *Local Competition Order* (at ¶ 176), the Commission rejected the argument "that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic," because that "duty applies to all LECs and is clearly expressed in Section 251(b)(5)." Thus, § 251(c)(2), read together with § 251(a)(1), which gives all carriers the right to indirect interconnection, establishes that incumbent LECs must provide transiting to CLECs.

The requirement to provide transiting is not at all inconsistent with the Commission's previous rulings concerning the application of section 251(a) to the terminating access offerings of sham CLECs.[8] In those cases, the question was whether a carrier could be forced to *purchase* the termination services of another carrier, even when the rates and terms for that service were patently unreasonable. The Commission held that § 251(a) did not require AT&T to purchase such sham services. And although it noted there that § 251(a) authorizes the Commission only to regulate the "physical linking of two networks," both the Commission and the D.C. Circuit have elsewhere established that § 251(a) requires all carriers to *offer* both direct and indirect interconnection -- which necessarily includes an offering of transiting service. Indeed, in affirming the Commission's decision in the *Total Telecom Order*, the D.C. Circuit found that all carriers have an obligation under § 251(a) "to *establish* a physical connection with" other carriers,[9] and that despite AT&T's refusal in that case to send traffic to the plaintiff carrier (and

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Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16,978, 17,340 ¶ 534 n.1640 (2003) (subsequent history omitted) (noting that "transiting" is "a means of indirectly interconnecting with other . . . carriers for the purpose of terminating local and intraLATA traffic."); *Collocation Remand Order*, at 15,477-78 ¶¶ 83-84 (finding that the Commission has authority to require LECs to provision a cross-connection between a CLEC and a competitive transport provider because that connection is essential to the indirect interconnection required under section 251(a)).

[8] Memorandum Opinion and Order, *Total Telecom. Servs. v. FCC*, 16 FCC Rcd 5726, 5736-37, ¶ 23 (*Total Telecom Order*), *aff'd in relevant part, reversed in part, AT&T* v. *FCC*, 317 F.3d 227 (D.C. Cir. 2003) (*Atlas Appeal*).

[9] *Atlas Appeal*, 317 F.3d at 235 (emphasis added).

to pay outrageously high terminating access charges), the two carriers were in fact interconnected via indirect transit-based links provided by Southwestern Bell.[10]

These cases thus support the Commission's section 251(a) authority over transiting and refute the ILECs' claims that they have no enforceable obligation to provide transit. The independent connections of AT&T and Southwestern Bell and the plaintiffs and Southwestern Bell could not satisfy section 251(a)'s indirect interconnection requirement unless Southwestern Bell were in fact *required* to provide a link between the two carriers. That is, the fact that two carriers directly connect with a third carrier may establish the possibility of indirect interconnection, but section 251(a) requires *actual* interconnection, and that is accomplished only where the middle link – transit – is offered by that third carrier. The D.C. Circuit's decision establishes that carriers cannot necessarily be forced to *purchase* service from one another (and thus a carrier may decline to utilize indirect interconnection in sending traffic to another carrier), but § 251(a) does require all carriers to *offer* such interconnection, including the provision of the essential middle link for indirect interconnection, at compensatory rates. Any other interpretation would render § 251(a)'s requirement of indirect interconnection meaningless.

The Commission would be especially justified in ordering *dominant* carriers, such as the ILECs, to provide transiting under § 251(a) (and § 251(c)(2)). Dominant carriers control ubiquitous, bottleneck facilities, and as a result they have the unique ability to block traffic altogether – and effectively lock new entrants out of the market – by refusing to offer transiting. New entrants – whether wireline, wireless, or VoIP providers – simply do not have the economic incentive or the resources to establish interconnection agreements and direct interconnection facilities with all of the smaller carriers with whom they exchange traffic. Indeed, in most cases there is no viable business case to create such connections because of the limited amount of traffic involved. Thus, it is vital to the continued functioning of the PSTN that the Commission require dominant ILECs to provide transiting, and to promptly load NXX codes in their tandems to facilitate the separate rating and routing of such traffic.[11]

