

**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 an 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
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**OPPOSITION OF  
OMNITEL COMMUNICATIONS, INC. AND TEKSTAR COMMUNICATIONS, INC.**

Thomas W. Cohen  
Edward A. Yorkgitis, Jr.  
Joshua T. Guyan  
Kelley Drye & Warren LLP  
3050 K Street NW, Suite 400  
Washington, DC 20007  
(202) 342-8518 (telephone)  
(202) 342-8451 (facsimile)  
[TCohen@Kelleydrye.com](mailto:TCohen@Kelleydrye.com)

February 9, 2012

**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. INTRODUCTION.....</b>	<b>2</b>
<b>II. THE SPRINT PETITION SEEKS CLARIFICATION ON MATTERS THAT ARE CLEAR.....</b>	<b>4</b>
<b>III. THE ISSUES RAISED BY SPRINT AND USTA REGARDING ACCESS STIMULATION DO NOT WARRANT RECONSIDERATION .....</b>	<b>6</b>
<b>IV. CONCLUSION .....</b>	<b>9</b>

**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 an 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
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**OPPOSITION OF  
OMNITEL COMMUNICATIONS, INC. AND TEKSTAR COMMUNICATIONS, INC.**

OmniTel Communications, Inc. (“OmniTel”) and Tekstar Communications, Inc. (“Tekstar”), through their undersigned counsel and pursuant to Section 1.429(f) of the Federal Communications Commission’s (“Commission’s”) rules, hereby respectfully submit their opposition to the petition for reconsideration and clarification filed by Sprint Nextel Corporation<sup>1</sup> and sections of the petition for reconsideration filed by the United States Telecom Association addressing access stimulation issues<sup>2</sup> of the Commission’s Connect America Fund Order.<sup>3</sup> In

---

<sup>1</sup> See Petition for Reconsideration and Clarification of Sprint Nextel Corporation, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (“Sprint Petition”).

<sup>2</sup> See Petition for Reconsideration of the United States Telecom Association, WC Docket No. 10-90 et al. (filed Dec. 29, 2011) (“USTA Petition”).

short, the Sprint Petition seeks clarification of issues that are clear under the *Order*, as well as Commission rules and precedent. Further, neither of the two petitions substantiate the need for the Commission to reconsider its decision regarding access stimulation rules reached after more than four years of deliberation. Finally, some of the issues raised by the petitions are to be addressed as part of the *Further Notice of Proposed Rulemaking* (“FNPRM”) issued in conjunction with the *Order* or are otherwise unnecessary for the Commission to address, as explained herein.

## I. INTRODUCTION

OmniTel and Tekstar are facilities-based rural competitive local exchange carriers (“CLECs”). OmniTel operates in smaller communities and less dense areas of Iowa, and Tekstar operates in similar areas in Minnesota. As rural CLECs, OmniTel and Tekstar are entitled under Section 61.26 of the Commission’s rules to assess interstate switched access charges at the National Exchange Carrier Association’s Band 8 rates because each competes with a non-rural incumbent local exchange carrier. However, when many interexchange carriers (“IXCs”) refused to pay their lawfully tariffed access rates, because the carriers had taken conference calling companies and chat lines (collectively “CCCs”) as customers, OmniTel and Tekstar began (approximately four years ago) entering into agreements with IXCs to substantially lower the rates for termination of switched traffic. Not every IXC agreed to enter into an agreement and there remained a great deal of confusion and dispute for OmniTel and Tekstar, and in the

---

<sup>3</sup> See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Inter-carrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*Order*”).

industry in general, with regard to rates IXCs would pay for terminating switched access traffic destined for CCCs.

OmniTel and Tekstar filed comments in this proceeding and generally supported the Commission's proposals to address so-called access stimulation and eliminate continuing uncertainty regarding intercarrier compensation for substantial increases in volumes of terminating interexchange traffic.<sup>4</sup> The petitioners also each actively participated in the proceeding and adequately advanced their positions for the Commission's consideration on multiple occasions.

