

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996)	
)	
Developing a Unified Intercarrier Compensation)	CC Docket No. 01-92
Regime)	
)	
Intercarrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68
)	
IP-Enabled Services)	WC Docket No. 04-36
)	
)	

OPPOSITION TO SPRINT NEXTEL PETITION FOR PARTIAL RECONSIDERATION

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ATTORNEYS FOR TW TELECOM INC.

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OPPOSITION TO SPRINT NEXTEL PETITION FOR PARTIAL RECONSIDERATION

tw telecom inc. (“tw telecom”), through its undersigned counsel, hereby submits this opposition to Sprint Nextel Corporation’s (“Sprint Nextel’s”) Petition for Partial Reconsideration¹ of the Commission’s November 5th, 2008 Order responding to the United States Court of Appeals for the District of Columbia Circuit’s remand of the Commission’s

¹ Sprint Nextel Corp. Pet. for Partial Recons., CC Dkt. Nos. 96-45 *et al.*, WC Dkt. Nos. 04-36 *et al.*, (filed Dec. 18, 2008) (“Petition”).

intercarrier compensation rules for ISP-bound traffic.² The Petition should be rejected for the reasons discussed herein.

I. **Sprint Nextel’s Petition Must Be Dismissed Because It Was Not Timely Filed**

As a threshold matter, the Petition must be dismissed as untimely. Section 405(a) of the Communications Act (the “Act”) and Section 1.106(f) of the Commission’s rules require petitions for reconsideration to be filed within 30 days from the date of public notice of the final Commission action.³ Under Section 1.4(b)(2) of the Commission’s rules, the date of public notice for non-rulemaking orders is the release date. *See* 47 C.F.R. § 1.4(b)(2). Here, the Order was adopted in a non-rulemaking proceeding. The decision ultimately underlying the Order was a declaratory ruling,⁴ and it is well established that declaratory rulemaking proceedings are adjudications, not rulemakings.⁵ Section 1.4(b)(1) therefore applies, and public notice of the Order occurred on November 5, 2008, the date the FCC released the Order. Thus, to have been timely, any petitions for reconsideration of the Order must have been filed with the Commission

² *High-Cost Universal Service Support et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (“Order”).

³ *See* 47 U.S.C. 405(a) (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.”); 47 C.F.R. § 1.106(f).

⁴ *See Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999), *vacated and remanded*, *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

⁵ *See, e.g., Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (holding that “there is no question that a declaratory ruling can be a form of adjudication”); *Pets. of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, ¶ 20, n.51 (2002) (“[A] declaratory ruling proceeding is an adjudication, not a rulemaking under the Administrative Procedure Act (APA). . . . The Commission rule that authorizes us to issue declaratory rulings specifically cites the adjudication provision of the APA as its source of authority. *See* 47 C.F.R. § 1.2 (citing 5 U.S.C. § 554).”).

no later than December 5, 2008. Sprint Nextel, however, filed its Petition on December 18, 2008. The Petition was therefore not timely filed and should be dismissed.

II. **Sprint Nextel's Petition Must Be Denied Because It Fails On The Merits**

Even if the Petition had been timely filed, it fails on the merits. Sprint rehashes flawed arguments previously made by other parties, particularly Level 3, to support its assertion that a \$.0007 cap for ISP bound traffic meets the "additional cost" standard of Section 252(d)(2) of the Act.⁶ As tw telecom and others have explained at length previously, these arguments have no merit.⁷ Sprint also argues that a rate of \$.0007 satisfies the TELRIC standard. This argument also fails.

First, Sprint argues that the record evidence submitted by AT&T and Sprint indicates that the additional cost of termination on both soft switches and circuit switches is well below \$.0007.⁸ But as many commenters have explained, the overwhelming evidence in the record shows that this data is incorrect. The soft switch data submitted by AT&T does not take into account the substantial incremental and common costs associated with either the use of soft

⁶ See, e.g., Letter of John T. Nakahata, Counsel, Level 3 Communications, LLC, CC Dkt. Nos. 01-92 *et al.*, (filed Aug. 18, 2008).

