Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

PETITION FOR PARTIAL RECONSIDERATION

In the *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking* ("*Order*") issued on November 5, 2008, the Commission concluded that ISP-bound traffic (a) falls within the scope of section 251(b)(5) of the Communications Act, which governs reciprocal compensation arrangements, and (b) is interstate in nature and therefore also falls within the Commission's section 201 authority. The Commission relied only on section 201 to maintain the $.0007 rate cap governing ISP-bound traffic.

Sprint Nextel agrees with the *Order* and files this Petition for Reconsideration for the limited purpose of urging the Commission to add that the $.0007 rate cap is alternatively justified under section 252(d)(2), the pricing rule governing reciprocal compensation agreements made under section 251(b)(5). Given the complexity of the statutory scheme, the lengthy history of litigation concerning compensation for carrying ISP-bound traffic, and the pending petition for review filed by Core Communications in the D.C. Circuit, the Commission would be well-served by relying on two alternative legal theories. In particular, because the D.C. Circuit stated – in *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) – that the Commission's rules governing ISP-bound traffic are likely permissible under section 251(b)(5), that court is extremely unlikely to overturn a rate cap based on that provision.

An *Order on Reconsideration* adding section 251(b)(5) as a second, independent justification for the rate cap could be as brief as a few pages. The *Order* itself already contains much of the necessary analysis (which need not be repeated), including the critical point that "ISP-bound traffic falls within the scope of section 251(b)(5)." *Order* ¶6. On reconsideration, the Commission would merely have to explain why sections 251(b)(5) and 252(d)(2) justify the $.0007 rate cap and the mirroring rule. That analysis, in turn, is already largely set forth in Appendices A and C of the *Order*, which provide the basis for the conclusion that $.0007 is a reasonable rate cap for all sorts of traffic. Accordingly, the Commission can and should act quickly to issue an *Order on Reconsideration* before the D.C. Circuit addresses the pending petition for review of the *Order*.

A. If The Commission Does Not Adopt Comprehensive Reform, It Should Immediately Conclude That The Rate Cap For ISP-Bound Traffic Is Justified Under Section 251(b)(5) As Well As Section 201.

In its comments filed pursuant to the Further Notice of Proposed Rulemaking portion of the Commission's November 5 release, Sprint Nextel urges the Commission to adopt the pending proposal to apply the additional costs standard of section 252(d)(2) to all intercarrier compensation payments that are subject to section 251(b)(5). Although Sprint Nextel continues to believe that bill-and-keep is the most efficient approach to intercarrier compensation, it concurs with Appendices A (¶¶ 236-273) and C (¶¶ 257-263) of the *NPRM* that setting terminating rates using a forward-looking, long-run incremental cost standard excluding all common costs – *i.e.*, "Faulhaber rates" – is the best approach for a Calling Party Network Pays regime.

If the Commission promptly adopts a comprehensive reform proposal that includes the additional costs standard, that would render this Petition for Reconsideration moot. If *all* intercarrier compensation payments falling under section 251(b)(5) were subject to the additional costs standard of Section 252(d)(2)(a), there would be no need for separate rules for ISP-bound traffic. As Appendices A and C explain, once "a state commission, applying the 'additional costs' standards" proposed by the Appendices, "has established reciprocal compensation rates that are at or below $.0007 per minute-of-use," the interim pricing standards for ISP-Bound traffic adopted by the Commission in the *ISP Remand Order* (as modified by the *Core Forbearance Order*) would no longer apply. App. A ¶198; App. C ¶193.

If, however, the Commission does not immediately adopt comprehensive reform of intercarrier compensation, it should clarify that the rate cap for ISP-bound traffic is independently justified under section 251(b)(5). And it should do so promptly, so that the

Commission may rely on that additional justification in litigation resulting from the existing *Order*.

Adopting section 251(b)(5) as an additional justification for the existing rules would not require extensive changes to the existing *Order*. Indeed, the *Order* already contains most of the necessary analysis. Most important, the *Order* begins by specifically holding "that . . . ISP-bound traffic falls within the scope of section 251(b)(5)." *Order* ¶6. It correctly explains that ISP-bound traffic is "telecommunications," the "broadest of the statute's defined terms," which "is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic." *Order* ¶8. The *Order* also properly rejects Verizon's claim[1] that section 251(b)(5) applies only to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier. *Order* ¶10.

The *Order* continues by addressing the relationship between section 251(b)(5) and section 252(d)(2), rejecting Verizon's argument[2] that Section 252(d)(2)(A) should be read as a limitation on section 251(b)(5). It explains that Section 251(b)(5) "defines the scope of traffic that is subject to reciprocal compensation," *Order* ¶12, and, as discussed above, that scope includes ISP-bound traffic.

Notwithstanding that conclusion, however, the Commission relied solely on section 201 in the *Order*, stating that it "retain[s] [its] authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic." *Order* ¶21. While Sprint Nextel agrees that the Commission has authority to regulate ISP-bound traffic under

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[1] *See, e.g.*, Letter from Ann. D. Berkowitz, Associate Director, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 99-68, 96-98, Att. at 26 (filed May 17, 2004) (attaching white paper entitled "Internet-Bound Traffic is Not Compensable Under Sections 251(b)(5) and 252(d)(2)") ("Verizon/BellSouth White Paper").