After more than four years of deliberation, the Commission, in the *Order*, modified the access charge rules rural CLECs like Omnitel and Tekstar had operated under, among other actions taken. To tackle the contentions by parties such as the petitioners that the interstate switched access rates being charged by some LECs did not "reflect the volume of traffic associated with access stimulation," the Commission struck an important balance to act in a "narrowly tailored" fashion to "minimize the costs of the rule revisions on the industry."<sup>5</sup> The Commission's concern was that the existing rules allowed significant increases in LECs' switched access traffic without changes to the rates that reflected the new volumes. The Commission addressed this concern by requiring that CLECs meeting new criteria, including participation in access revenue sharing arrangements, benchmark their interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which "are presumptively consistent with section 201(b) of the Act."<sup>6</sup>

---

<sup>4</sup> See Comments of OmniTel Communications, Inc. and Tekstar Communications, Inc., WC Docket No. 10-90 et al. (filed Apr. 1, 2011) and Reply Comments (filed Apr. 18, 2011).

<sup>5</sup> *Order*, ¶¶ 660, 662.

<sup>6</sup> *Id.*, ¶ 660.

Several parties, including the petitioners, argued that the Commission should declare revenue sharing to be a violation of Section 201(b) or prohibit the collection of switched access charges for traffic sent to LECs that meet the conditions for access stimulation.<sup>7</sup> The Commission in the *Order* determined that a complete ban on revenue sharing arrangements would be overly broad and determined expressly the parties had “[not] demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.”<sup>8</sup> The *Order* sets forth new rules that are generally workable and clear, that will dramatically reduce interstate switched access rates of affected LECs to reflect large call volumes, and that satisfy the just and reasonable standard of Section 201(b).

## **II. THE SPRINT PETITION SEEKS CLARIFICATION ON MATTERS THAT ARE CLEAR**

Sprint’s Petition asks the Commission to clarify issues that are already clear under the *Order*, the Communications Act, and the Commission’s rules and precedent. First, Sprint asks the Commission to clarify that nothing in the *Order* overturns its existing standards for determining whether a LEC’s customer is a “legitimate end user/customer under its access tariff.”<sup>9</sup> OmniTel and Tekstar believe that the Commission was clear that the *Order* did not address definitions of end user/customer under LEC’s individual tariffs. The Commission recently confirmed that OmniTel and Tekstar were correct in their belief and that the *Order* “complements” the Commission’s previous decisions regarding this issue and should “[not] be construed as overturning or superseding these previous Commission decisions.”<sup>10</sup>

---

<sup>7</sup> See *id.*, ¶ 672, n. 1112, 1113.

<sup>8</sup> *Id.*, ¶ 672.

<sup>9</sup> Sprint Petition at 4.

<sup>10</sup> See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service*

Second, Sprint asks the Commission to clarify that the *Order* does not overturn the statutory definition of telecommunications service.<sup>11</sup> Sprint admits that the Commission could not have, in any event, overturned the statutory definition and states that the issue is “self evident.”<sup>12</sup> Because the Commission could not have taken the action for which Sprint seeks clarification, there is nothing for the Commission to clarify.

Finally, Sprint argues that the Commission should clarify that a CLEC meeting the conditions for access stimulation that benchmarks its interstate switched access rates according to the new rules may tariff a rate that “reflects only those functions it actually performs.”<sup>13</sup> The Commission’s rules and orders on this matter were clear that this was the case prior to the *Order*, and the Commission did not revisit this matter in the portion of the *Order* addressing the new access stimulation rules.<sup>14</sup> Accordingly, this matter requires no further clarification.<sup>15</sup> Further,

---

*Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Order, FCC 12-147, ¶ 25 (rel. Feb. 3, 2012) (“Clarification Order”).*

<sup>11</sup> See Sprint Petition at 5-6.

<sup>12</sup> See *id.*, at 5.

<sup>13</sup> See *id.* at 6.

<sup>14</sup> See *Order*, ¶ 970 (“when relying on tariffs, LECs have been permitted to charge access charges to the extent that they are providing the functions at issue.”) (citing *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, ¶ 21 (2004)).

<sup>15</sup> The *Order* created a limited exception for VoIP traffic, stating that a CLEC may charge for the elements and functions (or equivalent elements or functions) performed by it and a VoIP provider “partner” in originating or terminating a call from or to the PSTN that originated or terminated at an end user customer’s premises in IP format. See *Order*, ¶ 970. This statement is also clear, and in any event the petitioners do not seek its clarification.

Sprint raised this issue in its comments on the proposed access stimulation rules,<sup>16</sup> but the Commission understandably saw no reason to address the matter further when adopting rules for access stimulation. Sprint's Petition has provided no new facts or arguments that would necessitate Commission clarification.