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[10] *Id.*

[11] *See, e.g., Virginia Arbitration Order*, 17 FCC Rcd 27,039, 27,101-02 ¶ 118 (2002) (transit is key to the "ability to interconnect indirectly with other carriers" and serve the "interests of all end users in connectivity to the public switched network"). The need for transiting has been well articulated by the North Carolina Utilities Commission: "If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. Indeed, in a small way this has already happened in this case when Verizon refused to transit certain traffic. ... These effects illustrate the ultimate unsupportability of the Opponent's view of their obligations as ILECs to interconnect indirectly – essentially, as matters of grace, rather than duty. . . . The fact of the matter is that transit traffic is not a new thing. It has been around since 'ancient' times in telecommunications terms. The reason that it has assumed new prominence since the enactment of [the 1996 Act] is that there are now many more carriers involved – notably, the new CMRS and the [CLECs] – and the amount of traffic has increased significantly.

*ILECs May Charge Only the Originating Carrier for Transiting.* A number of RLECs have taken the position that the "other" carrier should pay all transiting costs, regardless of whose network originated the call. These claims are flatly inconsistent with the Commission's rules. The Commission should clarify that ILECs may charge only the originating carrier for transiting.

Rule 51.703(b) (47 C.F.R. § 51.703(b)) provides that "[a] LEC may not assess charges on *any other* telecommunications carrier for telecommunications traffic that originates on the LEC's network" (emphasis added). This rule unambiguously establishes that the *originating* carrier bears the *entire* financial responsibility for the costs of transmitting calls that originate on its network to the terminating party. Therefore, RLECs are prohibited from imposing *any* charges on another carrier for calls originating on their networks. Accordingly, the Commission should make clear that neither a call-originating RLEC nor a transiting ILEC may charge a CLEC for transiting when the CLEC is the *terminating* carrier. Rather, the RLEC, as the call originator, is responsible for all costs for transiting and terminating their customers' calls to CLEC subscribers. They may not shift those costs to terminating CLECs.

The Commission's transiting decisions regarding paging carriers do not require a different result. To be sure, in complaint cases involving paging carriers, the FCC has permitted the transiting carrier to charge the terminating carrier. Those cases make equally clear, however, that this was permissible *only* because the terminating carrier could turn around and obtain reimbursement from the originating carrier under the reciprocal compensation regime. *See Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd. 6275, ¶ 4 (2002) ("GTE North may charge Answer Indiana for the cost of the portion of these facilities used for transiting traffic, and Answer Indiana may seek reimbursement of these costs from originating carriers through reciprocal compensation"); *Mountain Communications Inc. v. Qwest*, 17 FCC Rcd. 2091, ¶ 12 n.30 (2002). Thus, consistent with the FCC's rules, the originating carrier ultimately paid the costs of transiting, either directly or indirectly. Any other result would have unlawfully allowed the originating carrier to shift some of its costs to another carrier in violation of Rule 51.703(b).

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Few if any, thought about complaining about transit traffic until recently. It strains credulity to believe Congress in [the 1996 Act] intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing so would inevitably have a tendency to thwart the very purposes that [the 1996 Act] was designed to allow and encourage." *Petition of Verizon South, Inc. for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method,* Order Denying Petition, Docket No. P-19, SUB 454 (Sept. 22, 2003) at 6-7.

Moreover, one of the paging carriers in these cases, Mountain Communications, sought D.C. Circuit review of the FCC's determination that a transiting carrier could charge the terminating carrier in the first instance. Mountain argued that the promise of reimbursement from the originating carrier was illusory, because the terminating carrier often did not have sufficient information to seek such reimbursement. The court strongly suggested in dictum that the FCC had acted arbitrarily by not adequately answering Mountain's claim. *See Mountain Communications, Inc.* v. *FCC*, 355 F.3d 644, 649 (D.C. Cir. 2004) ("by indicating that Mountain could charge the originating carrier, [the FCC] suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs"). There was no holding on that point only because Mountain withdrew its appeal after Qwest promised at oral argument to provide Mountain the information necessary to bill the originating carrier. *See id.*

