

**Before the  
Federal Communications Commission  
Washington, D.C. 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. 96-95
	)	
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

**OPPOSITION OF CORE COMMUNICATIONS, INC. TO  
SPRINT NEXTEL’S PETITION FOR PARTIAL RECONSIDERATION**

Core Communications, Inc. (“Core”), by its undersigned counsel, hereby provides its opposition to Sprint Nextel’s (“Sprint’s”) December 18, 2008 petition for partial reconsideration of the Federal Communications Commission’s (“Commission’s” or “FCC’s”) October 5, 2008 *Order on Mandamus*.<sup>1</sup>

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<sup>1</sup> *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-98 et al., FCC 08-262 (rel. Nov. 5, 2008) (“*Order on Mandamus*”), petitions

## Background

In the *Order on Mandamus*, the Commission responded to United States Court of Appeals for the District of Columbia Circuit's writ of mandamus in *In re Core Commc'ns Inc.*, 531 F.3d 849 (D.C. Cir. 2008). There, the D.C. Circuit noted that the Commission had "twice failed to articulate a valid legal justification for its rules" that establish a discriminatory reciprocal compensation system for telecommunications traffic terminated to dial-up Internet Service Providers ("ISPs"). *In re Core* at 850. In the first instance, the D.C. Circuit vacated the FCC's ISP rules. *Bell Atl. Tel. Co. v. FCC*, F.3d 1 (D.C. Cir. 2000). In the second instance, the D.C. Circuit remanded without vacating the FCC's rules. *WorldCom v. FCC*, 288 F.3d 429 (D.C. 2002).

For over six years, the FCC failed to respond to the Court's remand, and the D.C. Circuit concluded that the Commission's delay was "egregious." *In re Core* at 850. In describing the trouble resulting from the delay, the D.C. Circuit noted that "the agency ... effectively nullified [the Court's] determination that [the FCC's] interim rules are invalid, because [the Court's] remand without vacatur left those rules in place." *Id.* at 856. "Moreover," the Court noted, "until the FCC states its explanation for its interim rules in a final order, Core cannot mount a challenge to those rules. In this way, the FCC insulates its nullification of our decision from further review." *Id.*

To "end the game of administrative keep-away," *id.* at 860 (internal quotation and citation omitted), the Court issued the writ of mandamus:

[W]e grant the writ of mandamus and direct the FCC to respond to our 2002 *WorldCom* remand by November 5, 2008. That response must be in the form of a final, appealable order that explains the legal authority for

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for review pending, No. 08-1365 (D.C. Cir. Nov. 21, 2008) and No. 08-1393 (D.C. Cir. Dec. 24, 2008).

the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5). No extensions of the deadline will be granted. The rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date.

*Id.* at 861-62.

At 11:52 pm on November 5, 2008, the FCC filed the *Order on Mandamus* with the D.C. Circuit. Concurrently, the FCC published the *Order on Mandamus* on the Commission's website. In the ordering clauses, the Commission noted it "consider[ed] [its] obligations met from the writ of mandamus." *Order on Mandamus* at ¶56. Towards this end, the Commission set November 5, 2008 as the effective date of the Order on Mandamus. *Id.* at ¶58.<sup>2</sup>

On the merits, the Commission concluded that all telecommunications between local exchange carriers ("LECs"), including telecommunications terminated to LEC customers that happen to be ISPs, are subject to section 251(b)(5) and 252(d). *Id.* at ¶15 ("the broad language of section 251(b)(5) and the grandfather clause in section 251(g)[] supports our view that the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)"). The Commission also concluded that all telecommunications terminated to ISPs are "interstate" and that the Commission "retains full authority to regulate charges for traffic and services subject to the federal jurisdiction even when it is within the sections 251(b)(5) and 252(d)(2) framework. *Id.* at ¶21.

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<sup>2</sup> By contrast, the Commission noted that the "notice of proposed rulemaking" portion of the item "bec[a]me effective on the date of publication of the text of a summary thereof in the Federal Register...." *Id.* at ¶57.

## Argument

The D.C. Circuit directed the FCC to issue a “final, appealable” order by November 5, 2008. *In re Core* at 863. Under the writ of mandamus, the *Order on Mandamus* is not subject to reconsideration. Even if it is subject to reconsideration, Sprint’s petition is untimely, as the time period for reconsideration expired on December 6, 2008, 30 days after the *Order on Mandamus* became appealable. Any other result would compel a finding by the Commission that it did not issue a “final, appealable” order on November 5, 2008, and accordingly, the Commission’s ISP rules were vacated on November 6, 2008. In any event, Sprint Nextel is wrong on the merits, as it both misconstrues the *Order on Mandamus* and asks the Commission to take unlawful action.

