Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Section XV, Reducing Inefficiencies and Waste by Curbing Arbitrage Opportunities	)	

COMMENTS OF
SPRINT NEXTEL CORPORATION

Charles W. McKee
Vice President, Government Affairs
Federal and State Regulatory

Michael B. Fingerhut
Director, Government Affairs

Norina T. Moy
Director, Government Affairs

900 Seventh St. NW, Suite 700
Washington, DC 20001
(703) 433-4503

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COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby respectfully submits its comments on Section XV of the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceedings on February 9, 2011. In Section XV, the Commission has asked for comment on reforms designed to reduce inefficiencies and waste by curbing arbitrage opportunities. Section XV focuses specifically on proposals relating to the appropriate intercarrier compensation framework for voice over Internet protocol (VoIP) traffic; revisions to call signaling rules to reduce phantom traffic; and changes to the

Commission's rules to address traffic pumping and help ensure that rates are just and reasonable.

I. INTRODUCTION AND SUMMARY.

The Commission will take a critical step toward a more rational intercarrier compensation system if, as expected, it acts expeditiously to address the serious arbitrage issues relating to intercarrier compensation for VoIP traffic, traffic pumping, and phantom traffic. For many years, these arbitrage activities have generated massive billing disputes and consumed inordinate resources that could have been put to far better and more productive uses. As discussed in greater detail below, the public interest would be well served through Commission adoption and immediate implementation of the following actions:

- The Commission should clarify that VoIP traffic exchanged with PSTN (or TDM) networks is not a telecommunications service, and thus is not subject to access charges. Rather, VoIP traffic should be subject immediately to a bill-and-keep regime.

- The Commission should adopt a 3:1 terminating-to-originating traffic trigger mechanism to combat unlawful traffic pumping. When this traffic ratio trigger is reached, an incumbent or competitive LEC may charge no more than $.0007 per minute on all of its terminating switched traffic. While the revenue sharing trigger/rate adjustment mechanisms proposed by the Commission in the instant NPRM are, admittedly, a vast improvement over the current dysfunctional arrangements, they present highly problematic enforcement challenges and, most importantly, will not eliminate traffic pumping. In contrast, the 3:1 ratio/$.0007 approach has proven effective and reasonable in other contexts (dial-up ISP-bound traffic and numerous reciprocal compensation agreements), is relatively straightforward to implement, and avoids complicated and contentious rate adjustment computations.

- To help address the phantom traffic issue, the terminating carrier must receive the OCN and, if the traffic is delivered by an IXC over FG-D trunks, the IXC's CIC. If the terminating carrier subtends a tandem, the tandem owner has the responsibility to pass the OCN and CIC to the terminating carrier. The Commission also must make clear that originating caller information cannot and should not always be used to

determine which intercarrier compensation rate applies. Because mobile traffic and certain IP-based services traffic are not tied to a fixed geographic area, it would be inappropriate to use originating caller information to jurisdictionalize traffic (to the extent that rates continue to differ based on jurisdictional distinctions, or the carrier attempts to jurisdictionalize traffic within the Commission's jurisdiction).

II. VoIP IS NOT A TELECOMMUNICATIONS SERVICE AND SHOULD BE SUBJECT TO BILL-AND-KEEP, NOT ACCESS CHARGES.

In Section XV.A of the NPRM, the Commission has asked for comment on the appropriate intercarrier compensation framework for voice over Internet protocol (VoIP) traffic that is exchanged with PSTN (or TDM) networks. As the Commission correctly noted, the lack of clarity over the applicable rate "has not only led to billing disputes and litigation, but may also be deterring innovation and introduction of new IP services to consumers."[1] In addition, significant market distortions have arisen because competitors are assessed and/or pay different rates for the same underlying function. Prompt release of a Commission order specifying the applicable compensation for IP-PSTN traffic is necessary and long overdue. Considering the public interest harms the Commission has correctly identified as being caused by the high per minute rates under the outdated switched access regime, Sprint urges immediate adoption of bill-and-keep for VoIP prospectively.[2]

As the Commission acknowledged (¶ 618), to date it has never affirmatively addressed the regulatory classification of interconnected VoIP services. In Sprint's view,

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[1] NPRM, ¶ 608, footnotes omitted.

[2] If carriers have existing commercial arrangements in place to govern compensation for VoIP traffic, the rate(s) specified in those arrangements should continue to prevail in accordance with the terms of those arrangements.

VoIP should be classified as an information service, rather than as a telecommunications service.[3] Certainly, VoIP traffic that is IP on one end and TDM at the other end has undergone a net protocol conversion, and is thus an enhanced service as defined in Section 64.702(a) of the Commission's Rules.[4] As federal courts have held,[5] IP-to-PSTN traffic, as an enhanced service, is not subject to access charges (per the ESP exemption),[6] but rather to an intercarrier compensation rate determined pursuant to Section 251(b)(5) interconnection agreements.

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[3] Sprint recognizes that classification of VoIP as an information service has implications for the federal Universal Service Fund ("USF"). Therefore, we urge the Commission to address expeditiously the issue of an appropriate USF contribution methodology in an increasingly all-broadband IP world.

[4] All services considered by the Commission to be enhanced services are information services under the 1996 Act; however, not all information services are enhanced. *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-6 (¶¶ 102-103) (1996).

[5] *Paetec v. CommPartners*, 2010 U.S. Dist. LEXIS 51926 (D.D.C., Feb. 18, 2010); *Southwestern Bell v. Missouri PUC*, 461 F. Supp. 2d 1055, 1073-84 (E.D. Mo. 2006) ("[B]ecause [VoIP-to-TDM] is a new service developed after the [1996] Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable").