⁷ See, e.g., Supplemental Ex Parte of Core Communications at 4, 9, attached to Ex Parte Letter of Michael B. Hazzard, Counsel, Core Communications, to Marlene H Dortch, Secretary, FCC, CC Dkt. Nos. 01-92, *et al.*, (filed Oct. 29, 2008); NTCA Additional Comments on the Adverse Impacts and Legal Arguments Against Adopting a Uniform Rate for Federal And State Intercarrier Compensation Charges at 26, attached to Ex Parte Letter of Daniel Mitchell, Vice President, Legal and Industry, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al.*, WC Dkt. Nos. 04-36 *et al.*, (filed Oct. 17, 2008); Letter of Thomas Jones, Counsel, tw telecom *et al.*, CC Dkt. Nos. 01-92 *et al.*, WC Dkt. Nos. 04-36 *et al.* (filed Oct. 14, 2008) ("*Willkie Oct. 14 Letter*"); Letter of Jeffrey Lanning, Director, Federal-Regulatory Affairs, Embarq, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 *et al.*, WC Dkt. Nos. 05-337 *et al.*, at 2 (filed Sept. 30, 2008).

⁸ See Petition at 6, n.5 (citing evidence submitted by AT&T regarding the cost of termination using a soft switch); *id.* at 8 (citing evidence submitted by Sprint regarding the cost of termination using a circuit switch).

switches or with the additional equipment necessary to terminate calls.⁹ In addition, several parties showed that the costs of termination using current switching schemes (which may include a combination of soft switches and circuit switches) are well in excess of \$.0007 and that Sprint's data regarding switching costs was compiled incorrectly.¹⁰

Second, the fact that *some* CLECs and ILECs have agreed to terminate reciprocal compensation traffic at or below \$.0007 (*see* Petition 7), has no bearing on whether a \$.0007 rate cap meets the "additional costs" standard or the TELRIC standard. If an ILEC originates more traffic than it terminates, it has an incentive to agree to the lower \$.0007 rate in order to minimize its costs. This is so regardless of whether the ILEC's cost of terminating each minute of traffic is well in excess of \$.0007. Moreover, the nature of complex intercarrier negotiations makes it impossible to determine the true "costs" of any particular element in that agreement. As with any intercarrier contract negotiation, ILECs and CLECs negotiate various terms with one side giving up a benefit in one area to gain a benefit in another.¹¹ *tw telecom* also showed that a CLEC (One Communications) often agrees to widely disparate termination rates in different states (from bill and keep to well in excess of \$.0007), even though there is no evidence that its

⁹ *See generally* Ex Parte Letter of John Heitmann, Counsel, Nuvox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 (filed Oct. 24, 2008); *see also* Declaration of August Ankum *et al.*, attached to *id.*

¹⁰ *See, e.g.*, Ex Parte Letter of Curt Stamp, President, ITTA, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al.*, WC Dkt. Nos. 04-36 *et al.*, (filed Oct. 2, 2008) (arguing that a rate of \$.0007 will not cover carriers' switching costs); Ex Parte Letter of John Heitmann, Counsel, Nuvox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92, WC Dkt. No. 04-36 at 5 (filed Oct. 2, 2008) (discussing flaws in Sprint's calculations); Declaration of Michael Starkey ¶ 2, attached to *id.* ("Starkey Decl.") (demonstrating that the QSI switching model, which incorporates soft switches, produces termination costs well in excess of \$.0007).

¹¹ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494, ¶ 12 (2004) (describing the multi-faceted nature of interconnection agreement negotiations).

costs vary so substantially from one state to the other.¹² It is therefore unlikely that the traffic exchange rates incorporated into interconnection agreements reflect carriers' termination costs.

Third, even if a \$.0007 rate cap appropriately captured the “additional costs” of termination, the FCC may not adopt Sprint’s proposal because it would constitute impermissible FCC ratemaking. The Eighth Circuit held that the FCC may not establish rates for traffic subject to Section 252(d)(2) even on an interim basis.¹³ Moreover, the FCC has repeatedly found that the establishment of rate caps constitutes the establishment of rates. For example, in the *1999 Pricing Flexibility Order*,¹⁴ the FCC held that the default special access tariff prices that ILECs must continue to offer under Phase I pricing flexibility are “rates for these services.” *See 1999 Pricing Flexibility Order* ¶ 24. Phase I pricing flexibility is similar to the regime in place for ISP-bound traffic; the FCC sets the “rate” at the cap while carriers and states are free to offer rates below the cap. Crucially, in the ISP Remand Order, the order which contains the very rules at issue, the FCC again found that the establishment of the \$.0007 rate cap qualified as the establishment of specific rates.¹⁵

Sprint’s only response is that a \$.0007 rate is not impermissible rate setting because “the Commission has cited evidence showing the proper rate . . . should be in the range of \$.00010 to

¹² *See* Attachment A to Willkie Oct. 14 Letter.