1. The *Order on Mandamus* is not subject to reconsideration. The Commission accordingly should dismiss Sprint’s petition as improper. As noted above, the D.C. Circuit’s writ of mandamus required the Commission to issue a *final, appealable* order by the conclusion of November 5, 2008. Any finding that the *Order on Mandamus* is subject to reconsideration would demonstrate that the FCC failed to comply with the writ of mandamus.

Reconsideration makes “agency action with respect to [the petitioning party] ... nonfinal, and thus nonreviewable, until the agency acts on the reconsideration request.” *ICG Concerned Workers Ass’n. v. ICC*, 888 F.3d 1455, 1458 (D.C. Cir. 1989). Any finding that the *Order on Mandamus* is not “final” with respect to Sprint or any other party by virtue of a petition for reconsideration would demonstrate that Commission has failed to comply with the Court’s writ of mandamus, and thus the “interim” ISP rules were “vacated on November 6, 2008.”

Reconsideration would also amount to an impermissible extension of the deadline set by the D.C. Circuit in its writ of mandamus. *In re Core* at 862 (“No extensions of this

deadline will be granted.”). By its terms, Sprint requests that the FCC adopt “a second, independent” justification for its ISP rules. Thus, grant of Sprint’s petition would amount to an impermissible extension of the deadline set by the D.C. Circuit, which would violate the writ of mandamus and demonstrate that the “interim” ISP rules were vacated by operation of the mandamus.

At bottom, the mere availability of reconsideration in this proceeding would make a mockery of the D.C. Circuit’s writ of mandamus. This case involves regulations that the FCC has enforced for nearly eight years without a valid legal basis. The D.C. Circuit directed – by writ of mandamus – the FCC to come forward with a legal basis to justify retroactively the rules it began enforcing in 2001 to “end the game of administrative keep-away.” *In re Core* at 860 (internal quotation and citation omitted). Reconsideration would perpetuate “administrative keep-away” by providing the FCC with yet another opportunity to justify its 2001 “interim” rules. “Either the FCC has such authority or it does not. If the FCC has such authority, it should not take six years to put its rationale in writing.” *Id.* at 859. The FCC took its third bite at the apple on November 5 in the *Order on Mandamus*. The D.C. Circuit’s writ of mandamus does not permit a fourth bite, as Sprint would have it.

2. Even if it could be said that reconsideration is available, which it is not, Sprint’s petition for reconsideration is untimely. The FCC entered its “final, appealable” *Order on Mandamus* on November 5, 2008, both with the Court and the public. Public notice occurred on that date. Accordingly, even if reconsideration were available, Sprint’s petition was due 30 days later, on December 5, 2008. Sprint filed its petition on December 18, 2008, and accordingly, its petition is untimely. Moreover, any finding that Sprint’s petition was timely filed would only demonstrate that the *Order on Mandamus* violated the D.C. Circuit’s directive

that any responsive order be final and appealable as of November 5, 2008. As already noted, to the extent that is the case, the “interim” ISP rules were vacated as of November 6, 2008.

3. On the merits, Sprint misconstrues the *Order on Mandamus* and asks the Commission to take unlawful action. Sprint misconstrues the *Order on Mandamus* by asserting that the FCC relied “only on section 201 to” maintain the \$0.0007 rate for telecommunications terminated to ISPs. This is incorrect. As a matter of statutory construction, the FCC held “that the transport and termination of all telecommunications exchanged between LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).” *Order on Mandamus* at ¶15. Telecommunications to ISPs fall within section 251(b)(5), and thus are subject to the pricing standard of section 252(d)(2). The FCC (erroneously) found that it could subject telecommunications to ISPs to a separate federal rate regime on grounds that telecommunications to ISPs are “interstate.” *Id.* at ¶21 (“The Commission ... retains full authority to regulate charges for traffic and services subject to the federal jurisdiction, even when it is within the section 251(b)(5) and 252(d) framework.”). Thus, the FCC concluded (again, incorrectly) that it has section 201 rulemaking authority over “interstate” telecommunications, purportedly including telecommunications to ISP, subject to sections 251(b)(5) and 252(d)(2) of the Act.<sup>3</sup>

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<sup>3</sup> On appeal, Core does not intend to challenge the Commission’s findings that telecommunications to ISPs are subject to the sections 251(b)(5)/252(d)(2) framework. Rather, Core intends to challenge the Commission determination that it has authority to prescribe rates for any such traffic, be it interstate or intrastate. Both the Supreme Court and the United States Court of Appeals for the Eighth Circuit have held that the FCC does not have power under section 201, or otherwise, to prescribe rates (or even a range of rates) for traffic subject to section 252(d)(2). *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999) (Although “the Commission has jurisdiction to design a pricing methodology,” the Supreme Court was careful to note that “[i]t is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.”); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (“The Supreme Court has held that the FCC ‘has jurisdiction to design a pricing methodology.’ *AT&T Corp.*, 525 U.S. at 385.... However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use.”) (subsequent history omitted).

