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
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF SPRINT NEXTEL CORPORATION

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Sprint Nextel Corporation ("Sprint") hereby requests that the Commission clarify and reconsider certain aspects of its *USF/ICC Transformation Order* in the above-captioned proceedings.[1] As demonstrated below, clarification and reconsideration of the newly adopted rules to address traffic pumping are required to ensure that these rules achieve their stated purpose, to make the rules more effective, and to minimize pumpers' ability to game the system at the expense of the public interest.

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[1] *Connect America Fund, et al.,* Docket Nos. 10-90, *et al., Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161 (Nov. 18, 2011), published in 76 Fed Reg. 73830 (Nov. 29, 2011) ("*USF/ICC Transformation Order*" or "*Order*").

I. INTRODUCTION AND SUMMARY

The Commission was entirely correct in describing the negative multi-billion dollar impact of traffic pumping,[2] in emphasizing that access stimulation must be "reduced,"[3] and in deciding that expedited implementation of the adopted remedies was essential.[4] While Sprint is hopeful that the steps taken by the Commission in this proceeding will indeed reduce traffic pumping, we request that the Commission clarify certain of its rules to close loopholes (perceived or actual), and that it reconsider certain of its rules to make them more effective at reducing traffic pumping schemes and disputes.

Specifically, the Commission should clarify that:

- The *Order* does not overturn previous Commission rulings or standards for determining whether a LEC's free service provider partner is a legitimate end user/customer under its access tariff;
- The *Order* does not overturn the statutory requirement that telecommunications services be offered "for a fee";
- Assuming that the Commission retains its price cap LEC rate benchmark remedy, a CLEC engaged in traffic pumping may include in its rate benchmark only those

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[2] *See, e.g., id.*, ¶ 663 ("access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment") and ¶ 665 ("access stimulation also harms competition by giving companies that offer a "free" calling service a competitive advantage over companies that charge their customers for the service").
[3] *See, e.g., id.*, ¶ 662 ("The record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate switched access rates remain just and reasonable…"). Indeed, the title of the section of the *Order* addressing traffic pumping (Section XI.A) is entitled "Rules to Reduce Access Stimulation."
[4] *See, e.g., id.*, ¶ 701 ("taking this basic step [adoption of new rules to reduce access stimulation which become effective December 29, 2011] will immediately reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes").

price cap LEC rate elements associated with functions the CLEC actually performs;

- For benchmarking purposes, a CLEC must use the price cap LEC's average local transport miles, or the CLEC's actual local transport miles, whichever is less.

In addition, Sprint urges the Commission to reconsider the following aspects of the *USF/ICC Transformation Order*:

- Use of price cap LEC rate benchmarks, or recalculated 61.38 rates, for LECs that meet the traffic pumping triggers. Instead, the Commission should mandate use of a rate of $.0007 for all LECs that meet the triggers;

- That if a CLEC's stimulated traffic volume exceeds the price cap LEC's traffic volume, the Commission "will" (rather than "may") reevaluate whether any further rate reductions are warranted. A true-up mechanism must be incorporated to help ensure that rates for the entire monitoring period are just and reasonable;

- That LECs that cease engaging in traffic pumping may revert back to the old way of establishing rates. Here again, a true-up mechanism must be incorporated into the revised ratemaking process;

- That LECs have 45 days after meeting the triggers to file a revised access tariff. This period is too long, and should be reduced to 15 days at the longest.

II. ISSUES FOR CLARIFICATION

The Commission explicitly, and correctly, found in the *Order* that traffic pumping has serious deleterious effects and that stimulation schemes must be curbed. Astonishingly, certain parties have characterized the Commission's order here as somehow legitimizing traffic pumping. For example, Farmers & Merchants has asserted that the *Order* "...acknowledges that...such service [pumped traffic] _is_ access service under the Commission's Rules, regardless whether the CCCs qualify as 'end users.'"[5] The Commission promptly rejected this assertion, stating that by omitting a

[5] See letter dated November 29, 2011 from John Cooney, counsel for Farmers & Merchants, to Mark J. Langer, Clerk of Court, US Court of Appeals for the DC Circuit, in *Farmers & Merchants Mutual Telephone Co. v. FCC*, No. 10-1093 at 1-2 (emphasis in original).

