

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Global NAPS, Inc. Petition for Declaratory	)	
Ruling and Alternative Petition for	)	WC Docket No. 10-60
Preemption to the Pennsylvania, New	)	
Hampshire and Maryland State	)	
Commissions	)	

**REPLY COMMENTS OF SPRINT NEXTEL CORPORATION**

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April 12, 2010

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## EXECUTIVE SUMMARY

Several commenting parties have suggested that the Commission make determinations of industry wide application in this proceeding where Global NAPS, Inc. seeks only a declaratory ruling applicable to itself. Sprint takes no position on what the Commission should decide on any ruling applicable to only Global NAPS, Inc. However, should the Commission consider making any ruling of general applicability, it should confirm that access charges do not apply to information services traffic in the form of VoIP calling that is terminated to the PSTN, whether that information services traffic is terminated directly by a carrier also providing VoIP service or by a wholesale or intermediate carrier.

VoIP traffic is not subject to access charges because it is a form of traffic that did not exist when the Telecommunications Act of 1996 was passed. As a result, it is exempt from access charges not “grandfathered” into access charges as an existing service via section 251(g). The provisions of section 251(b)(5) require that VoIP traffic be subject to reciprocal compensation under these circumstances. The courts that have considered this matter have approved this interpretation.

VoIP traffic is clearly information services traffic when a net protocol conversion is performed to allow VoIP traffic to be connected to the PSTN. The federal courts have found that the net protocol conversion necessary to facilitate interconnection between VoIP providers and the PSTN results in the correct categorization of VoIP service as an information service. In accord with Commission precedent, information services are exempt from access charges. The fact that a VoIP provider uses a carrier to perform the interconnection with the PSTN does not change the nature of the information service

VoIP traffic and cannot result in application of access charges on a wholesale or intermediate carrier providing that PSTN interconnection.

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**REPLY COMMENTS OF SPRINT NEXTEL CORPORATION**

**I. INTRODUCTION**

Sprint Nextel Corporation (“Sprint”) respectfully submits its reply comments in the above-captioned proceeding pursuant to the Federal Communications Commission’s (“Commission”) Public Notice seeking comment on whether the Commission should act on Global NAPS, Inc.’s Petition for Declaratory Ruling or Preemption of state commissions in regard to Voice over Internet Protocol (“VoIP”) traffic intercarrier compensation.<sup>1</sup> Sprint urges the Commission to reject the efforts of certain parties to extend legacy access charges to VoIP traffic through this proceeding.

Sprint notes that Global NAPS, Inc. (“Global”) has narrowly focused its request for guidance “regarding the tariff treatment of” VoIP “traffic terminated to end users of interconnected LECs through Global.”<sup>2</sup> Sprint takes no position regarding traffic specific to Global. However, several of the parties providing comments in this proceeding

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<sup>1</sup> Public Notice, Pleading Cycle Established for Comments on Global NAPS Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions, DA 10-461 (rel. Mar. 18, 2010).

<sup>2</sup> Global NAPS, Inc. *et al.*, Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions, WC Docket No. 10-60 (dated Mar. 5, 2010) (“Petition”) at 1.

suggest that the Commission should issue a ruling that would have general application in the industry. Sprint opposes these calls to modify the Commission's sole jurisdiction over VoIP traffic and urges the Commission to confirm that access charges do not apply to VoIP traffic.

**II. AS A MATTER OF LAW, ACCESS CHARGES CANNOT BE IMPOSED ON VOIP TRAFFIC**

Several parties have argued that access charges should be applied to VoIP traffic.<sup>3</sup>

These arguments should be rejected as contrary to current law. There are at least two independent reasons why access charges may not be applied to VoIP traffic: (a) VoIP traffic does not fall within the statutory exemption permitting LECs to impose access charges on certain traffic, and in any event (b) VoIP traffic constitutes an information service and LECs are precluded from imposing access charges on such services. Federal courts have uniformly held that access charges may not, as a matter of law, be applied to VoIP traffic and the Commission has not found to the contrary.

