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

In the Matter of	)	
	)	
Petition of Sprint for Declaratory Ruling	)	
Regarding Application of CenturyLink's	)	WC Docket No. 12-105
Access Tariffs to VoIP Originated Traffic	)	
Pursuant to Primary Jurisdiction Referral	)	

COMMENTS OF AT&T INC.

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I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies (collectively, AT&T) respectfully submit the following comments in response to Sprint's Petition asking the Commission to declare whether access charges applied to VoIP-originated traffic under the Commission's rules as they existed prior to the December 29, 2011, effective date of the *ICC-USF Order*.[1] AT&T disagrees with Sprint on the appropriate substantive answer to that question – access charges have always applied to interexchange VoIP-originated traffic exchanged between telecommunications carriers, both before and after the *ICC-USF Order*. At the same time, however, we agree with Sprint that the Commission should address this important issue, which has been pending before the agency for *more than fourteen years*.[2]

In fact, it is precisely because the Commission has delayed for so long in answering this question that Sprint finds itself in litigation with CenturyLink over the appropriate intercarrier compensation applicable to VoIP-originated traffic.[3] This litigation, in turn, led to the primary jurisdiction referral that is the subject of Sprint's Petition.[4] But the dispute between Sprint and CenturyLink is not the only live controversy over the applicability of access charges to VoIP under the rules predating the *ICC-USF Order*. AT&T and other carriers are involved in similar disputes, which remain active solely because the Commission chose to address intercarrier

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[1] Petition of Sprint for Declaratory Ruling Regarding Application of CenturyLink's Access Tariffs to VoIP Originated Traffic Pursuant to Primary Jurisdiction Referral, WC Docket No. 12-105 (April 5, 2012) (Petition). *See Connect America Fund*, WC Docket No. 10-90, et al, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (Nov. 18, 2011) (*ICC-USF Order*).

[2] *See Federal-State Board on Universal Service*, CC Docket No. 96-54, Report to Congress, FCC 98-67, ¶ 91 (released April 10, 1998) (*Report to Congress*).

[3] Petition at 1-2.

[4] Petition at 2-3.

compensation for VoIP traffic only on a *prospective* basis in that *Order*.[5] Thus, as Sprint explains in its petition, to address these ongoing controversies "the Commission must still resolve the treatment of that traffic for prior periods."[6]

And in the course of doing so, the Commission should examine Sprint's asymmetrical behavior and inconsistent positions related to the application of switched access charges to VoIP traffic exchanged between telecommunications carriers. Specifically, in its role as a wholesale provider of PSTN connectivity to cable VoIP providers (and thus a potential payor of access charges on VoIP-to-PSTN calls), Sprint has repeatedly told the Commission that access charges did not apply to VoIP traffic under the Commission's pre-*ICC-USF Order* rules and that imposing such charges would be "unreasonable and arbitrary."[7] Yet, when handling the same calls flowing in the opposite direction (i.e., when delivering PSTN-to-VoIP traffic to its wholesale VoIP provider customers), AT&T understands that Sprint imposed access charges on long distance carriers for those calls.

Similarly, in claiming that access charges did not apply to the VoIP-originated traffic that Sprint delivered to the PSTN prior to the *ICC-USF Order*, Sprint asserts that it performed a protocol conversion on this traffic and, thus, there "simply cannot be a telecommunications service" here to which access charges would have applied.[8] But when demanding interconnection rights under section 251 of the Act in its capacity as a wholesale provider to

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[5] *See, e.g.*, VAYA Telecom, Inc. v. Pacific Bell Telephone Co d/b/a AT&T California, Complaint, Public Utilities Commission of California Case No. 10-12-001 (filed Dec. 3, 2010).

[6] Petition at 6. *See also* 47 C.F.R. § 1.2 (the Commission may issue a declaratory ruling "terminating a controversy or removing uncertainty").

[7] *See* Letter from Donna Lampert, counsel for Sprint, et al, to Marlene Dortch, FCC, WC Docket No. 10-90, et al (Sept. 30, 2011), attaching *Hold the Phone (Charges)*, White Paper, Sprint, et al, at 12 (September 2011) (*Hold the Phone (Charges) White Paper*).

[8] Petition at 4, 7.

cable VoIP operators, Sprint has repeatedly told this Commission that the wholesale service it offers to those VoIP providers is, in fact, a "telecommunications service."[9]

Given that Sprint has previously been admonished for its "obfuscation" when seeking to evade lawful access charges on VoIP traffic,[10] it is troubling – but perhaps not surprising – that Sprint would resort to these tactics before this Commission. What would be surprising, however, is if the Commission did not inquire further into the apparent inconsistencies in Sprint's story. Thus, irrespective of how the Commission ultimately decides the substantive issues raised in the Petition, it should at a minimum require that Sprint provide a full explanation for its asymmetrical behavior and contradictory representations to the Commission.