[6] The ESP exemption has been in effect since 1983 and has been retained in several subsequent reviews. *See, e.g., First Reconsideration of 1983 Access Charge Order*, 97 FCC 2d 682, 715 (1983); *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982, 16133-35 (1997). In addition, the plain language of the FCC's rules makes clear that access charges apply to telecommunications services only, and not to information services. *See* 47 C.F.R. § 69.5(b) ("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*") (italics added).

Even if the Commission were to overturn its long-standing precedent that the existence of a net protocol conversion renders the traffic an information service,[7] and then decide that the ESP exemption does not apply to IP-to-PSTN traffic, the Act still precludes LECs from imposing access charges on VoIP traffic. As the FCC has repeatedly held, except as specifically provided in Section 251(g), Section 251(b)(5) reciprocal compensation applies to all telecommunications, regardless of its local or interstate nature.[8] Section 251(g) temporarily exempts certain traffic from section 251(b)(5) reciprocal compensation, retaining the access charge regime for certain traffic in place before passage of the 1996 Act.[9]

The D.C. Circuit stated in *Worldcom v. FCC* that, "[o]n its face, § 251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations,' including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superceded [sic] by Commission action implementing the Act."[10] It specifically found that "because there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound

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[7] The Commission has already used the "net protocol conversion" standard in the context of PSTN-TDM traffic. *See AT&T IP-in-the-Middle Order*, 19 FCC Rcd 7457 (2004) (AT&T's services held to be a telecommunications service because there was no net protocol conversion).

[8] *See 2008 ISP Remand Order*, 24 FCC Rcd 6475, 6479-80 (¶¶ 8-9) (2008), *aff'd sub nom Core et al. v. FCC,* 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 2010 U.S. LEXIS 8885 (Nov. 15, 2010); *see also 2001 ISP Remand Order,* 16 FCC Rcd 9151, 9165-66 (¶¶ 31-32) (2001), *remanded on other grounds, WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002), *cert. denied,* 538 U.S. 1012 (2003).

[9] *Id.*

[10] *Worldcom, Inc. v. FCC*, 288 F.3d at 432.

traffic," the Commission could not rely on section 251(g) to "carve out" from section 251(b)(5) calls made to ISPs.[11]

The same logic applies to VoIP services, which also did not exist at the time the 1996 Act was adopted. Because there was "no pre-Act obligation relating to intercarrier compensation" for IP-to-PSTN traffic, the Commission cannot mandate application of section 251(g) access charges to that traffic. At most, it could only find that reciprocal compensation applies.

Beyond the statutory and judicial prohibition on the assessment of access charges on VoIP traffic, there are public policy reasons to avoid this outcome. Applying access charges to VoIP would be a counter-productive step backwards – an ironic outcome given the glide path proposed in other sections of this NPRM away from high per minute of use intercarrier compensation rates even for traffic that is subject to access charges. Access charges are significantly above economic cost,[12] and to allow the assessment of such rates on VoIP traffic will depress demand for IP services and discourage investment in broadband facilities and services.

Accordingly, the Commission should declare that a bill-and-keep mechanism applies to VoIP traffic exchanged after the effective date of a Commission order to this effect, absent a different compensation arrangement negotiated by carriers in their

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[11] *Id.*

[12] In fact, the Wireline Bureau has determined that LECs using digital circuit-based switches incur no additional costs in call termination and that their reciprocal compensation rate should be set at zero. *See Virginia Arbitration Cost Order,* 18 FCC Rcd 17722, 17877 (¶ 391), 17903-04 (¶¶ 463-65), 17911-13 (¶¶ 484-89) (2003); *Virginia Arbitration Cost Compliance Order*, 19 FCC Rcd 1259, 1269 (¶ 30) (2004). Furthermore, federal courts have held that under the Act, "if no additional costs are

Footnote continued on next page

commercial agreements. As the Commission has consistently observed, "the current [intercarrier compensation] system is not sustainable in an all-broadband Internet Protocol (IP) world where payments for the exchange of IP traffic are not based on per-minute charges, but instead are typically based on charges for the amount of bandwidth consumed per month."[13] Given the economics of IP technology; the well-documented benefits of bill-and-keep;[14] and the importance of encouraging further deployment of broadband technology and IP-based networks (including IP interconnection) and services, the public interest clearly is best served by adoption of a default system of bill-and-keep for VoIP traffic.

III. PUMPED TRAFFIC IS NOT ACCESS TRAFFIC AND SHOULD NOT BE SUBJECT TO ACCESS CHARGES.

In Section XV.C of the NPRM, the Commission has asked for comment on revisions to its interstate access rules to address "access stimulation," a multi-billion dollar "arbitrage scheme" that "imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition."[15] Sprint is in full agreement with the Commission about the deleterious consequences of traffic pumping schemes, and applauds its expressed intent to address traffic pumping by both competitive and incumbent LECs on an expedited basis (*viz*, the accelerated pleading cycle and detailed proposed rules).

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incurred, there is nothing to pay." *Ace v. Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2005).

[13] NPRM, ¶ 505, quoting the National Broadband Plan at p. 142.

[14] *See, e.g., Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610, 9624-9630 (¶¶ 37-57) (2001); *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685, 4703 (¶ 37) (2005).

[15] NPRM, ¶¶ 636-7.