The mere fact that the FCC has found such arrangements to be *permissible*, however, does not mean that such arrangements are the most efficient or logical way to handle transiting traffic. As the D.C. Circuit recognized in *Mountain*, the transiting carrier – not the terminating carrier – has the information necessary for the proper billing for transiting. It simply makes no sense, as a matter of policy, for the Commission to allow the transiting carrier to bill one carrier for all such services (in both directions) and then force that carrier to seek reimbursement from the other carrier, when the transiting carrier – which has superior information as well as an existing direct relationship both carriers – can simply bill the originating carrier directly.[12] The Commission issued the *Texcom* and *Mountain* rulings in complaint cases, where the only question was whether an existing practice was permissible. Especially in light of the D.C. Circuit's opinion in *Mountain*, the Commission should make clear in this policy proceeding that the best and most procompetitive reading of its rules is to require the transiting carrier to bill only the originating carrier.

*Bill and Keep Should Be the Default Rule for Traffic that is Indirectly Passed Between Carriers.* Finally, many RLECs attempt to assess access charges – both originating and terminating – on CLECs for transited traffic. This is also a blatant violation of the Commission's rules. The Commission should immediately make clear that its reciprocal compensation rules

[12] A rule that permits transiting carriers to bill terminating carriers for their transit services would force the terminating carrier to negotiate and enter into a billing arrangement with the originating carrier before it could obtain reimbursement for the transiting charges it pays on behalf of the originating carrier. Given the small volumes of traffic that are typically involved, requiring carriers to engage in such a process would be enormously cumbersome and inefficient, and it would significantly reduce the benefits of indirect interconnection. Such a policy clearly would not advance the fundamental purpose of the Act's provisions supporting indirect interconnection, *i.e.*, to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers."

govern this traffic and that bill and keep is the default rule that applies between CLECs and RLECs.

The traffic at issue is governed by the Commission's reciprocal compensation rules, *not* the access charge rules. The traffic at issue is traffic for which the competitive carrier (whether wireline, wireless, or VoIP) has established an NXX in the RLEC's local calling area, and calls exchanged between these providers and the RLEC are offered and billed as local services. The Commission's reciprocal compensation rules apply unless traffic involves "exchange access" within the meaning of the Act. 47 C.F.R. § 51.701(b)(1). "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purposes of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone toll service," in turn, is defined as "telephone service between stations in different exchange areas *for which there is made a separate charge not included in contracts with subscribers for exchange service*." *Id.* § 153(48) (emphasis added). The services at issue here both begin and end in the same exchange areas, and new entrants and RLECs both bill such services as local services (without toll charges). Accordingly, the reciprocal compensation rules apply. *See* AT&T 1/25/05 Ex Parte at 2-5.

Within this framework, the Commission should clarify here that, in the absence of an interconnection agreement between the originating and terminating carrier, the default rule is bill and keep. New entrants, such as CLECs and small VoIP providers, simply do not have the resources to establish an interconnection arrangement and agreement with every RLEC and CMRS carrier in these outlying areas with which they may exchange traffic. The Commission's rules should reflect these realities by establishing a default bill and keep rule in such cases.[13] Otherwise, CLECs and VoIP providers would be saddled with prohibitively expensive transaction costs that would retard the development of these services.

A bill and keep default rule is also necessary to prevent the ILECs that provide transit "in the middle" from abusing their position to fleece new entrants by forcing them to purchase a "clearinghouse function." For example, some ILECs, such as SNET, have charged new entrants both for transiting and also for termination on "behalf" of the terminating RLEC. SNET then established a bill and keep arrangement with the RLECs, and pocketed the difference. Although the Connecticut commission had ordered SNET to put a stop to its practice – reducing SNET's transiting rate from 3.5 cents per minute to cost plus 35% for its existing transit service that includes the "clearinghouse function" and ordering a second, alternative transit service that excludes the "clearinghouse function" – the order has been stayed pending SBC's federal court challenge. *Southern New England Telephone Company* v. *Connecticut Department Of Public Utility Control*, Civil Action No. 3:03CV00278 SRU, U.S. Dist. Ct. for the District of

[13] If, however, an RLEC and CLEC have voluntarily established an interconnection agreement that calls for billing of call termination charges, the transiting carrier should be required to provide specific call information that would permit the carriers to bill one another.

Connecticut.

Very truly yours,

/s/ David L.Lawson

David Lee Lawson