II. BACKGROUND

In its 1998 Report to Congress, the Commission observed that there were differing opinions about the regulatory treatment of VoIP.[11] Rather than provide a definitive answer, however, the Commission promised that it would "undoubtedly" address the matter, including "issues relating to the assessment of access charges," in "upcoming proceedings."[12] More than fourteen years later – and despite the same basic issue being raised in countless requests for declaratory rulings, forbearance petitions, rulemakings, and other proceedings[13] – the

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[9] Sprint Comments, WC Docket No. 06-55, at 13-15, 19-21, 23-24 (April 10, 2006).

[10] *See Central Telephone Co. of Va. v. Sprint Communications Co. of Va.*, Memorandum Opinion, 759 F.Supp. 789, 809 (E.D. Va. 2011) ("If there is a common thread to Sprint's arguments, it is obfuscation.")

[11] *Report to Congress* at ¶ 85.

[12] *Report to Congress* at ¶ 91. *See also id. at* ¶ 83 note 172.

[13] *See, e.g.*, *Report to Congress* at ¶ 91; Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No 03-266 (Dec. 23, 2003); *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, ¶¶ 61-62 (released March 10, 2004); Petition for Declaratory Ruling that Inflexion Communications ExtendIP VoIP Service Is Exempt from Access charges, WC Docket No. 04-52 (Feb. 27, 2004); Petition for Declaratory Ruling of Grande Communications, Inc., Regarding Self-Certification of IP-Originated VoIP Traffic, WC Docket No. 05-283 (Oct. 3, 2005); Petition of Feature Group IP for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and

Commission has steadfastly refused to provide an answer. Faced with this regulatory taciturnity and the costly arbitrage schemes that have flowed from it, the communications industry was given little choice but to pursue time-consuming, investment-draining litigation to resolve the inevitable disputes that have arisen over the applicability of access charges to VoIP. That litigation has produced a "a host of conflicting court and state regulatory rulings"[14] – some tribunals have found that access charges apply; others have found that they do not; and still others have thrown-up their hands and referred the matter to the Commission for resolution.[15]

As evidenced by Sprint's Petition, this state of confusion will likely persist for years to come unless the Commission provides an answer to the question of whether access charges applied to VoIP traffic exchanged between telecommunications carriers under the rules that existed prior to the *ICC-USF Order*. AT&T has explained on numerous occasions why the Commission should answer that question in the affirmative and we respectfully refer the

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69.5(b) of the Commission's Rules, WC Docket No. 07-256 (Oct. 23, 2007); Petition of the Embarq Local Operating Companies for Forbearance from Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (Jan. 11, 2008); Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption," WC Docket No. 08-152 (July 17, 2008); Global NAPs Petition for Declaratory Ruling and Alternative Petition for Preemption to [sic] the Pennsylvania, New Hampshire and Maryland State Commissions, WC Docket No. 10-60 (March 5, 2010) (Global NAPs Petition); Petition of Pac-West Telecom, Inc. for Declaratory Ruling Regarding Access Charges Assessed on VoIP-Initiated Access Traffic, WC Docket No. 11-115 (June 28, 2011); Petition of Vaya Telecom, Inc., for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges, CC Docket No. 01-92 (Aug. 26, 2011).

[14] *Manhattan Telecommunications Corp. v. Global NAPs Inc.*, 2010 WL 1326095, No. 08 Civ. 3829 (JSR), at 2 (S.D.N.Y. March 31, 2010).

[15] *See, e.g.*, *Global NAPs California, Inc. v. Public Utilities Commission of California*, 624 F.3d 1225 (9th Cir. 2010); *Manhattan Telecommunications v. Global NAPs, supra*; *Paetec Communications, Inc. v. Commpartners, LLC*, 2010 WL 1767193 (D.D.C. Feb. 18, 2010); *CenturyTel of Chatham, LLC, et al, v. Sprint Communications Co. LP*, 2011 WL 284447 (W.D.La. Jan. 25, 2011); *Palmerton Telephone Co. v. Global NAPs, Inc.*, No. C-2009-2093336 (Pa.P.U.C. March 16, 2010). *See also supra* Global NAPs Petition at 4-5 (chart cataloging "lawsuits and disparate results concerning the application of intrastate access charges to VoIP traffic").

Commission to those filings.[16] We devote the remainder of these comments to responding to the main arguments raised in Sprint's Petition.

III. DISCUSSION

A. Switched Access Charges Applied to VoIP Traffic Under the Commission's Rules as They Existed Prior to the *ICC-USF Order*.