"critical…qualifier" when quoting the *Order*, Farmers deliberately misrepresented a qualified, limited Commission statement as being an absolute assertion.[6]

To short-circuit further attempts by traffic pumping LECs and their revenue sharing partners to mischaracterize or otherwise manipulate the Commission's new traffic pumping rules, Sprint requests that the Commission clarify several points.

First, the Commission should explicitly state that nothing in the *Order* overturns previous rulings and existing standards for determining whether pumped traffic is access traffic or whether a LEC's traffic pumping partner is a legitimate end user/customer under its access tariff. If an entity does not qualify as an end user under the terms of the LEC's access tariff, calls generated by that entity and terminated by the LEC in question do not constitute access traffic, and access charges do not apply.[7] This is the case today, and will be equally true after December 29, 2011, when the new traffic pumping rules take effect.

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[6] See letter dated December 1, 2011 from Joel Marcus, Counsel, FCC, to Mark J. Langer, Clerk, US Court of Appeals for the DC Circuit, in Case No. 10-1093 ("In the new order, the FCC rejected the proposition (¶672) that "traffic directed to [conference companies] should not be subject to tariffed access charges *in all cases.*") In any event, where, as in Case 10-1093, the case involves a tariff interpretation, the prospective *Order* "has no bearing on that issue."

[7] *See Qwest Communications Corp., Complainant, v. Farmers and Merchants Mutual Telephone Co., Defendant,* File No. EB-07-MD-001, *Second Order on Reconsideration*, 24 FCC Rcd 14801, 14814 (¶26) (2009). *See also Qwest Communications Corp. v. Northern Valley Communications,* File No. EB-11-MD-001, *Memorandum Opinion and Order,* 26 FCC Rcd. 8332 (2011), *reconsideration denied*, 26 FCC Rcd 14520 (Oct. 5, 2011); and *Sprint Communications Company, L.P. v. Northern Valley Communications*, File No.EB-11-MD-003, 26 FCC Rcd 10780 (2011), *reconsideration denied*, FCC 11-170, 2011 FCC Lexis 4630 (issued November 14, 2011). Northern Valley has filed petitions for review of these decisions before the U.S. Court of Appeals for the D.C. Circuit. *Northern Valley v. FCC*, Case No. 11-1467 (2011) (appealing the Qwest decision) and *Northern Valley v. FCC*, Case No. 11-1468 (appealing the Sprint decision). The cases have been consolidated.

Although it would seem to be self-evident, the Commission also should explicitly state that the *Order* does not (indeed, cannot) overturn the statutory definition of telecommunications service. The Act defines telecommunications service as "the offering of telecommunications for a fee directly to the public…."[8] If a LEC provides exchange service to an entity free of charge (that is, not "for a fee"), termination of calls to such an entity by that LEC by definition does not constitute telecommunications service and thus such calls are not subject to access charges.

The Commission stated that the scope of revenue sharing includes agreements:[9]

> …whether express, implied, written or oral, that over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers.

Sprint fully supports the Commission's efforts to define revenue sharing in such a way as to capture various types of payments and to capture arrangements with both independent entities and the LEC's own affiliates, and thus limit the access charge levels assessed on legitimate telecommunications services provided by an entity engaged in revenue sharing. Sprint is concerned, however, that the definition as currently structured could be read in conjunction with the new limit on access charges to conflict with the statutory definition of a telecommunications service by implying that access can be charged on non-telecommunications services. In order to render it explicitly consistent with the statutory definition, the Commission should clarify that when a carrier engages in a revenue sharing arrangement that encompasses the provision of service to the "other party" (the

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[8] 47 U.S.C. 153(53).
[9] *Order,* ¶ 669.

revenue sharing partner) without assessment of a fee, the non-telecommunications traffic handled by that carrier is not subject to access charges of any type.

For the above reasons, Sprint asks for a clarification of the FCC's decision stating that the FCC was not modifying the definition of a telecommunications service. If, however, the FCC interprets this new rule in a manner that would apply access rates to services not provided for a fee, Sprint seeks reconsideration of the Commission's decision. By definition, services not provided for a fee are not telecommunications services and can neither be tariffed nor subjected to access charges.