¹³ *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), *subsequent history omitted* (“[T]he FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC’s authority to design a pricing methodology and intrudes on the states’ right to set the actual rates pursuant to [§] 252(c)(2). . . . We conclude that the proxy prices cannot stand and . . . vacate rules 51.513, 51.611 and 51.707.”).

¹⁴ *See Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“1999 Pricing Flexibility Order”).

¹⁵ *See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996 et al.*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶¶ 7, 78 & n.149, 79 (2001) (“ISP Remand Order”).

\$.00024.” Petition at 10. Not only does this passage fail to address the question of impermissible rate setting, but Sprint implies that \$.0007 is appropriate because the correct rate is actually *lower than* \$.0007. It cannot be that \$.0007 appropriately captures the additional costs of termination if the record evidence shows that the additional cost of termination is lower.

Finally, Sprint’s assertion that a rate cap of \$.0007 would satisfy TELRIC makes no sense on its own terms. *See* Petition 7-9. Under TELRIC, states are provided specific and detailed methodological guidance regarding how to set reciprocal compensation rates.¹⁶ States must follow that methodology unless or until it is replaced by the FCC. TELRIC produces a range of rates, the average of which is well above \$.0007.¹⁷ Therefore, Sprint’s proposed rate cap is either a new methodology (i.e., it is not TELRIC), or, more likely, as tw telecom and others have argued, impermissible rate setting. In either case, a rate cap of \$.0007 cannot satisfy the TELRIC standard.

For the foregoing reasons, Sprint Nextel’s Petition must be denied.

III. **Request For Waiver Of Section 1.106(g) Of The Commission’s Rules**

tw telecom respectfully requests a waiver of Section 1.106(g) of the Commission’s rules, which provides that oppositions to a petition for reconsideration “shall be served upon . . . parties to the proceeding.” 47 C.F.R. 1.106(g). The Commission may waive any provision of its rules “if good cause therefor is shown” (*see* 47 C.F.R. § 1.3) and if a party can demonstrate that such a waiver is in the public interest.¹⁸ Here, pursuant to Rule 1.106(g), tw telecom will serve

¹⁶ *See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, First Report and Order, ¶¶ 1046-1068, 11 FCC Rcd 15499 (1996), *subsequent history omitted*.

¹⁷ *See* Starkey Decl. ¶ 6 (demonstrating that the weighted average of reciprocal compensation rates across 40 jurisdictions is \$.0029).

¹⁸ *See, e.g., Telecomms. Relay Servs. and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further

this Opposition on Sprint Nextel and its counsel, as evidenced by the attached Certificate of Service. However, it would be overly burdensome for tw telecom to serve all “parties to the proceeding” as required by the Rule. Countless parties have filed comments and participated in the nine above-captioned proceedings, some of which have been pending for 12 years. If tw telecom were required to strictly comply with the Rule and serve its Opposition on all parties to these nine proceedings, it would be unable to file its Opposition, thereby depriving the Commission of the opportunity to consider counterarguments to Sprint Nextel’s Petition. Such a result would not be in the public interest. Moreover, waiver of the Rule would not undermine its underlying purpose because tw telecom is filing this Opposition on the Commission’s Electronic Comment Filing System (“ECFS”), and parties to these nine proceedings will be able to view it on ECFS. It should also be noted that as of today, December 29, 2008, tw telecom has not been served with a copy of Sprint Nextel’s Petition and Sprint Nextel did not attach a Certificate of Service indicating that all parties to the proceeding were being served pursuant to Section 1.106(f) of the Commission’s Rules.¹⁹

For the foregoing reasons, the Commission should grant tw telecom a waiver of the requirement in Rule 1.106(g) that all “parties to the proceeding” other than Sprint Nextel be served with this Opposition to Sprint Nextel’s Petition.

Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (2004) (discussing standard for waiver of Commission rules); *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

¹⁹ See 47 C.F.R. § 1.106(f) (providing that petitions for reconsideration “shall be served upon parties to the proceeding”).

Respectfully submitted,

/s/ Thomas Jones

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December 29, 2008

CERTIFICATE OF SERVICE

I, Jonathan Lechter, hereby certify that the foregoing Opposition Of tw telecom To Sprint Nextel Petition for Partial Reconsideration was served this 29th day of December, 2008, by mailing true copies thereof, via first-class mail, to the following persons at the addresses listed below:

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_____/s/_____
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