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July 29, 2011

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Written Ex Parte Communication
Application of LEC Access Charges to Interconnected VoIP Traffic
WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, CC Docket
No. 01-92, CC Docket No. 96-45, WC Docket No 03-109

Dear Ms Dortch:

Sprint Nextel Corporation (“Sprint”) submits this letter to respond to those LECs requesting that the Commission permit them to impose access charges on interconnected VoIP traffic. Sprint demonstrates below that the Commission cannot grant this LEC request, both as a matter of an explicit statutory mandate and as a matter of law.

A. APPLYING ACCESS CHARGES TO INTERCONNECTED VOIP TRAFFIC WOULD BE INCOMPATIBLE WITH THE CONGRESSIONAL DIRECTIVE IN SECTION 706

Congress has specified that the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,”¹ and it has further classified interconnected VoIP service as an advanced communications service.² The Commission recently concluded that broadband is “not being deployed in a reasonable and timely fashion to all Americans.”³ This finding is important because in this situation, Congress

¹ 47 U.S.C. § 1302(a).

² 47 U.S.C. § 153(1) (“The term ‘advanced communications service’ means (A) interconnected VoIP service . . .”). Congress has defined interconnected VoIP service by referring to FCC Rule 9.3 “as such section may be amended from time to time.” *See id.* at § 153(25).

³ *Seventh Broadband Progress Report*, GN Docket No. 10-159, FCC 11-78, at ¶ 1 (May 20, 2011). *See also Sixth Broadband Deployment Report*, 25 FCC Rcd 9556, 9558 ¶ 2 (2010).

has specifically directed the FCC to take “immediate action to accelerate deployment of such capability.”⁴

In response to the call for “immediate action” to “accelerate deployment” of interconnected VoIP service, the LECs propose to impose new costs – in the form of legacy access charges – on providers of interconnected VoIP services, even though such access charges are well above economic cost.

The lowest access charges in the country are 0.55 cents/minute – and some access charges are as high as 35.9 cents/minute.⁵ The Wireline Bureau, however, has determined that “the incremental cost of termination [on circuit switches] is zero.”⁶ Given this conclusion, *even the “lowest” access rate constitutes 100 percent profit to the LEC.*

The following four ILECs all favor applying their legacy access rates to interconnected VoIP traffic, and it becomes immediately apparent why they take this position. Based on the \$0.0007/minute ISP rate (rather than the more accurate but lower “de minimis” or “zero” incremental cost) these ILECs generate truly remarkable profit margins:

	Interstate		Intrastate	
	Average Rate	Profit Margin	Average Rate	Profit Margin
AT&T	0.55¢	686%	0.80¢	1,043%
CenturyLink	0.65¢	829%	3.20¢	4,471%
Windstream	1.20¢	1,614%	5.50¢	7,757%
Frontier	0.70¢	900%	1.70¢	2,329%

⁴ 47 U.S.C. § 1302(b).

⁵ The “lowest” rate is the average traffic sensitive rate the RBOCs charge for interstate access. *See* 47 C.F.R. § 61.3(qq). *See also* National Broadband Plan at 142 (Access “[r]ates vary from zero to 35.9 cents per minute.”).

⁶ *See Chairman Martin’s ICC Reform Proposal*, 24 FCC Rcd 6475, 6611 ¶ 255 (2008). *See also Virginia Arbitration Cost Order*, 18 FCC Rcd 17722 (2003)(Bureau finds Verizon incurs no incremental costs of termination with its circuit switches). Similarly, three prominent economists have advised the FCC that the incremental costs of termination on circuit switches are “de minimis,” if not zero, and that transport involves “very little incremental costs.” *See* 24 FCC Rcd at 6610-11 ¶¶ 255-56. AT&T has submitted evidence that the incremental cost of termination for one softswitch is zero, while this cost with another softswitch, using “conservative” estimates, ranges from 0.01 to 0.024 cents/minute. *See id.* at 6611-12 ¶ 257.