### **III. THE ISSUES RAISED BY SPRINT AND USTA REGARDING ACCESS STIMULATION DO NOT WARRANT RECONSIDERATION**

Sprint and USTA seek reconsideration of issues that have already been thoroughly analyzed and decided by the Commission based upon an extensive record, are to be addressed as part of the *FNPRM*, or are otherwise unnecessary for the Commission to address.<sup>17</sup>

**Rate Remedy.** Sprint continues to argue that LECs meeting the conditions for access stimulation should be permitted to charge no more than \$0.0007 per minute for terminating interstate switched access traffic – a point it fully argued in its comments.<sup>18</sup> USTA originally had a different position regarding the applicable rate, but without explanation it has now advocated in favor of Sprint's position.<sup>19</sup> Regardless of who raised the argument previously, in the *Order* the Commission considered and squarely rejected requiring this rate where there is access stimulation. The Commission concluded that there was “insufficient evidence to justify

---

<sup>16</sup> See Comments of Sprint Nextel Corporation, WC Docket No. 10-90 et al. at 16 (filed Apr. 1, 2011) (“Sprint April 1<sup>st</sup> Comments”).

<sup>17</sup> As a brief example, Sprint argues that rate-of-return and competitive LECs that end access stimulation arrangements and revert back to the existing rules to set their rates should be required to include a true-up mechanism in their ratemaking process to adjust for overearnings generated as a result of traffic pumping. See Sprint Petition at 10-11. This proposal obviously could not apply to CLECs that benchmark to price cap LEC rates since they do not engage in ratemaking.

<sup>18</sup> See Sprint April 1<sup>st</sup> Comments at 8, 12-20.

<sup>19</sup> See USTA Petition at 36. USTA previously agreed with the Commission's proposal to require CLECs meeting the conditions for access stimulation to benchmark terminating switched access rates to the Bell Operating Company in the state or the LEC with the most access lines. See Comments of the United States Telecom Association, WC Docket No. 10-90 et al. at 11 (filed Apr. 1, 2011). Notably, the rates under the *Order* will be at this level *or lower*.

abandoning competitive LEC benchmarking entirely.”<sup>20</sup> The Commission also determined that requiring CLECs to benchmark to the price cap LEC with the lowest rates in the state would adequately address the concern regarding unjust and unreasonable rates “within the parameters of the existing access charge regulatory structure.”<sup>21</sup>

Under the *Order*, the \$0.0007 rate will apply to price cap carriers and all CLECs that benchmark to them as of July 1, 2016.<sup>22</sup> Accordingly, CLECs engaged in access stimulation as of that date will be charging a rate of \$0.0007. Sprint and USTA have provided no further evidence to justify a flash cut to the \$0.0007 rate and Commission reconsideration of its transition rules. The Commission should not reconsider its decision on the basis of arguments already presented to it.<sup>23</sup>

**CLEC Volumes Exceeding the Benchmarked LEC.** Under the new rules, a CLEC meeting the access stimulation triggers must benchmark its rates against those of the price cap ILEC in the state regardless of its traffic volumes. The Commission then decided to adopt a safety valve measure, concluding that if a benchmarking CLEC’s traffic volumes substantially exceed those of the price cap LEC to which it benchmarks, the Commission may reevaluate the CLEC’s specific rates.<sup>24</sup> In those circumstances, the Commission can determine at that time if

---

<sup>20</sup> *Order*, ¶ 692.

<sup>21</sup> *Id.*

<sup>22</sup> *See Order*, ¶ 801, Figure 9.

<sup>23</sup> *See Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Telephone Number Portability*; CC Docket Nos. 99-200, 96-98, 95-116, Fourth Order on Reconsideration, FCC 07-65, ¶ 5 (2007) (“The Commission will entertain a petition for reconsideration if it is based on new evidence, changed circumstances or if reconsideration is in the public interest. The Commission, however, does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented. This is particularly true, where a petitioner advances arguments that the Commission previously considered and rejected in prior orders.”) (citing 47 C.F.R. § 1.429(b),(i)).