**A. VOIP TRAFFIC DOES NOT FALL WITHIN THE SECTION 251(G) ACCESS CHARGE EXCEPTION**

Even if VoIP were to be classified as "telecommunications", which it has not, it could not be subject to 251(g) access because it falls outside of the types of traffic that existed when the Telecommunications Act of 1996 was passed, and thus, it is not subject to access charges. Section 251(b)(5) of the Act imposes on LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."<sup>4</sup> The Commission has held that this statute, "on its face," requires

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<sup>3</sup> See Comments of CenturyLink, Frontier and Windstream ("Mid-Sized LECs") at 4-12, Comments of The United States Telecom Association at 2, and Comments of AT&T Inc. at 5-11.

<sup>4</sup> 47 U.S.C. § 251(b)(5).

LECs to establish reciprocal compensation arrangements for “all ‘telecommunications’ . . . without exception”:

Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of all telecommunications traffic.<sup>5</sup>

There is such a limitation on the scope of Section 251(b)(5) – namely, the “carve out” or “grandfather” provision in Section 251(g).<sup>6</sup> As the Commission has stated of this “grandfather” provision, “traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope”:

Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing “receipt of compensation.”<sup>7</sup>

The scope of traffic encompassed within Section 251(g) – and accordingly, the type of traffic that LECs may apply access charges – is limited. Specifically, federal courts have held that Section 251(g) is worded “simply as a transitional device, preserving various LEC duties that *antedated the 1996 Act* until such time as the Commission should adopt new rules pursuant to the Act.”<sup>8</sup> Thus, for example, dial-up

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<sup>5</sup> *2001 ISP Remand Order*, 16 FCC Rcd 9151, 9165-66 ¶¶ 31-32 (2001)(emphasis in original). *See also 2008 ISP Remand Order*, 24 FCC Rcd 6475, 6482-83 ¶ 15 (2008)(“We find that the better reading of the Act as a whole, in particular 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).”), *aff’d Core Communications v. FCC*, 592 F.3d 139 (D.C. Cir. 2009).

<sup>6</sup> Section 251(g) provides in relevant part: “On and after February 8, 1996, each [LEC], to the extent that it provides wireline services, shall provide exchange access . . . to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.” 47 U.S.C. § 251(g)(emphasis added).

<sup>7</sup> *2008 ISP Remand Order*, 24 FCC Rcd at 6483 ¶ 16.

<sup>8</sup> *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002)(emphasis added), *cert. denied*, 538 U.S. 1012 (2003).

Internet service provider (“ISP”) traffic is not encompassed within the scope of Section 251(g) because there was “no pre-Act obligation relating to carrier compensation of ISP-bound traffic.”<sup>9</sup> Federal courts have further made clear that regulators have no discretion to enlarge the types or number of services that fall within the scope of the Section 251(g) “grandfather” provision:

But nothing in § 251(g) seems to invite the Commission’s reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs’ pre-Act obligations.<sup>10</sup>

The issue of whether LECs may impose access charges on VoIP traffic was first addressed in *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006). In this appeal of an arbitration order, AT&T argued that the Missouri Commission erred in rejecting its attempt to impose access charges on VoIP traffic (*see id.* at 1073). The federal district court also rejected AT&T’s argument and affirmed the Missouri Commission’s decision:

The Court concludes that the MPSC’s decision subjecting IP-PSTN traffic to reciprocal compensation is consistent with the Act and the FCC’s rules, and is not arbitrary or capricious. . . . Read together, these sections [251(b)(5) and 251(g)] establish that carriers must exchange reciprocal compensation to transport and terminate telecommunications unless a separate pre-Act rule prescribed a different form of compensation for that form of communications.

\* \* \*

Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable. As a result, IP-PSTN traffic falls within the statutory mandate that reciprocal compensation be used to compensate carriers for transporting traffic between calling and called parties that subscribe to different carriers (*id.* at 1079-80)(internal citations omitted).

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<sup>9</sup> *Id.* at 433 (emphasis in original).

<sup>10</sup> *Id.* at 433.

Notably, while AT&T appealed other parts of this district court order, it chose not to appeal the court's VoIP/access charge decision.<sup>11</sup>

Another federal court recently reached the same result, also ruling that VoIP traffic is subject to reciprocal compensation and not access charges. As the court explained in *PAETEC Communications v. CommPartners*, No. 08-0397 (D.D.C., Feb. 18, 2010):

There cannot be a pre-Act obligation to intercarrier compensation for VoIP, because VoIP was not developed until the 1996 Act was passed. PAETEC's submission that the analysis should turn not on whether companies actually paid access charges for VoIP prior to the Act, but instead whether pre-Act law would have supported such charges – is not so much an argument as an invitation to speculate. The invitation is declined (slip op. at 7-8)(underscoring in original; internal citations omitted).