Sprint believes that the Commission has, unfortunately, underestimated the traffic pumpers' willingness to exploit even the smallest loophole (perceived or actual) as justification to continue or to expand their wasteful and unlawful schemes, and to seize willfully upon any lack of specificity to evade the intent of any rule. As discussed below, Sprint is deeply concerned that traffic pumping will continue -- indeed, expand -- so long as there is any suggestion that pumping traffic is a legitimate practice, or if the compensation remains at a non-cost-based level that continues to make this arbitrage activity profitable. Moreover, it will be difficult to ascertain when a "revenue sharing" trigger is met, and it is doubtful that the Commission's proposed trigger-induced rate adjustment mechanisms will result in just and reasonable rates.

Rather than relying upon a revenue sharing trigger and a complex re-calculation of non-cost-based rates under section 61.38 or 61.39 of the Rules, Sprint urges the Commission to mandate a rate no higher than $.0007 per minute for situations in which there is at least a 3:1 ratio of terminating to originating switched traffic. As discussed below, there are many benefits to adopting the 3:1 ratio/$.0007 approach. It is an effective, administratively simple, and auditable mechanism for curbing traffic pumping schemes. It has been successfully adopted in the context of ISP-bound traffic for several years, has been upheld by the Court, and the mechanics of its implementation are well known to the Commission and industry players. The $.0007 rate also has been adopted in numerous compensation agreements negotiated between private parties and thus may be considered to be commercially reasonable.

The ratio approach avoids many of the most problematic aspects of the revenue sharing mechanism proposed in the NPRM. And, it is not unreasonably or excessively

burdensome on local exchange carriers. Any LEC that has a legitimate reason for exceeding the 3:1 ratio, or that can demonstrate that a $.0007 rate is somehow inappropriate given that LEC's particular circumstances, always has the option of requesting a waiver of the rule. By the same token, any IXC or CMRS carrier that believes it has been improperly charged for pumped traffic would have the option of filing a complaint (and requesting retroactive intercarrier compensation credit where appropriate) with federal and/or state regulatory bodies even if the trigger (whatever is adopted) has not been met.

A. Pumped Traffic is Not Access Traffic.

As an initial matter, Sprint would emphasize that pumped traffic associated with purportedly "free" conference/chat, etc. services is not access traffic and that the terminating LEC (or any intermediary LEC on the terminating side) may therefore not assess access charges on such traffic. In those traffic pumping cases that have been considered in detail, both federal and state regulatory bodies have concluded that the so-called "free" service providers ("FSPs") are *not* end user customers of the terminating LEC pursuant to the LECs' tariffs.

As this Commission found, the FSPs do not subscribe or seek to subscribe to services offered under the LEC's tariff; they were provided connections by the LEC which differed from those available to customers of the LEC's tariffed services; they entered into agreements with the LEC that prohibited the LEC from providing the services involved to any competitor of the FSP or which had other unique terms not available under the LEC tariff; their account information was not entered into the LEC's customer billing systems in accordance with the LEC's standard business practices for

tariffed services; and they were not contemporaneously billed for any services provided them by the LEC.[16] Because the FSPs were not end users of the LEC's tariff, any usage associated with the "free" conference services is not access traffic and cannot be assessed access charges.[17]

The Iowa Utilities Board ("IUB") similarly found, after exhaustive discovery, that the traffic pumping "free" conference service providers did not subscribe to the services in the LECs' access and local exchange tariffs and thus were not end users of the LECs. As the IUB correctly concluded, intrastate access charges may not be applied to the pumped traffic because the disputed calls were not delivered to an end user of the LEC's local exchange tariffs; the calls did not terminate at the end user's premises; and the calls did not terminate in the LEC's certificated local exchange area.[18] The arrangements between the traffic pumping LECs and the FSPs involved in this complaint were "business partnerships,"[19] not service provided pursuant to tariff.

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[16] *Qwest Communications Corp., Complainant, v. Farmers and Merchants Mutual Telephone Company, Defendant*, File No. EB-07-MD-001, *Second Order on Reconsideration* ("*Qwest v. Farmers Second Order on Reconsideration*"), 24 FCC Rcd 14801, 14805-08 (¶¶ 10, 13, 14, 16) (2009).
[17] *Id.*, 24 FCC Rcd at 14814 (¶ 26).
[18] *Qwest Communications Corp., Complainant, vs. Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a/ Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, Respondents*, IUB Docket No. FCU-07-2, *Final Order* issued September 21, 2009, pp. 53-54.
[19] *Id.*, p. 33.

Recent attempts by certain LECs to redefine "end users" in their tariffs do not magically render traffic generated by their FSP partners access traffic. These tariffs are unlawful *ab initio*, and Sprint is confident that challenges brought against these tariffs will be upheld.[20]

Although the Commission does not assert in the instant NPRM that pumped traffic is legitimate access traffic, its proposal to allow LECs to assess access charges (either the BOC rate or adjusted LEC-specific rates) on pumped traffic may be interpreted -- incorrectly -- by some parties as an FCC seal of approval of traffic pumping activities. This surely and obviously is not the case. The NPRM makes clear that the FCC is not sanctioning these "wasteful," "inefficient" and "harmful" arbitrage