LECs also propose imposing their bloated access charges even though these per-minute charges are fundamentally incompatible with the flat-rated price structure that VoIP providers typically use with their retail services. For example,

- AT&T, with its U-verse services, offers “unlimited calling within the U.S. and to Canada, Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Marianas for just \$35 per month.”⁷
- Comcast for existing customers offers for \$19.99/monthly an XFINITY voice service that includes “unlimited local and long-distance calls in the United States, Canada and Puerto Rico. Enjoy the latest technology like Universal Caller ID on your TV and PC and voicemail you can check online. Plus, 12 popular calling features including Call Waiting, 3-Way Calling and more.”⁸
- Vonage offers for \$25.99/monthly (following a three month promotional rate of \$14.99) its Vonage World service, which includes “unlimited local and long distance home phone service across the U.S., Canada and Puerto Rico,” “unlimited calling to landlines” in 60 countries, and “unlimited calling to mobile phones” in 10 countries, “even India.”⁹
- CenturyLink-Qwest offers for \$19.99/monthly an unlimited VoIP calling plan for domestic calls – while the same plan using its circuit-switched network is more than twice the price: \$45/monthly.¹⁰

As Verizon has documented, even if VoIP customers have only moderate “toll” usage, their VoIP provider could see annual cost increases of up to \$180 – or more.¹¹ Cost increases of this magnitude necessarily will be passed through to customers in the form of higher retail prices.

Of course, imposing significant new costs on interconnected VoIP services cannot possibly accelerate deployment of such services. It is therefore unsurprising that no LEC has attempted to reconcile its “impose legacy access charges” position with the specific mandate that Congress imposed on the FCC in § 706 of the 1996 Act. In fact, under no circumstances can anyone credibly claim that imposing bloated access charges on providers of interconnected VoIP services will “accelerate” broadband deployment and use of broadband voice services.

⁷ See <http://www.att.com/u-verse/explore/voice-plans.jsp> (visited June 1, 2011).

⁸ See <http://www.comcast.com/Corporate/Learn/DigitalVoice/digitalvoice.html> (visited July 28, 2011).

⁹ See <http://www.vonage.com/world-calling-plans/vonage-world/> (visited July 28, 2011).

¹⁰ Compare <http://www.qwest.com/residential/products/voip/> and <http://www.qwest.com/residential/phonelanding/> (visited July 28, 2011).

¹¹ See Verizon § XV Reply Comments filed April 18, 2011 at 8.

B. THE FCC CANNOT CLASSIFY INTERCONNECTED VOIP SERVICE AS A TELECOMMUNICATIONS SERVICE AND SUBJECT IT TO THE ACCESS REGIME WITHOUT OVERRULING 30 YEARS OF UNIFORM PRECEDENT

Many LECs contend that the “simplest way” for the FCC to apply access charges to interconnected VoIP service would be to classify this advanced service as a “telecommunications service” under the Act.¹² However, the FCC cannot make such a classification and impose access charges on such service without overruling 30 years of uniform precedent.

Access charges have never been applied to information services. The FCC decided not to apply such charges to what it then called enhanced services in its 1983 orders establishing access charges.¹³ As the FCC later explained, the imposition of access charges is “not appropriate and could cause disruption in this industry segment that the provision of enhanced services to the public might be impaired.”¹⁴

Shortly following enactment of the 1996 Act, which added the “information services” classification, the FCC held that “all of the services the Commission has previously considered to be ‘enhanced services’ are ‘information services.’”¹⁵ The FCC further reaffirmed that LECs may not impose access charges on information service providers:

We find that our existing policy promotes the development of the information services industry, advances the goals of the 1996 Act, and creates significant benefits for the economy and the American people.¹⁶

The presence or absence of a “net” protocol conversion has been one of the defining factors the FCC has considered in determining whether a particular service should be classified as an information service or a telecommunications service.¹⁷ For example, in its *IP-in-the-Middle Order*, the FCC held that an IXC’s use of IP within its long haul network constituted a telecommunications service because the toll calls underwent “no net protocol conversion” (as both the calling and called parties were still served by TDM networks).¹⁸ Citing Rule 69.5(b),

¹² See *Cbeyond Reply Comments* at 10. See also *Comptel § XV Comments* at 2-7; *Rural LEC Section XV Group Comments* at 7-8.

¹³ See *MTS/WATS Market Structure Order*, 97 F.C.C.2d 682, 715 ¶ 83 (1993). To achieve this result, the FCC adopted Rule 69.5(b), which provided in relevant part: “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*.” *Id.* at Appendix A (italics added).

¹⁴ *Enhanced Service Providers Order*, 3 FCC Rcd 2631, 2633 ¶ 17 (1988).

¹⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21955-56 ¶¶ 102-03 (1996).

¹⁶ *First Access Charge Reform Order*, 12 FCC Rcd 15982, 16003 ¶ 50 (1997).

¹⁷ See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-58 ¶¶ 104-06. The Act’s definition of information service is nearly verbatim with the same term as defined in the 1982 AT&T Consent Decree. The antitrust court had also consistently construed protocol conversions as being within the scope of the Decree’s definition of information services. See, e.g., *United States v. Western Electric*, 673 F. Supp. 525 (D.D.C. 1987).