A third area of clarification involves benchmarked rates. Under the new rules, CLECs that meet the access stimulation triggers (revenue sharing and traffic volumes) must revise their tariff to reflect "a rate no higher than the lowest rate of a price cap LEC in the state."[10] Assuming that this rule is retained,[11] the Commission should specify which price cap LEC rate elements may be included in this composite rate, or, at a minimum, explicitly direct the CLEC to tariff a rate that reflects only those functions it actually performs. A CLEC may not aggregate every rate element tariffed by the price cap LEC, and charge that aggregated rate, if it does not perform each of the functions associated with each rate element included, for each minute of traffic on which the composite rate is assessed.[12]

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[10] *Order*, ¶ 689. Section 61.26(5) specifies that a CLEC is to file "a rate for interstate switched exchange access services," defined as "the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges."

[11] See pp. 7-8 below, requesting reconsideration of this rule.

[12] It is axiomatic that a carrier is not allowed to include in a benchmark rate the costs for services it does not provide. *See, Access Charge Reform,* 19 FCC Rcd 9108 at ¶ 21 and fn. 70 (2004).

Most if not all price cap LECs have a local transport rate structure that includes a per mile element. Sprint urges the Commission to clarify that in setting a composite rate, a CLEC engaged in access stimulation must base any local transport charge on either the price cap LEC's average local transport miles, or the CLEC's own transport miles for the call in question, whichever is lower. A limit on local transport mileage charges is critical to prevent "local transport pumping" – a situation in which a LEC will drag a call to a far-distant interconnection point, even if there is a closer interconnection point, simply to maximize transport revenues. This sort of gaming of the system is not idle speculation. Sprint has been victimized by at least two LECs, which changed the point of interconnection from a relatively close end office to a far distant end office (in one case, the point of interconnection was changed from an end office 10 miles from Sprint's point of presence, to one 158 miles away). Such action was not necessitated by any network purpose, or justified by any engineering principle; to the contrary, the LECs in question re-routed Sprint's traffic solely to maximize the number of miles for which they could impose a per-mile local transport fee. The Commission should exert its authority to ensure efficient interconnection, and put an end to transport pumping by capping allowable local transport miles in traffic pumping situations.

III. ISSUES FOR RECONSIDERATION

In addition to clarifying the traffic pumping section of the *Order* as discussed above, the Commission should also reconsider four issues to further reduce the deleterious effects of traffic pumping.

First, the Commission should reconsider the rate remedy that will apply in situations in which the traffic pumping triggers are met – for CLECs, the rate charged by the price cap LEC with the lowest rates in the state, and for rate-of-return LECs, the rates derived from a Section 61.38 analysis. Instead, the Commission should require LECs that meet the traffic pumping triggers to charge a default rate of no more than $.0007 per minute.

As Sprint has demonstrated, a rate of $.0007 for this stimulated traffic is compensatory, simple to implement, is widely used in other intercarrier compensation situations, and has passed judicial review.[13] The Commission has since recognized that the existing rate structure/intercarrier compensation mechanism for price cap LECs is seriously flawed, and has adopted a transition plan to the most optimal mechanism – bill and keep.[14] This transition to bill-and-keep for terminating traffic is being phased in over the next several years to give LECs the opportunity to adapt to the new regime for what is presumably legitimate access traffic involving legitimate end users. This is not the case with traffic pumping LECs. The Commission has found that traffic pumping is contrary to the public interest, and, in the cases scrutinized by the Enforcement Bureau, that the stimulated traffic is not access traffic. Thus, it should not provide a safe harbor for CLECs to continue to engage in these schemes and earn unreasonable returns by charging rates which, while lower than those assessed prior to December 29, 2011, are still far above cost. If the Commission, out of an excess of caution to protect legitimate business arrangements to increase access traffic (*e.g.*, the new call center scenario), declines to implement bill-and-keep immediately on stimulated traffic, it should allow CLECs that have met the traffic pumping triggers to charge no more than $.0007.

[13] *See, e.g.*, Sprint's comments dated April 1, 2011 in the instant proceedings, pp. 5, 15-19.
[14] *Order*, ¶¶ 736-808.