<sup>24</sup> *See Order*, ¶ 690.

there is a Section 201(b) concern to be addressed taking into account all of the circumstances. In its petition, Sprint seeks to lock the Commission into conducting a rate reevaluation, utilizing TELRIC methodology, and requiring an accounting order when the traffic volumes of a CLEC that meets the conditions of access stimulation exceed those of the benchmarked LEC by any amount.<sup>25</sup>

There is no reason for the Commission to lock itself into specific and detailed administrative procedures to address a situation that may or may not occur, especially when the Commission is perfectly well-equipped to address the situation if it does occur. Moreover, Sprint offers no real-world basis for concluding that the rates of the CLEC at the conclusion of such a proceeding would be lower than the price cap ILEC to which it benchmarks. It is hard to believe that Sprint would accept in that scenario that the CLEC could raise its rates above the price cap ILEC. Indeed, the Commission requires benchmarking to the price cap ILEC's rates by a CLEC meeting the access revenue sharing triggers regardless of how far the volumes of the CLEC are below the traffic volumes of the price cap ILEC. Not surprisingly, Sprint does not see fit to address that situation. Sprint's speculative concern need not be addressed on reconsideration. Rather, the Commission adopted the proper balance in the rules it has implemented. Further, as the Commission states, the *Order's* comprehensive intercarrier compensation reform and transition to reduced rates over the period 2014 to 2017 will eventually address this potential concern anyway.<sup>26</sup>

**Local Transport Charges.** Sprint argues that the Commission should prevent so-called "local transport pumping" by requiring any CLEC engaged in access stimulation to "base any local transport charge on either the price cap LEC's average local transport miles, or the CLEC's

---

<sup>25</sup> See Sprint Petition at 9.

<sup>26</sup> See *Order*, ¶ 690.

own transport miles for the call in question, whichever [are] lower.”<sup>27</sup> There would be several problems with the adoption of such a new rule.

First, a CLEC could not comply with Sprint’s proposed rule in any state where there is an equal access provider of middle mile transport, such as Minnesota or Iowa, because the CLEC would not control or know the local transport miles for the traffic between the IXC point of presence and the meet point between the two LECs. Second, the mere fact that a CLEC’s mileage may exceed that of the price cap ILEC with which it benchmarks does not mean that the CLEC’s mileage is in any way excessive. For one thing, CLECs are not required to follow ILEC’s network architecture. For another, the CLEC and the price cap ILEC with which it benchmarks may operate in completely different parts of the same state. Further, the Commission considered allegations of “mileage pumping” in the *Order* and determined that it will address transport rate reform in the context of the *FNPRM*.<sup>28</sup> Therefore, transport rates are not an appropriate issue for reconsideration. Finally, if IXCs believe a CLEC has excessive transport mileage, it can bring a complaint before the Commission and the Commission can address that situation on the specific facts and circumstances.<sup>29</sup>

#### IV. CONCLUSION

The Commission should dismiss the Sprint and USTA petitions with respect to access stimulation issues. The Sprint Petition seeks clarification of issues that are already clear under the *Order*, Commission rules, and precedent. Further, both petitions seek reconsideration of

---

<sup>27</sup> Sprint Petition at 7. Sprint calls this a clarification, but it is really reconsideration, which is consistent with USTA’s characterization.

<sup>28</sup> See *Order*, ¶ 820.

<sup>29</sup> The *Order* does not modify the Commission’s complaint procedures. Therefore, there is no need for the Commission to clarify the remedies available for allegations of “mileage pumping” as requested by USTA. See USTA Petition at 36.

issues that have been addressed by the Commission after more than four years of deliberation, are to be addressed as part of the *FNPRM*, or are otherwise unnecessary for the Commission to address.

Respectfully submitted,



---

Thomas W. Cohen  
Edward A. Yorkgitis, Jr.  
Joshua T. Guyan  
KELLEY DRYE & WARREN LLP  
3050 K Street NW, Suite 400  
Washington, DC 20007  
(202) 342-8518 (telephone)  
(202) 342-8451 (facsimile)  
[TCohen@Kelleydrye.com](mailto:TCohen@Kelleydrye.com)

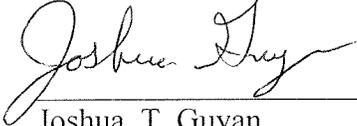
February 9, 2012

Certificate of Service

I, Joshua T. Guyan, hereby certify that on this 9<sup>th</sup> day of February, 2012, I caused a copy of the foregoing Opposition of OmniTel Communications, Inc. and Tekstar Communications, Inc. to be served by USPS First Class Mail on the following:

Charles W. McKee  
Norina T. Moy  
Sprint Nextel Corporation  
900 Seventh Street, NW, Suite 700  
Washington, DC 20001

Jonathan Banks  
Glenn Reynolds  
United States Telecom Association  
607 14<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

  
\_\_\_\_\_  
Joshua. T. Guyan