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[20] *See Sprint Communications Company L.P. v. Northern Valley Communications,* File No. EB-11-MD-003 filed February 21, 2011. In its complaint, Sprint is seeking a ruling that Northern Valley's Tariff No. 3, which Northern Valley filed in the wake of the FCC's decision in *Qwest v. Farmers* in order to evade the FCC's findings therein, was invalid and void *ab initio* under §§ 201(b) and 251(b) & (g) of Act as well as §§ 61.2 and 61.26 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.26, because the "tariff" seeks to make "fundamental changes in the definition of a switched access service that render it ambiguous and impossible to interpret"; because Northern Valley "seeks to tariff a service with no functional ILEC equivalent;" because the "tariff's" definition of "access service" is at odds with the FCC's definition set forth in the Rules; and because the "tariff" seeks to impose rates on non-telecommunications services. Sprint also seeks a ruling that even if the tariff is not void, "the rates, terms and conditions to the extent that they can be understood are unjust and unreasonable in violation of Section 201(b)." Complaint at 2. *See also Qwest v. Northern Valley*, File No. 11-EB-MD-001 filed January 7, 2011 (challenging the fact that Northern Valley seeks to impose switched access services on the delivery of services to entities that are not its end user customers). Additional complaints against CLECs that have filed similar if not identical tariffs to the challenged Northern Valley tariff (including Aventure Communication Technology, LLC, Core Communications, and Bluegrass Telephone Company) are likely to be filed in the near future. Sprint would also note that the FCC now has before it primary jurisdiction referrals asking the FCC to decide the lawfulness of the previous version of Northern Valley's tariff as well as the previous version of the tariffs of those CLECs such as Tekstar Communications, Inc. that filed new tariffs that seek to nullify the FCC's findings in *Qwest v. Farmers*.

"schemes." Indeed, the Section XV.C proposals are explicitly intended to *reduce* traffic pumping, and are, by the Commission's own description, the latest in a series of actions it has taken over the years to "curb arbitrage incentives created by above-cost intercarrier compensation rates."[21]

Traffic pumping schemes cause significant distortions in the retail long distance market, the retail wireless market, and the conference calling and chat line markets. Through the improper imposition of hundreds of millions (perhaps even billions) of dollars in access charges and related dispute/litigation costs, traffic pumping LECs and their FSP partners have dramatically increased the cost of providing long distance and wireless services. Through improper revenue sharing agreements, traffic pumping entities also have negatively impacted the ability of legitimate conference calling and chat line service providers (who do not receive subsidies from non-competitive access charges) to charge fair and market-based rates for the services they provide. Such market distortions are obviously contrary to the public interest and must be addressed expeditiously.

B. Adoption of a Ratio/$.0007 Rule Is Superior to the Proposed Revenue Sharing Trigger Approach.

In the instant NPRM, the Commission has proposed that once a LEC meets an access revenue sharing trigger, it would be subject to modified access charge rules that vary depending on the nature of the carrier. Once the trigger is met, a rate-of-return LEC that participates in the NECA pool would be required to exit the pool and file its own

[21] NRPM, ¶¶ 655 – 657, citing its actions to address dial-up ISP-bound traffic, its 2007 investigation of certain rate-of-return LECs engaged in traffic pumping, and its traffic pumping rulemaking proceeding.

tariff subject to Section 61.38. Section 61.38 rates are based on the LEC's projected costs and demand. A LEC currently filing access tariffs subject to Section 61.39 (which provides for the computation of rates based on historical costs and demand) would, upon meeting the trigger, be required to file revised rates subject to Section 61.38. And a competitive LEC would, upon meeting the trigger, be required to benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in that state.[22]

Sprint understands the Commission's concern that "good" LECs not be penalized or unduly burdened as the result of the actions of the relatively few LECs that have engaged in traffic pumping activities. However, the revenue sharing trigger approach proposed in the NPRM is far too conservative. While it may mitigate the most egregious effects of traffic pumping (which would, admittedly, be a vast improvement over the current situation in which there are virtually no regulatory limits on traffic pumping by competitive LECs), it will certainly not eliminate the practice and will be difficult to enforce. To the extent that any LEC views the proposal as an FCC-sanctioned go-ahead to engage in traffic pumping, and the LEC will be able to turn a tidy profit even if required to charge adjusted access rates (which remain significantly higher than incremental cost), the trigger proposal may actually encourage additional LECs to begin engaging in such practices.

Sprint has several concerns about the revenue sharing trigger proposal. First, it is unclear how the Commission or interested parties can know or prove the existence of an

[22] NPRM, ¶¶ 662-665.

access revenue sharing agreement between the LEC and the FSP. Outside of the complaint process, traffic pumping LECs and the "free" service providers usually do not make their partnership arrangements public,[23] and the Commission has declined to require certifications or additional reporting by the LECs regarding the existence of any access revenue sharing arrangements.[24]

Second, it appears that the Commission's proposed trigger involves "a net payment" by the LEC to its FSP partner "over the course of the agreement."[25] Sprint expects that the traffic pumping parties will argue that a determination of net payments is possible only after expiration of the revenue sharing agreement (or even longer, assuming some additional period of time to "close the books"), and that they are allowed to continue to engage in traffic pumping, and to continue to assess the unadjusted (extremely high) access charges, until the agreement expires. Allowing traffic pumping to continue for the length of the revenue sharing agreement is contrary to the public interest and surely is not the outcome envisioned by the Commission.