[2] Verizon/BellSouth White Paper at 41-43.

section 201, the Commission could further bolster the *Order* by adopting a limited order on reconsideration confirming that the pricing rules adopted by the *Order* are independently justified under Section 251(b)(5).[3]

B. The $.0007 Rate Cap Is Consistent With Section 252(d)(2)(A) Under Either An "Additional Costs" Or A "TELRIC" Approach.

Section 252(d)(2)(A) provides that State commissions must ensure that "the terms and conditions for reciprocal compensation" are "just and reasonable" by providing for "mutual and reciprocal recovery" on the "basis of a reasonable approximation of the additional costs" of terminating the traffic. In the *Local Competition First Report and Order*,[4] the Commission directed the states to employ a forward-looking, long-run average incremental cost methodology – known as TELRIC – in arbitrating interconnection disputes. In 2001, however, when many intercarrier compensation rates were much higher than $.0007, the Commission found that "'CLECs appear to have targeted customers that primarily or solely receive traffic, particularly ISPs, in order to become net recipients' of reciprocal compensation payments." App. A ¶239, quoting *Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9616, ¶11 (2001). Adopting an additional costs standard would eliminate that incentive.

1. *The* "*Additional Costs*" *Standard.* The traditional economic definition of incremental costs differs from TELRIC primarily in that it "excludes all common costs." App. C. ¶246. This

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[3] As the Commission proceeds with intercarrier compensation reform, it should continue to keep its authority over wireless rates under section 332 in mind, as it did in the *Order*. *See Order* ¶¶19-20. That provision plainly provides the Commission with authority to order ILECs to exchange traffic with wireless carriers at specified rates. However, that authority is more pertinent to the mirroring rule than to the $.0007 rate cap for ISP-bound traffic because the most typical situation in which the rate cap applies involves an ILEC carrying traffic to a CLEC that delivers it to an ISP, rather than a situation where a wireless carrier is involved.

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15844-69, ¶¶ 672-732 ("*Local Competition First Report and Order*").

approach is more consistent than TELRIC with the Commission's finding in the *Local Competition First Report and Order* that "the 'additional cost' of terminating a call . . . primarily consists of the traffic-sensitive component of local switching." 11 FCC Rcd at 16025, ¶1057.

As Appendices A and C demonstrate, the incremental cost of call termination on modern circuit networks is small because "modern switches are to a large extent non-traffic sensitive." App. C ¶250. Accordingly, "the incremental cost of call termination on modern switches should be de minimis." *Id.* Record evidence places these "de minimis" costs between $.00010 and $.00024 per minute for existing modern circuit switches, far below the existing rate cap of $.0007.[5] While some commenters criticized this evidence for failing to reflect the fact that not all incumbent LEC switches are as efficient as today's softswitches,[6] "[t]his argument fundamentally misconstrues the purpose of a forward-looking cost methodology." App. C ¶254. The point of such methodology is to "measure . . . the economic value of future investments," which is what drives investment in a competitive market. *Id.* Adopting an additional costs methodology will thus both curtail regulatory arbitrage and result in better investment decisions by carriers.

In short, if the Commission adopts the "additional costs" standard under section 252(d)(2) for ISP-bound traffic, there is no question that $.0007 is a reasonable rate cap, since the evidence cited in the *Further Notice* suggests that the additional cost of completing calls is in the range of $.0001 to $.00024. The Commission's *Order on Reconsideration* should adopt the additional cost standard for ISP-bound traffic, set forth the evidence regarding actual additional costs, and conclude that the existing rate cap is reasonable in light of those costs.

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[5] *See, e.g.,* App. C ¶252 (discussing evidence submitted by AT&T estimating the incremental cost of a modern softswitch).

[6] *See, e.g.,* Windstream Oct. 27, 2008 *Ex Parte* Letter at 2.

2. *The "TELRIC" Standard*. The $.0007 cap can also be justified if the Commission retains TELRIC as the appropriate standard. Level 3, the CLEC that serves the majority of ISPs, submitted evidence showing that it has entered into agreements covering "the vast majority of ILEC lines nationwide" that provide for compensation at or below the $.0007 rate level.[7] Most of those agreements – including agreements for a $.0004 rate with Verizon, a $.0004 rate with Embarq, and a $.00035 rate for the SBC region – were negotiated after the Commission adopted the $.0007 rate cap in 2001.[8] The Commission selected $.0007 as the rate cap in 2001 because, relying on evidence relating to Level 3's agreements with ILECs at that time, $.0007 approximated "the downward trend in intercarrier compensation rates reflected in recently negotiated interconnection agreements."[9] Plainly the downward trend has continued, and if a $.0007 rate cap was justified in 2001 it is clearly justified now.