In summary, because VoIP traffic does not fall within the scope of the Section 251(g) “grandfather” provision, this Commission cannot, as a matter of law, permit LECs to impose access charges on such VoIP traffic. Instead, under the Act, VoIP traffic is rather subject to reciprocal compensation or rates otherwise established through negotiation.

**B. ACCESS CHARGES CANNOT BE IMPOSED ON VOIP TRAFFIC BECAUSE SUCH TRAFFIC CONSTITUTES AN INFORMATION SERVICE**

The Commission has yet to rule definitely whether interconnected VoIP is an information service or a telecommunications service.<sup>12</sup> Nevertheless, established

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<sup>11</sup> See *Southwestern Bell v. Missouri PSC*, 530 F.3d 676 (8<sup>th</sup> Cir. 2007), cert. denied, 2009 U.S. LEXIS 554 (Jan. 12, 2009). A reasonable conclusion one can draw from AT&T's decision not to challenge in its Eighth Circuit appeal the district court's VoIP/access charge ruling is that AT&T realized that its arguments lacked merit.

<sup>12</sup> The FCC specifically asked, in a six-year-old rulemaking that remains pending, whether VoIP services should be classified as a telecommunications service or an information service. See *IP-Enabled Services NPRM*, 19 FCC Red 4863, 4892-94 ¶¶ 42-44 (2004). The FCC did point out that this rulemaking was “not addressing whether [access] charges apply or do not apply under existing law.” *Id.* at 4904 ¶ 61.

Commission precedent makes clear that (1) IP-PSTN traffic constitutes an information service, and (2) LEC access charges may not be imposed on information services.<sup>13</sup> In addition, every federal court that has addressed this issue has agreed that IP-PSTN traffic constitutes an information service and, as a result, LECs may not lawfully impose access charges on such traffic.

1. IP-PSTN Traffic Constitutes an Information Service.

The Commission has held that the categories of telecommunications services and information services are mutually exclusive – that is, an information service cannot also be a telecommunications service.<sup>14</sup> In this regard, the Commission does “not recognize the telecommunications component of an information service as a telecommunications service under the Communications Act.”<sup>15</sup>

The Commission has held that whether a particular service is a telecommunications service or an information service “turns on the nature of the functions that the end user is offered.”<sup>16</sup> In this regard, the presence of a net protocol conversion has been a determinative indicator of whether a service is an information service rather than a telecommunications service. A net protocol conversion occurs when “an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.” Such a conversion, the FCC has held, “clearly

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<sup>13</sup> By “IP-PSTN traffic,” Sprint means a call that originates (or terminates) in the Internet Protocol (“IP” or “VoIP”) and terminates (or originates) in traditional circuit-switched technology – namely, Time Division Multiplexing (“TDM” or simply, “PSTN”).

<sup>14</sup> See, e.g., *Universal Service Report to Congress*, 13 FCC Rcd 11501, 11520 ¶ 39, 11522-23 ¶ 43 (1998) (“Stevens Report”).

<sup>15</sup> *CALEA Broadband/VoIP Order*, 20 FCC Rcd 14989, 14997 ¶ 15 (2005).

<sup>16</sup> *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, 4822-23 ¶ 38 (2002).

‘transforms’ user information” and thus falls within the Act’s definition of information services.<sup>17</sup>

All federal courts that have considered the matter have agreed that IP-PSTN is properly classified as an information service. As the federal court explained in an AT&T appeal of a Missouri Commission arbitration order, a [n]et protocol conversion is a determinative indicator of whether a service is an enhanced or information service”:

IP-PSTN traffic is an information service within the meaning of the Act because it offers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” IP-PSTN also alters the form and content of the information sent and received, because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN. The communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the CLEC's switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM. Without this protocol conversion from IP to TDM, the called party's traditional telephone could not receive the VoIP call. For these reasons, IP-PSTN is an information service.<sup>18</sup>