In any event, Sprint appears to ask the FCC to adopt a newly proposed “additional cost” standard retroactive to April 27, 2001. The *Order on Mandamus*, however, required the FCC to issue a legal basis for its 2001 ISP rules, not to come up with a new cost standard with a retroactive effect of eight years. Moreover, the FCC first sought comment on the “additional cost” standard on November 5, 2008, and the reply comment round closed on December 22, 2008. To the extent the Commission’s newly-proposed “additional cost” standard could be lawfully adopted (which is far from certain), the Commission could only do so prospectively, not retroactively. Accordingly, Sprint requests relief on that is otherwise unavailable on the merits.

Sprint’s contention that a \$0.0007 rate is based on “cost” is erroneous in any event. Indeed, in the *ISP Remand Order* itself, the FCC “emphasize[d]” that its \$0.0007 rate is not based on cost. *ISP Remand Order*, 16 FCC Rcd at 9156 (“we emphasize” that the \$0.0007 rate “is not intended to reflect the costs incurred by each carrier that delivers ISP traffic.”). Moreover, the Commission has found that “carriers incur costs in terminating traffic that are not de minimis.” *Local Competition First Report and Order* at 16055.<sup>4</sup> And, the cost of terminating telecommunications to ISPs is no different than terminating traffic to any other customer. *ISP Remand Order* at 9194 (“The record developed ... fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP.”). Unrebutted record evidence in the proceeding below demonstrated that a rate of \$0.0007 is not even sufficient to cover the cost associated with billing intercarrier compensation. *See, e.g., Ex Parte of Great Plains Communications*, CC Docket 99-68, *et al.* (Sept. 17, 2008). There is no justification for maintaining a below-cost compensation rate for

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<sup>4</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) (“*Local Competition First Report and Order*”) (subsequent history omitted).

terminating telecommunications to ISPs when the Commission's existing cost methodology, "TELRIC," yields rates 300-400% higher than the \$0.0007 rate unlawfully prescribed by the Commission for telecommunications traffic terminated to ISPs.

Nor can settlement agreements between Level 3 (a company that: (i) has never earned even a penny of profit; (ii) has a Moody's corporate credit rating of "Selective Default"; and (iii) appears to be teetering on the edge of bankruptcy) and incumbent local exchange carriers establish a cost-based rate under section 252(d). Those agreements, which are nowhere in the record, are the product of negotiation between those parties, and the "gives and takes" of those agreements are impossible to know. Indeed, Level 3's primary business is sending VoIP traffic to LEC networks for termination, not terminating traffic itself. Be that as it may, TELRIC is and continues to be the cost standard for telecommunications traffic termination until such time as the FCC prospectively adopts a different cost standard.

Sprint's petition also demonstrates that its real goal is to receive free, or nearly free, access to the networks of facilities-based providers. The Commission, however, has rejected the "bill and keep" outcome desired by Sprint. Indeed, bill and keep is not even on the table in the on-going rulemaking proceeding. That said, to the extent that is the result Sprint seeks, it should go ahead and file its own petition pursuant to section 332 of the Act, which Sprint claims could provide the relief it seeks. Sprint Petition at n.3. In no event, however, should Sprint be permitted, by reconsideration or otherwise, to devalue facilities-based networks and deter network investment decisions of local exchange carriers, such as Core, which seek only reasonable, cost-based network recovery as mandated by Congress in the Act.

**Conclusion**

Consistent with the forgoing, the Commission should dismiss Sprint’s petition for partial reconsideration. In the alternative, to the extent the Commission finds that (i) reconsideration is available to Sprint or (ii) Sprint’s petition was timely filed, the Commission should, on its own motion, vacate the *Order on Mandamus* as failing to comply with the D.C. Circuit’s writ of mandamus, which required the Commission to issue a “final, appealable” order by November 5, 2008.

Respectfully submitted,

/s/

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