Third, it will be difficult, perhaps impossible, to "address a revenue sharing arrangement within the same company where an explicit revenue sharing agreement may not exist."[26] A LEC that offers a "free" service itself or through one of its affiliates need

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[23] Indeed, some traffic pumping LECs have gone to great lengths to hide and even mis-represent their business arrangements with their FSP partners. For example, the Commission reversed its original ruling in the *Qwest v. Farmers and Merchants* complaint proceeding based on newly available evidence that Farmers had back-dated contracts and invoices. *See Qwest v. Farmers Second Order on Reconsideration*, 24 FCC Rcd at 14805-06 (¶ 11).
[24] NPRM, fn. 1021.
[25] NPRM, ¶ 659.
[26] *Id.*

not have an explicit revenue sharing agreement – the financial benefits of traffic pumping flow to the corporate entity as a whole even if the LEC does not share any portion of any access revenues with its "free" service sibling. Of course, if the trigger is never met, no rate adjustment would ever be required, and the LEC has an open-ended *carte blanche* to engage in traffic pumping schemes and to charge unjust and unreasonable rates for the pumped traffic.

Fourth, even assuming that the revenue sharing trigger problems noted above could be adequately addressed, Sprint is skeptical that Section 61.38 will ensure that traffic pumping LECs' rates will in fact be just and reasonable. Section 61.38 requires LECs to set rates based upon their projected costs and demand. These projections are made by the LECs themselves -- parties that have every incentive to over-forecast their costs and under-forecast their demand -- and even the most diligent outsider will find it difficult to thoroughly evaluate these projections, particularly within the time frame associated with a tariff filing.

Even if the LECs' projections are made in complete good faith, the apparent lack of a true-up mechanism means that LECs incur no penalty (except perhaps as may arise from resource-intensive, carrier-by-carrier complaint proceedings) for overearnings resulting from variance between actual and forecasted costs and demand. Finally, because the fully distributed cost standard that underlies Section 61.38 does not reflect true economic costs, the resulting rates will be far in excess of forward-looking incremental costs. In short, rates calculated under Section 61.38 may be lower than the rates traffic pumping LECs assess today, but they will not necessarily be just and

reasonable, and they almost certainly will remain high enough to keep traffic pumping a profitable activity for pumpers, to the detriment of the public.

Fifth, the proposed fix for competitive LEC traffic pumping – benchmarking to the BOC/largest independent ILEC rate – will be largely ineffective at curbing traffic pumping. While an improvement over the current situation, in which some competitive LECs are charging $.05 or more per minute, BOC rates still provide a hefty profit margin because they exceed the economic cost of providing traffic termination. Moreover, unless the Commission specifies otherwise, traffic pumping LECs are likely to include every possible BOC switched access rate element in their claimed benchmark to maximize the benchmark rate level. This certainly should not be allowed, since LECs that direct pumped traffic to the FSP's equipment collocated in the central office do not provide the same functions rendered to true end user customers that have an actual premise in the LEC's service territory. Indeed, it is axiomatic that a "benchmark" rate cannot include the cost of services not provided. Therefore, if the Commission adopts its proposed trigger mechanism, it must specify that at most, the benchmark may include only the interstate BOC/independent ILEC local switching rate element.[27]

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[27] Sprint does vigorously support the Commission's proposal to prohibit LECs that meet the trigger from filing tariffs on a "deemed lawful" basis (NPRM, ¶ 666). Particularly in the case of competitive LECs, which currently are not required to file their tariffs electronically, the difficulty in obtaining a copy of the tariff filing plus the extremely short notice period make it difficult if not impossible to review and object to problematic tariffs. Even more serious is the lack of redress carriers have against "deemed lawful" tariffs that involve rates that result in excess earnings. Even where there can be no dispute that past-period overcharges occurred, deemed lawful status may preclude refunds. *See Qwest v. Farmers, Memorandum Opinion and Order*, 22 FCC Rcd 17973, 17978, fn. 52 (2007).

Sixth, the proposed trigger approach does not address intermediate LECs such as tandem providers who often are also involved in the routing of pumped traffic. IXCs, CMRS carriers and even other competitive LECs do not interconnect directly with each of the roughly 1500 LECs in the country.[28] Instead, they interconnect with a tandem provider, which in turn routes the IXC/CMRS/CLEC carriers' traffic to terminate over the multiple LECs subtending the intermediary LEC's tandem.[29] Intermediate LECs benefit greatly from traffic pumping even when they have no direct relationship with the "free" service provider, since they assess tandem switching and transport charges on the IXC/CMRS/CLEC provider for pumped traffic that is routed through the access tandem to the end office of the terminating LEC. Pumped traffic is not access traffic, and may not be assessed access charges, if it was delivered to a FSP that is not a legitimate end user subscriber of the terminating LEC's tariff. In Sprint's view, the non-access nature of this traffic extends backwards along the entire terminating route: the traffic does not become access traffic at the tandem by virtue of the fact that the intermediate LEC does not have a direct arrangement with the FSP. Reducing the financial incentive of a terminating LEC to engage in traffic pumping will also reduce disputes between the IXC/CMRS/CLEC provider and the intermediate LEC, but will not eliminate all such disputes to the extent that traffic pumping continues (highly likely, as discussed above).

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[28] There were an estimated 1521 local exchange carriers in the United States as of December 31, 2009. *See Local Telephone Competition: Status as of December 31, 2009*, Table 16, Industry Analysis and Technology Division, Wireline Competition Bureau, report released January 2011.

[29] In some instances, the tandem provider is owned by a consortium of LECs, some of whom may be engaged in traffic pumping. In other cases, the tandem provider may be an affiliate of a traffic pumping LEC.