The fact that these agreements were voluntarily negotiated shows that a $.0007 rate cap – which is *double* the negotiated level for the SBC region – is reasonable under TELRIC. TELRIC, of course, was upheld by the Supreme Court in the face of arguments that it led to unreasonably low rates, and TELRIC had been struck down by the Eighth Circuit on the ground that it envisioned the use of a hypothetical network that had unrealistically low costs.[10] There is simply no reason to think that CLECs serving ISPs would voluntarily negotiate agreements covering the majority of lines nationwide that set rates that do not provide adequate compensation under the stringent TELRIC standard.

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[7] *See* Level 3 Aug. 18, 2008 *Ex Parte* Letter at 5.

[8] *Id*. at 6.

[9] *ISP Remand Order* at 9190-91 ¶85.

[10] *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 496 (2002).

In addition, TELRIC assumes the use of the most efficient technology.[11] Appendices A (¶254) and C (¶249) summarize record evidence provided by Sprint Nextel[12] concerning the cost of termination on *circuit* switches as determined by state commissions applying TELRIC. Specifically, "the national weighted average price per minute for unbundled local switching was $0.00058 (with individual rates ranging from a low of $0.00004 to a high of $0.0061)." App. C ¶249. Given that this average price per minute is well below the existing rate cap of $.0007, the Commission could justify that cap even assuming that networks should be assumed to use circuit switches for purposes of the TELRIC analysis. But as Sprint Nextel also explained, more efficient "packet networks have become the deployment norm."[13] Because TELRIC calls for the calculation of rates assuming the use of the most efficient technology, the use of *packet* networks should be assumed for purposes of a TELRIC analysis. Since the relevant TELRIC figure for circuit switches is less than the $.0007 rate cap, that cap is plainly warranted if rates are calculated on the basis of the use of packet switches.

Moreover, as Sprint Nextel previously demonstrated, "carriers of all types and sizes" have entered into voluntary agreements for the exchange of massive volumes of traffic at termination rates of $.0007 or less.[14] Because there is no reason why carriers would voluntarily agree to rates that are not fully compensatory, that evidence strongly supports the $.0007 rate cap. Again, there is simply no reason why carriers would agree to these rates if they were entitled to more under the stringent TELRIC standard.

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[11] *See Id.* at 506, quoting 47 C.F.R. § 51.505(b)(1).

[12] *See* Sprint Nextel Sept. 26, 2008 *Ex Parte* Letter. The data used in the analysis were obtained from the March 2006 "Survey of Unbundled Network Element Prices in the United States."

[13] *Id.* at 6.

[14] *Id.* at 2.

3. *Core's Arguments*. Core has argued that it would be unlawful for the Commission to apply a different rule to ISP-bound traffic than other traffic, but that should not prevent the Commission from acting on this Petition for Reconsideration. Of course, Sprint Nextel has urged the Commission to proceed with comprehensive reform immediately, and if it does so that would eliminate Core's argument that it is being treated discriminatorily. But there is no merit to the contention in any event. As the record shows, ISP-bound traffic has been a particular problem with respect to arbitrage schemes, and it would be permissible for the Commission to address the most pressing problem first.

In addition, under section 251(g) the access charge regime and other systems of intercarrier compensation that governed prior to the enactment of the 1996 Telecommunications Act remain in place until explicitly superseded. There is surely no problem with treating compensation for carrying ISP-bound traffic differently than other forms of compensation in light of that provision, under which Congress directed that compensation issues not governed by pre-1996 Act regimes should be subject to section 251(b)(5) before other compensation regimes are reformed.

Nor is there merit to Core's argument that the Commission would be impermissibly establishing rates by maintaining the $.0007 rate cap. In Sprint Nextel's view, rates should be established far below that level. If the Commission does not move to a bill-and-keep methodology, it should adopt the additional costs standard. As noted above, the Commission has cited evidence showing that the proper rate under that standard should be in the range of $.00010 to $.00024. But the evidence before the Commission shows that application of the additional costs standard cannot reasonably lead to rates above $.0007, which is many multiples of an appropriate rate.

Similarly, as stated above, the vast majority of ISP-bound traffic is currently carried at rates about half of the $.0007 level. The Commission could therefore conclude that no reasonable application of the TELRIC standard – including the requirement that rates be based on the use of the most efficient technology – could lead to rates above $.0007. Because the technology used to carry *most* ISP-bound traffic results in rates far below that level, use of the most efficient technology necessarily leads to rates far below $.0007.[15]

Respectfully submitted,

/s/ Charles W. McKee
Charles W. McKee
Michael B. Fingerhut
SPRINT NEXTEL CORPORATION
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-3786

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[15] Finally, it is worth noting that nothing about this request for the addition of an alternative basis for the $.0007 rate for ISP-bound traffic adversely affects rural ILECs. ISP-bound traffic already is subject to a $.0007 cap and the addition of an alternative justification changes only the grounds on which it can be defended. Moreover, ILECs obtain the benefit of the rate cap only if they agree to the mirroring rule, and some ILECs have not done so. Nothing about adding a justification for the rate cap under sections 251(b)(5) and 252(d)(2) affects the ability of rural ILECs to choose not to be subject to the rate cap and the mirroring rule.