¹⁸ See *AT&T IP-in-the-Middle Order*, 19 FCC Rcd 7457 ¶ 1, 7465 ¶ 12 (2004).

which limits access charges to telecommunications services, the FCC concluded that access charges may be assessed on this IXC's traffic.¹⁹

While the FCC has not yet addressed the regulatory classification of interconnected VoIP services, several federal courts have been asked to decide whether access charges may be applied to such traffic. These courts, applying the Act and FCC precedent, have held that interconnected VoIP services are information services and that as a result, access charges may not be imposed.²⁰ For example, in *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), AT&T appealed an arbitration order that precluded it from imposing access charges on interconnected VoIP traffic. The court rejected AT&T's arguments and held that interconnected VoIP services are an information service under the Act:

Net-protocol conversion is a determinative indicator of whether a service is an enhanced or information service. . . . The communication originates at the caller's location in the 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 (*id.* at 1081-82).

Noting that information services are "outside the access charge regime," the court then held that "the MPSC correctly ruled that CLECs should not pay access charges when they originate or terminate IP-PSTN traffic" (*id.* at 1081).²¹

Administrative agencies are, of course, free to change their policies so long as they "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."²² But given that the FCC has determined that information

¹⁹ *Id.* at 7457 ¶ 1 and 7466 ¶ 44. See also *Prepaid Calling Card Order*, 21 FCC Red 7290,7297 ¶ 20 (2006) (FCC applies the same analysis in connection with IXC prepaid cards where the IXC uses IP within its network).

²⁰ See *Paetec v. CommPartners*, 2010 U.S. Dist. LEXIS 51926, at *6 and *8 (D.D.C., Feb. 18, 2010) (The "net conversion of the [interconnected VoIP] calls is properly labeled an information service" and "[i]nformation services are not subject to the access charge regime."). See also *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) (The interconnected "VoIP service provided by Vonage constitutes an information service" because 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."), *aff'd*, 394 F.3d 568 (8th Cir. 2004).

Given that federal courts have uniformly held that interconnected VoIP services constitute an information service and that access charges may not be applied as a result, it is difficult to understand the LEC claim that the decision by VoIP providers not to pay LEC access charges constitutes a "reckless decision" that is "unsupported by Commission precedent." ITTA Section XV Reply Comments at 6.

²¹ Although AT&T appealed other parts of this district court order, it chose not to appeal the ruling prohibiting access charges on interconnected VoIP traffic. See *Southwestern Bell v. Missouri PSC*, 530 F.3d 676 (8th Cir. 2008).

²² *Greater Boston v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

services should not be subject to LEC access charges to “promote the development of the information services industry” and to “create significant benefits for the economy and the American people,”²³ given the explicit Congressional mandate for the FCC to take “immediate action to accelerate the deployment” of interconnected VoIP services,²⁴ and given the NBP’s findings that per-minute charges should be eliminated because they are hindering broadband deployment,²⁵ it is not apparent why the Commission would want to change course and impose the access regime on information services.

LECs, unable to challenge the analysis above, instead urge the FCC to focus on its “ESP Exemption,” which the LECs argue was “never intended to exempt” providers of interconnected VoIP services from paying access charges.²⁶ But of course, the FCC did not specifically “intend” to address interconnected VoIP when it first established the ESP Exemption, since VoIP technology did not even exist at that time. But what is important is that since then, the FCC has repeatedly reaffirmed that access charges may not be applied to enhanced services (or later, to information services).

More fundamentally, the ESP Exemption is no longer relevant. The FCC has recognized that the information services definition which Congress added to the 1996 Act, while it encompasses all services that had previously been treated as enhanced, is also broader than the former enhanced services definition.²⁷ Consequently, the Commission should decide the access charge question under the Act’s regulatory classifications, rather than attempt to define (or modify) the ESP Exemption that applied before Congress changed the Act.

C. SECTION 251(G) PRECLUDES IMPOSITION OF ACCESS CHARGES EVEN IF INTERCONNECTED VOIP SERVICE IS DEEMED TO BE A TELECOMMUNICATIONS SERVICE

Some LECs contend that if the FCC classifies interconnected VoIP service as a telecommunications service, then “access charges would automatically apply” to interconnected VoIP service.²⁸ These LECs are mistaken because interconnected VoIP traffic does not fall within the scope of the § 251(g) access charge exception even if the service is deemed to be a new, post-1996 subset of the telecommunication services regulatory category.