In contrast to the revenue sharing trigger approach, a 3:1 ratio/$.0007 approach would be more effective at curbing traffic pumping, is easier to administer, and easier to audit. Under the ratio approach, any LEC that terminates 3 or more minutes for every minute it originates would be allowed to charge no more than $.0007 per minute for all of its terminating switched traffic, and must apportion the revenues associated with the $.0007 rate with any intermediary LEC involved in terminating that traffic. This approach offers the following advantages:

- The Commission[30] and private parties have found in other contexts (dial-up ISP-bound traffic, numerous reciprocal compensation negotiated agreements) that the $.0007 rate is reasonable, compensatory but not so high as to encourage excessive arbitrage or unlawful cross-subsidization.[31] Although Sprint does not concede that the actual economic cost incurred by a traffic pumping LEC is $.0007, Sprint is willing to compromise at $.0007 in the interest of rapid implementation of a rule to address traffic pumping.[32] The traffic pumping situation is strikingly analogous to the ISP-bound situation: sharp increases in predominantly one-way traffic volumes generated by regulatory arbitrage; LECs in effect paying an entity (ISPs or "free" service providers) to become their customers; and inaccurate price signals to users of the network. Thus, the reasoning applied by the Commission in addressing the ISP-bound traffic situation applies equally to the traffic pumping situation at issue here.

- A 3:1 ratio trigger (ascertained either when the LEC itself reports that the trigger has been met, or when an IXC reports that it has experienced this traffic

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[30] *2008 ISP Remand Order*, 24 FCC Rcd 6480 (¶ 9), 6483 (¶ 16) (2008); *Core et al. v. FCC*, 592 F.3d at 141 ("[f]inding no legal error in the Commission's analysis [in the *2008 ISP Remand Order*], we affirm its order").

[31] Section 254(k) of the Act forbids subsidy of competitive services by non-competitive services. In light of this statutory imperative, LECs should not be allowed to continue to subsidize competitive services such as conference calling, with revenues from non-competitive services such as terminating access.

[32] The $.0007 rate was computed some 12 years ago, and Sprint believes that the economic cost of terminating a minute today, particularly using current IP technology, is even lower. Therefore, bill-and-keep is the more rational and certainly the most effective remedy for traffic pumping; indeed, bill-and-keep is the ultimate outcome envisioned by the Commission for all categories and types of switched traffic (see sections X-XIV of the NPRM, setting forth the Commission's plan for long-term, comprehensive intercarrier compensation reform).

imbalance) would be relatively easy to identify and audit. The Commission and interested parties need not rely solely upon the honesty of the terminating LEC to ascertain when the trigger has been met. Any IXC can determine, based on its own traffic studies and on bills it has received from the LEC, what its ratio of terminating to originating traffic is; as there is no reason to suspect that traffic pumpers are singling out any particular IXC, an individual IXC's results are likely to be a reasonably good proxy for the LEC's overall ratio. Because information on originating and terminating minutes of use is available on a fairly real-time basis, the ratio approach minimizes disputes over whether the trigger has been met, and avoids long delays in implementing the adjusted rate.

- A fixed rate of $.0007 avoids the need to compute and evaluate rates computed under Section 61.38, and to true up results in the event that the LEC exceeds its authorized rate of return. As proven in the case of ISP-bound traffic, the fixed rate approach effectively addressed the problem, at a low regulatory cost, with no need for on-going monitoring by the Commission or complex rules, and little if any opportunity for ISPs to manipulate the rules to continue to engage in uneconomic arbitrage.

Finally, Sprint would emphasize that the ratio trigger should not impose an undue burden on "good" LECs. In Sprint's experience, the overwhelming majority of LECs have *not* engaged in traffic pumping. Sprint currently has outstanding billing disputes of $10,000 or more with 69 LECs for usage which Sprint has identified as pumped traffic; 27 of these 69 LECs account for 84% of the outstanding disputed traffic pumping charges.[33] And, to the extent that "good" LECs are considered to be unduly burdened by Sprint's proposal, additional safeguards could be incorporated to reduce the number of non-traffic pumping LECs that may be affected by the ratio approach.[34]

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[33] Sprint also has identified several other LECs that have engaged in traffic pumping at some point since 2007, but which subsequently ceased traffic pumping activities, largely because of regulatory or judicial actions or negotiated settlements.

[34] For example, the Commission might consider the following:

- Adding a minimum volume threshold above which the $.0007 rate would apply (that is, the $.0007 rate would apply when a LEC both exceeds a 3:1 ratio and has more than X terminating minutes of use);
- Requiring known traffic pumpers to use telephone numbers only from a certain NPA-NXX for the provision of their "free" services. Under this approach, all

Footnote continued on next page

Sprint believes that its 3:1 ratio/$.0007 proposal will help mitigate the economic and public interest harms caused by unlawful traffic pumping arbitrage schemes of incumbent and competitive LECs and their FSP partners, but acknowledges that its proposal likely will not eliminate such harms. Another measure to protect against traffic pumping by CLECs in particular is for the Commission to require CLECs engaged in traffic pumping to detariff their access charges.[35] Mandatory detariffing would eliminate the ability of these CLECs to take advantage of the "deemed lawful" language set forth in Section 204(a)(3), or to invoke the "filed rate" doctrine in seeking to collect their tariffed access charges from IXCs. The Commission has previously found that eliminating the ability of competitive carriers to invoke the filed rate doctrine would be in the public interest.[36]

Sprint recognizes that the Commission previously declined to require mandatory detariffing as a means of disciplining competitive LECs that were abusing the tariff

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traffic to those numbers would be assessed a maximum $.0007 rate per minute. This approach avoids some of the implementation complications associated with a 3:1 ratio approach, but would not address traffic pumping by as-yet unidentified entities or services.