Other federal courts have reached the same result: “CommPartners’ transmission and net conversion of the [VoIP] calls is properly labeled an information service.”<sup>19</sup>

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<sup>17</sup> *Id.* The FCC has already applied this “net protocol conversion” test in the context of VoIP services. In its *AT&T IP-in-the-Middle Order*, 19 FCC Rcd 7457 (2004), the FCC held that an AT&T’s long distance service using an IP network was a telecommunications service and that as a result, AT&T was required to pay terminating LEC access charges. The FCC explained that AT&T’s service was a telecommunications service because it did “not involve a network protocol conversion and does not meet the statutory definition of an information service” (*id.* 7465 ¶ 13). Specifically, even with AT&T’s use of IP within its network, both the calling and called parties used TDM technology, resulting in no net protocol conversion (*i.e.*, PSTN-AT&T IP-PSTN).

<sup>18</sup> *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d 1055, 1080-82 (E.D. Mo. 2006)(internal citations omitted).

<sup>19</sup> *PAETEC Communications v. CommPartners*, No. 08-0397, slip op. at 7 (D.D.C., Feb. 18, 2010). *See also Vonage v. Minnesota PSC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003)(“For calls originating with one of Vonage’s customers, calls in the VoIP format must be transformed into the format of the PSTN before a POTS user can receive the call. For calls originating from a POTS user, the process of acting on the format and protocol is reversed. The Court concludes that Vonage’s activities fit within the definition of information services.”), *aff’d* 394 F.3d 568 (8<sup>th</sup> Cir. 2004).

## 2. Access Charges May Not Be Imposed on Information Services Traffic.

Commission Rule 69.5(b), adopted in 1983 when the FCC first permitted LECs to impose access charges in anticipation of the AT&T Divestiture, makes clear that access charges apply to “interexchange carriers” as they provide “telecommunications services,” but not to information services:

Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign *telecommunications services*.<sup>20</sup>

As the FCC reaffirmed shortly following the 1996 Act, “incumbent LECs may not assess interstate access charges on information service providers.”<sup>21</sup> Once again, federal courts have uniformly recognized that “FCC rules exempt carriers from paying access charges when they offer information services.”<sup>22</sup> This obligation is universal and is not dependant on whether the information service is nomadic VoIP or some other form of VoIP.<sup>23</sup> The exemption applies to all types of information services that employ VoIP capabilities.

AT&T and the Mid-Sized LECs incorrectly argue that information services traffic becomes subject to access charges when it passes through an intermediate carrier.<sup>24</sup>

While AT&T and the Mid-Sized LECs must be admired for their creative slight of hand in attempting to move the focus of the Commission from the fact that information

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<sup>20</sup> The FCC has stated that “Section 69.5(b) establishes who is to pay carrier’s carrier charges.” *MTS/WATS Market Structure Order*, 1985 FCC LEXIS 2325 at ¶ 15 (CCB, Dec. 18, 1985). *See also AT&T IP-in-the-Middle Order*, 19 FCC Rcd 7457, 7472 ¶ 24 (2004) (“We find AT&T’s specific service . . . is a telecommunications service and is subject to section 69.5(b) of the Commission’s rules.”).

<sup>21</sup> *First Access Charge Reform Order*, 12 FCC Rcd 15982, 16003 ¶ 50 (1997). *See also id.* at 16132 ¶ 344 (“[I]ncumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs.”).

<sup>22</sup> *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d 1055, 1081 n.19 (E.D. Mo. 2006). *See also PAETEC Communications v. CommPartners*, No. 08-0397, slip op. at 5 (D.D.C., Feb. 18, 2010) (“Information services are not subject to the access charge regime.”).

<sup>23</sup> *See Vonage Memorandum Opinion and Order*, 19 FCC Rcd 22404, 22425 ¶ 32 (where Vonage services, from a nomadic VoIP provider, are compared to cable VoIP services which may be more fixed in nature, and the Commission states it would treat the two comparably).

<sup>24</sup> Mid-Sized Carriers Comments at 15-17 and Comments of AT&T at 5-9.

services traffic is not and has never been subject to access charges to the fact that only through a carrier providing telecommunications services can VoIP traffic be terminated to the PSTN. With the focus potentially moving, they argue that access charges must apply because carriers and telecommunications services are involved. This conclusion is faulty. The traffic in question remains information services traffic even though it passes through a wholesale or intermediate carrier. The VoIP traffic has had a net protocol change when exchanged with the PSTN, it remains information services traffic, and as a result, no access charges apply when this traffic is terminated.