The FCC has held repeatedly that the reciprocal compensation statute, § 251(b)(5), “on its face” requires LECs to establish reciprocal compensation arrangements for the transport and termination of “*all* ‘telecommunications’ they exchange with another telecommunications carrier, without exception”:

²³ See *First Access Charge Reform Order*, 12 FCC Rcd at 16003 ¶ 50.

²⁴ See 47 U.S.C. § 1302(b).

²⁵ See National Broadband Plan, Recommendations 8.7, 8.11 and 8.14.

²⁶ Consolidated Section XV Reply Comments at 6. See also AT&T Section XV Comments at 27.

²⁷ See *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21955-56 ¶ 103 (1996).

²⁸ See, e.g., Cbeyond § XV Reply Comments at 10.

Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, – *i.e.*, whenever a [LEC] exchanges telecommunications traffic with another carrier.²⁹

There is one exception to this LEC duty. Specifically, “Section 251(g) singles out access traffic for special treatment and *temporarily* grandfathers the pre-1996 rules applicable to such traffic, including rules governing ‘receipt of compensation.’”³⁰

The temporary access charge exception in § 251(g) is limited in scope to certain activities that predated the enactment of the 1996 Act. The plain language of this statute makes clear that it applies only to the “continued enforcement” of those “interconnection restrictions and obligations (including receipt of compensation) that apply to such [LECs] on the date immediately preceding February 8, 1996 under any . . . regulation, order, or policy of the Commission.” Thus, the D.C. Circuit held that the FCC erred in attempting to bring ISP-bound traffic within the scope of § 251(g) because there had been “no pre-Act obligation relating to intercarrier compensation of ISP-bound traffic.”³¹ The Court further held that the FCC does not possess the discretion to enlarge the types of services that fall within the scope of the § 251(g) grandfather provision (and thereby narrow the scope of the § 251(b)(5) reciprocal compensation statute).³²

Two federal courts have been asked to determine whether interconnected VoIP traffic falls within the scope of § 251(g). Both courts held that under the Act, LECs may not impose access charges on interconnected VoIP calls because such traffic does not fall within the § 251(g) access charge exemption:

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.³³

²⁹ 2001 ISP Remand Order, 16 FCC Red 9151, 9165-66 ¶¶ 31-31 (2001) (italics in original; underscoring added), *remanded on other grounds*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). See also *Connect America Fund et al. NPRM*, 26 FCC Red 4554, 4712 ¶ 513 (Feb. 9, 2011) (“ICC Reform NPRM”); 2008 ISP Remand Order, 24 FCC Red 6475, 6479-80 ¶ 8 (2008), *aff’d*, *Core v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 626 (Nov. 15, 2010).

³⁰ See *ICC Reform NPRM*, 26 FCC Red at 4712 ¶ 514 (emphasis added). See also 2001 ISP Remand Order, 16 FCC Red at 9166-67 ¶ 34; 2008 ISP Remand Order, 24 FCC Red at 6483 ¶ 16.

³¹ *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002) (italics in original).

³² See *id.* (“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.”).

³³ *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d 1055, 1080 (E.D. Mo. 2006) (supporting citations omitted). See also *Paetec v. CommPartners*, 2010 US. Dist. LEXIS 51926, at *9 (D.D.C., Feb.

No one can credibly claim that there existed on February 8, 1996 an obligation on providers of interconnected VoIP services to pay LEC access charges. After all, the current dispute – whether access charges should be applied – obviously would have never arisen had there been such an obligation in 1996. Consequently, whether interconnected VoIP service is ultimately deemed to be an information service or a telecommunications service is irrelevant. Either way, the service does not fall within the § 251(g) grandfather provision, and the Act therefore precludes LECs from imposing access charges on interconnected VoIP traffic. At most, interconnected VoIP traffic can be subjected to reciprocal compensation rates.³⁴

D. CONCLUSION

Based on the foregoing, Sprint respectfully submits that the Commission may not lawfully permit LECs to impose access charges on interconnected VoIP services. Moreover, to the extent that policy is relevant, imposing legacy access charges, set at rate levels well above economic cost, cannot possibly be deemed to be action that would “accelerate” the deployment of interconnected VoIP services.

Respectfully submitted,

/s/ Charles W. McKee

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18, 2010) (“There cannot be a pre-Act obligation relating to inter-carrier compensation for VoIP, because VoIP was not developed until the 1996 Act was passed.”).

³⁴ See *ICC Reform NPRM*, 26 FCC Rcd at 4748 ¶ 615 (Interconnected VoIP traffic is “telecommunications” traffic within the scope of § 251(b)(5) “regardless of whether interconnected VoIP service were to be classified as a telecommunications service or information service.”).