[35] *See Hyperion Telecommunications Inc. Notice of Proposed Rulemaking*, (CC Docket Nos. 96-262 and 97-146), 12 FCC Rcd 8596 (1997) (proposing to "establish complete detariffing for all non-ILEC providers of interstate access services") and *Commission Asks Parties to Update and Refresh the Record on Mandatory Detariffing of CLEC Interstate Access Services, Public Notice*, 15 FCC Rcd 10181 (2000).

[36] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,* 11 FCC Rcd 20730, 20760 (1996), subsequent FCC history omitted ("Absent filed tariffs, the legal relationship between carriers and customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment. Thus, eliminating the filed rate doctrine in this context would serve the public interest by preserving reasonable commercial expectations and protecting consumers"). The D.C. Circuit later affirmed the Commission's decision (*see MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000)).

system to engage in uneconomic arbitrage.[37] In its *Seventh Report and Order* in CC Docket No. 96-262, the Commission instead adopted the benchmark approach that remains in effect today. However, as witnessed by the instant proceeding and related traffic pumping complaints and dockets, the benchmark approach has proven inadequate, and certain competitive LECs have set up operations in rural areas not to offer competitive local services[38] but rather to engage uneconomic arbitrage to the detriment of the public interest. To discourage competitive LECs from engaging in such activities, the Commission should adopt its tentative conclusion in the *Hyperion* rulemaking that the public interest would be served by the mandating the complete detariffing of competitive LEC "access" charges.

C. Compensation for IntraMTA CLEC-CMRS Traffic Should Be Clarified.

In the instant NPRM, the Commission has asked for comment on several issues relating to intraMTA competitive LEC-CMRS traffic.[39] Specifically, it has asked about the impact of its North County decision;[40] whether it should adopt rules governing

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[37] *See In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC 9923 (2001). The Commission found that the CLECs were "positioned to wield market power with respect to access service," 16 FCC Rcd at 9957 (¶ 8); that such power "create[d] an arbitrage opportunity for CLECs to charge unreasonable access rates," 16 FCC Rcd at 9936 (¶ 34); and that "some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services" (*id.*).

[38] 16 FCC Rcd at 9955-56 (¶ 80).

[39] Because the Commission has sought comment on intraMTA traffic in this section, Sprint has limited its discussion here to this category of traffic. Sprint does not concede in any way that interMTA CMRS traffic is subject to access charges, and intends to discuss the appropriate compensation for interMTA traffic (CMRS-LEC traffic generally) in subsequent comments on other sections of this NPRM.

[40] *North County Communications Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 3807 (Enf. Bur. 2009), *pet. for rev. pending sub nom., MetroPCS California, LLC v. FCC*, No. 10-1003 (D.C. Cir. filed Jan. 11, 2010). In the *North County Order*, the Commission

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competitive LEC-CMRS compensation arrangements under section 20.11; and whether it should clarify that carriers may only assess a charge under section 20.11 after an agreement has been signed (NPRM, ¶ 673). As discussed below, Sprint has experienced an increase in intraMTA traffic pumping. To address those disputes, Sprint urges the Commission to state that, to the extent that any compensation is due at all on competitive LEC-CMRS traffic, such traffic is subject to the reciprocal compensation (not access) regime, and that in the absence of an interconnection agreement, all competitive LEC-CMRS traffic is subject to bill-and-keep.

Like other CMRS providers,[41] Sprint has experienced a significant increase in highly problematic intraMTA traffic terminating to certain competitive LECs since release of the *North County Order*. For example, between 2009 and 2010, charges for Sprint's intraMTA traffic terminating to Tekstar increased by 71% -- highly suspicious, given Tekstar's record in pumping inter- and intraLATA traffic.

Sprint agrees that it would be helpful for the Commission to further address intercarrier compensation rules for intraMTA competitive LEC-CMRS traffic. First, the Commission should reiterate its long-established finding that this traffic, like all intraMTA traffic, is subject to the reciprocal compensation rather than access regime,

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stated that it had authority to establish pricing rules for intraMTA wireless traffic terminated by competitive LECs, but declined to do so, prompting certain competitive LECs to assert that they could assess rates higher than those which incumbent LECs are allowed to assess for intraMTA traffic.

[41] See, for example, *ex parte* letter from Tamara Preiss, Verizon, to Marlene Dortch, FCC, dated June 28, 2010, filed in WC Docket No. 07-135.

pursuant to section 251(b)(5) of the Act.[42] Section 51.701 of the Rules further establishes reciprocal compensation pricing rules for telecommunications traffic, which explicitly (per Section 51.701(b)(2)) includes intraMTA LEC-CMRS traffic. Thus, between the *Local Competition First Report and Order* and Section 51.701 of the Rules, there can be no dispute that intraMTA competitive LEC-CMRS traffic is subject to the reciprocal compensation regime.[43]

Second, the Commission should reiterate its decision in the *T-Mobile Order* that LECs (both competitive and incumbent) may not use tariffs to impose intercarrier compensation obligations with respect to CMRS traffic.[44] Section 20.11(e) of the Rules (adopted in the *T-Mobile Order*) specifies that "Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." As there can be no dispute that competitive LECs are "local exchange carriers" for purposes of Section 20.11(e), a competitive LEC may assess reciprocal compensation obligations upon a CMRS provider for traffic only pursuant to a negotiated agreement executed by the two parties.

What the Commission can and should clarify is that in the absence of any signed intercarrier compensation agreement between the CMRS carrier and the competitive

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[42] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16016 (¶ 1041) (1996) (subsequent history omitted).