**C. CURRENT PUBLIC POLICY WEIGHS HEAVILY IN FAVOR OF VOIP CALLING BEING FREE OF ACCESS**

The Commission has said that it seeks a “market-led transition in technology and services, from the circuit switched PSTN system to an IP-based communication world.”<sup>25</sup> It recently released, on March 16, 2010, its Connecting America: The National Broadband Plan and highlighted its mission:

The Mission of this plan is to create a high-performance America – a more productive, creative, efficient America in which affordable broadband is available everywhere and everyone has the means and skills to use valuable broadband applications.<sup>26</sup>

VoIP service is one of the “valuable broadband applications” that the Commission is seeking to foster. It is one of the primary applications that will make America more productive and efficient. It is one of the broadband applications that promote the expansion of broadband facilities and the subscription rate for broadband services. Yet, VoIP is a broadband information service that some are trying to burden with traditional access charges that discourage broadband deployment and subscription to broadband

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<sup>25</sup> Public Notice, Comment Sought on Transition from Circuit-Switched Network to All-IP Network, DA 09-2517 (rel. Dec. 1, 2009).

<sup>26</sup> Connecting America: The National Broadband Plan at 9.

services. Sprint noted this problem in its NBP Public Notice #25 Comments.<sup>27</sup>

Suggestions that VoIP charges be raised through the application of access charges is clearly contrary to the national interest in encouraging the deployment and use of IP technology and the efficiency it brings to the national economy.

While Sprint notes that the Commission is looking at transitioning from the currently unsustainable high access charges now in place, in reality, exemption of VoIP traffic from access charges has served as a transition from high access charges to a more rational intercarrier compensation system as IP technology has been phased into the industry. The LEC dependence on access has gradually decreased as traffic has moved from the traditional wireline TDM network to both wireless and VoIP service. This attrition has served as a first step in transitioning from access charges, which nearly all agree, need to be significantly reformed. This action is entirely consistent with the goals of increased broadband penetration and adoption in the United States and should be continued for solid public policy reasons.

Verizon agrees with Sprint that the regulatory overhang of LECs attempting to apply access to VoIP traffic has “deterred competition and market entry, and discouraged investment in and deployment of broadband and IP networks and services.”<sup>28</sup> Verizon also believes that access charges are in significant need of reform and supports the outcome that access charges should not be applied to VoIP traffic.<sup>29</sup> The Voice on the Net Coalition (“VON Coalition”) also supports continuation of “the Commission’s longstanding policy that enhanced services such as VoIP are exempt from the payment of

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<sup>27</sup> See Comments of Sprint Nextel Corporation NBP Public Notice #25 (Dec. 21, 2009) at 7-10.

<sup>28</sup> Comments of Verizon at 5.

<sup>29</sup> *Id.* at 4-5.

access charges” and the continuation of the “status quo” while the Commission considers additional intercarrier compensation reform.<sup>30</sup>

Finally, wholesale services are vital to the success of competitive services and as a result are used extensively within the United States communications infrastructure. It would be contrary to sound communications policy to eliminate the information service provider right to avoid the stifling effect of paying access charges simply because it chooses to utilize a wholesale carrier for traffic transport and termination. There are no other communications industry examples whereby the rights of a service provider are eliminated as a result of the lawful use of a wholesale provider.

#### **D. CONCLUSION**

Sprint requests, that if the Commission act on the Global Petition in a manner that impacts the industry, and not just Global, that it confirm that VoIP traffic is not subject to access charges and that wholesale carriers providing a service to terminate that traffic to the PSTN are likewise not subject to access charges for the VoIP traffic they carry.

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<sup>30</sup> Comments of the Voice on the Net Coalition at 1.

Respectfully submitted,

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April 12, 2010

## Certificate of Service

I hereby certify that a copy of the foregoing Reply Comments of Sprint Nextel Corporation was filed electronically or via US Mail on this 12<sup>th</sup> day of April, 2010 to the parties listed below.

  
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