The remedy for rate-of-return LECs that meet the traffic pumping triggers should also be revised. Rather than undergoing a Section 61.38 rate process – with all the attendant problems associated with forecasting and evaluating prospective demand and costs in a short timeframe – rate-of-return LECs that meet the triggers also should be allowed to charge no more than $.0007.

A second area for reconsideration involves situations in which a CLEC which has met the traffic pumping trigger has traffic volumes that exceed those of the price cap LEC to which it is benchmarked. The Commission has stated that "should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted."[15]

The Commission's policy here should be strengthened as follows. When a competitive LEC that meets the traffic pumping trigger has traffic volumes that exceed the traffic volumes of the price cap LEC to which it benchmarks, the Commission *will* reevaluate the appropriateness of the competitive LEC's rates. The competitive LEC shall base its rates by dividing its forecasted costs by its forecasted minutes of use, using a TELRIC methodology, and shall if necessary implement a true-up, based upon 12 months' of actual results, to ensure that the forecasted rates were just and reasonable. The tariffs reflecting the forecasted rates shall not be deemed lawful and shall be subject to an accounting order. Alternatively, the competitive LEC may assess a default rate of $.0007 on all of its traffic, until such time as the price cap LEC has implemented bill-and-keep, at which point the competitive LEC must also implement a bill-and-keep

[15] *Order*, ¶ 690.

mechanism for all rate elements for which the price cap LEC has implemented a bill-and-keep methodology. Tariffs reflecting a \$.0007 rate need not be subject to an accounting order.

A third area for reconsideration is the Commission's decision to allow LECs that terminate their revenue sharing arrangements to revert back to the "old" rules for setting their rates.[16] While Sprint agrees that LECs should be encouraged to terminate revenue sharing agreements and cease traffic pumping, they should not be allowed to avoid the consequences of the rules once their "circumstances" have changed. While there is considerable merit to the "you made your bed, now you must lie in it" approach to rate making (*i.e.*, requiring a traffic pumping LEC to keep its rates at the adjusted level for a prescribed period of time such as a full 12 months), if the Commission does allow a LEC that has ceased engaging in traffic pumping to revise its rates, it should at a minimum require such a LEC (rate-of-return or competitive) to include a true-up mechanism in its ratemaking process. Under this true-up process, the LEC would have to adjust its prospective rates by any overearnings generated while it was engaged in traffic pumping. The maximum allowable return would be the authorized rate of return for rate-of-return ILECs, and the LEC's true up calculations should be available for review by interested parties.

Evaluating rates in situations in which the CLEC's traffic volume exceeds the benchmark ILEC's traffic volume is necessary to ensure that rates are just and reasonable as required by Section 201(b). There are cases in which a CLEC engaged in traffic pumping has generated usage far in excess of that handled by non-pumping price cap

[16] "If a LEC's circumstances change because it terminates the access revenue sharing agreement(s), it may file a tariff to revise its rates under the rules applicable when access stimulation is not occurring" (*Order*, ¶ 671, footnote excluded).

LECs. In such situations, the traffic pumping CLEC does not resemble the price cap LEC and closer regulatory scrutiny of the CLEC's rates is clearly warranted.

Finally, the Commission should reconsider its decision to require a LEC that meets the traffic pumping triggers to file revised tariffs "within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition."[17] 45 days is excessive; LECs that have entered into revenue sharing agreements obviously know of the existence of such agreements, and know in virtually real time whether they have met the traffic volume trigger or the 3:1 terminating to originating ratio. Such LECs should be required to charge a rate of zero until such time as they have a new/revised tariff filed and effective (the approach adopted in Iowa). At the very most, LECs that meet the traffic pumping trigger should be required to file revised tariffs within 15 days. Any time in excess of 15 days (arguable, in excess of 1 day) for filing a revised tariff gives such LECs an unnecessary and unwarranted extra period in which to assess their inflated, excessive rates.

IV. CONCLUSION

As the Commission has correctly found, traffic pumping is a pernicious practice which has already cost the industry billions of dollars. Clearly, the public interest demands that such practices be curtailed to the maximum extent possible. By issuing the clarifications discussed above, and adopting the rule changes discussed above, the Commission will make its rules more effective at reducing access stimulation.

[17] *Order*, ¶ 691.

Respectfully submitted,

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