[43] Application of reciprocal compensation rules to intraMTA CLEC/CMRS traffic does not, however, impose any new obligations on CMRS providers (*e.g.*, CLECs may not demand that CMRS providers establish reciprocal compensation arrangements).

[44] *Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs* ("*T-Mobile Order*"), 20 FCC Rcd 4855 (2005).

LEC, bill-and-keep arrangements apply. As the Commission stated in the *T-Mobile Order*, "...in the absence of a request for an interconnection agreement, *no compensation is owed for termination*" (fn. 57, emphasis added). Besides being specifically endorsed in this order, the bill-and-keep mechanism is a common and efficient commercial arrangement, widely used to govern Internet peering arrangements and the exchange of wireless-to-wireless traffic. The benefits of bill-and-keep apply with equal force to the exchange of all traffic between CMRS carriers and competitive LECs.

IV. PHANTOM TRAFFIC

In Section XV.B of the NPRM, the Commission has asked for comment on proposed rules designed "to help ensure that service providers receive sufficient information associated with each call terminated on their networks to identify the originating provider for the call."[45] "Phantom traffic" billing disputes may arise when the terminating carrier is unable to identify the originating service provider because the originating traffic information was misidentified or concealed, or because the call signaling information was somehow otherwise lost or altered. Phantom traffic billing disputes may also arise because of disagreements as to how or whether rules written many years ago apply to new services and types of traffic. To reduce the incidence of the former category of phantom traffic, the Commission proposes to extend the obligation to pass Calling Party Number (CPN) to all traffic originating or terminating on the PSTN.[46]

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[45] NPRM, ¶ 620.

[46] NPRM, ¶ 629. The proposed rules would apply to interstate traffic, intrastate traffic, and traffic transmitted using either SS7 call signaling or Internet protocols.

As both an originating and terminating carrier, Sprint has a vested interest in the adoption of reasonable rules that ensure proper identification of the party responsible for any payment obligation. In its capacity as a CMRS provider and a competitive LEC terminating other carriers' calls, Sprint needs accurate originating traffic information to determine whom to bill and what rate to assess. As an originating CMRS provider, a competitive LEC, and an interexchange carrier, Sprint recognizes the importance of providing correct information so that it is assessed the appropriate intercarrier compensation rate. Accordingly, Sprint does not strip or alter originating information on its traffic.

While Sprint supports reasonable efforts to address phantom traffic, the Commission should, in evaluating the costs and benefits of codifying any new rules, take into consideration the following factors.

First, Sprint would emphasize that originating caller information cannot and should not always be used to determine which intercarrier compensation rate applies. Mobile traffic and evolving IP-based services traffic, by their very nature, are not tied to a fixed geographic area, and it would be inappropriate to use calling party number to jurisdictionalize traffic (to the extent that rates continue to differ based on jurisdictional distinctions).[47] Similarly, when a mobile customer roams on another carrier's network, that mobile customer's calling party number cannot be used to identify which carrier

[47] For example, an end user with a 202 (Washington, DC) mobile number may place a call to a 415 (San Francisco, CA) number while staying in San Francisco on business. Such a call is local and would legitimately be terminated over a local interconnection trunk; however, based solely on the CPN, this call would be (incorrectly) jurisdictionalized as an interstate call.

should be billed. In these examples, using the CPN would result in either the incorrect rate or the incorrect carrier being assessed.

Second, Sprint would note that the underlying network provider does not always receive certain originating information such as the CPN. Some IP-based services allow end user subscribers to choose what calling information is presented (*e.g.*, a number assigned to the end user by the IP service provider, rather than the calling party number).[48] Sprint, as the underlying network provider, has little or no control over this process and should not be obliged to "fix the problem" or be held liable for the end user's choice.

Indeed, the burden to any carrier of "fixing the problem" should be kept to a minimum. The Commission has expressed its firm intent to transition to a progressively more unified intercarrier system and, ultimately, to bill-and-keep. It makes no sense to require carriers to invest in costly billing or other system modifications to accommodate the patchwork of intercarrier compensation rates that are to be phased out.

After taking the above factors into consideration, the Commission should specify that the terminating carrier must receive the OCN and, if the traffic is delivered by an IXC over FG-D trunks, the IXC's CIC. If the terminating carrier subtends a tandem, the tandem owner has the responsibility to pass the OCN and CIC to the terminating carrier.

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[48] For example, a Google Voice customer may choose to have either his Google Voice number or the number associated with his handset appear as the originating number. *See* www.google.com/googlevoice/about.html#.

V. CONCLUSION.

Sprint heartily agrees with the Commission on the need to address arbitrage issues involving VoIP traffic, traffic pumping, and phantom traffic, in an expeditious manner. Sprint believes that its recommendations discussed above represent a balanced and effective approach that can be implemented expeditiously and at a reasonable cost.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Charles W. McKee

Charles W. McKee
Vice President, Government Affairs
Federal and State Regulatory

Michael B. Fingerhut
Director, Government Affairs

Norina T. Moy
Director, Government Affairs

900 Seventh St. NW, Suite 700
Washington, DC 20001
(703) 433-4503

April 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Sprint Nextel Corporation was filed electronically or via US Mail on this 1st day of April, 2011 to the parties listed below.

Norina T. Moy

Victoria Goldberg
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Victoria.Goldberg@fcc.gov

Joseph Cavender
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
Joseph.Cavender@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th St., SW, Room CY-B402
Washington, DC 20554
fcc@bcpiweb.com