According to Sprint, switched access charges did not apply to VoIP prior to the *ICC-USF Order* for two reasons. First, Sprint claims that under section 251(g) of the Act, which was enacted in 1996, access charges may only be applied to traffic "subject to the then-existing access regime."[17] In Sprint's view, that regime did not include VoIP traffic terminated to the PSTN.[18] Second, Sprint contends that the Commission's former access charge rule (§ 69.5) did not apply to non-telecommunications services, such as VoIP, which means that access charges could not be imposed on Sprint when it delivered VoIP traffic to the PSTN.[19] Sprint is wrong on both counts.

Access Charges Have Always Applied to VoIP Traffic. In 1983, when the Commission first adopted the access charge regime, it determined that *all* providers of interstate service (including then-nascent enhanced services providers) that rely on local exchange facilities to reach local subscribers should pay their fair share of costs. The Commission therefore created "a single, uniform and nondiscriminatory structure for interstate access tariffs covering those services that make identical or similar use of access facilities."[20] Thus, despite Sprint's

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[16] *See* AT&T Comments, WC Docket No. 07-256 (Feb. 19, 2008); AT&T Petition for Declaratory Ruling, WC Docket No. 08-152 (July 17, 2008); AT&T Comments, WC Docket No. 10-60 (April 2, 2010).

[17] Petition at 8

[18] Petition at 8

[19] Petition at 8.

[20] *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C. 2d 241, ¶ 24 (1982).

suggestions to the contrary, there clearly were rules governing the payment of access charges for PSTN-originated and PSTN-terminated interexchange traffic prior to the 1996 Act.[21]

Indeed, it was the existence of those rules that gave rise to the so-called enhanced service provider (ESP) exemption in the first place. As the Commission explained, "[o]ur intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*."[22] Thus, the status quo under the Commission's rules was that access charges apply to VoIP-to-PSTN services, unless an exception applies or until the Commission changes those rules in the future. For all of the reasons AT&T has previously explained, the ESP exemption was limited in scope; it permitted an *ESP* to purchase a *local business line* from a LEC in order to enable the ESP's customers to make calls to the *ESP's servers*.[23] The ESP exemption does not, and never did, apply to VoIP-to-PSTN traffic delivered by a *telecommunications carrier* (as Sprint purports to be) over a *local interconnection trunk* to a LEC for termination to a *POTS customer* on the PSTN.[24] Thus, Sprint's arguments based on section 251(g) are simply misplaced.

Access Charges Apply to the VoIP Traffic Sprint Delivered to the PSTN Under the Commission's Former Access Charge Rules. Sprint correctly points out that under former section 69.5(b) of the Commission's rules, access charges "shall" be assessed on "all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign *telecommunications services*."[25] Sprint then claims that the wholesale service it offers

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[21] *See* former 47 C.F.R. § 69.5(b).

[22] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) (emphasis added).

[23] *See* AT&T Comments, WC Docket No. 07-256, at 9-14 (Feb. 19, 2008).

[24] *See* AT&T Comments, WC Docket No. 07-256, at 10-13.

[25] *See* former 47 C.F.R. § 69.5(b) (emphasis added).

to VoIP providers involves a protocol conversion, which means that the service "simply cannot be a telecommunications service."[26] Thus, in Sprint's view, because it is not using a LEC's local exchange switching facilities for the provision of a "telecommunications service," the traffic it delivers to the LEC is not subject to access charges under section 69.5(b).[27]

Apparently, Sprint has been struck with an acute case of regulatory amnesia and has forgotten what it told this Commission in 2006 in response to Time Warner Cable's petition regarding the section 251 interconnection rights of CLECs serving cable VoIP providers.[28] In that proceeding, Sprint represented to the Commission that the wholesale service it provides to cable VoIP providers is, in fact, a "wholesale telecommunications service."[29] Specifically, Sprint described how its wholesale service met both prongs of the *NARUC II* test for common carriage because "Sprint Nextel offers it services indifferently to all potential customers within a class of users" and the purpose of its service "is to allow Sprint Nextel's wholesale customers, on behalf of their end user subscribers, to make and receive calls – something unquestionably within the scope of 'transmitting intelligence of [one's] own design and choosing.'"[30] Sprint went on to state that, as a "wholesale carrier to VoIP or cable telephony providers," Sprint "meets [the] federal definition" of a "telecommunications carrier" providing "telecommunications services."[31] And lest there be any doubt about the matter, Sprint declared that "[i]n providing their services to

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[26] Sprint Petition at 4, 7. *See Report to Congress* at ¶ 13 (explaining that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive").

[27] Sprint Petition at 6-7.

[28] *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

[29] Sprint Comments, WC Docket No. 06-55, at 13, 20. (April 10, 2006).

[30] Sprint Comments, WC Docket No. 06-55, at 19-20.

[31] Sprint Comments, WC Docket No. 06-55, at 21.

cable telephony and VoIP providers, wholesale carriers like Sprint clearly act as telecommunications carriers."[32]

By its own admission, then, when Sprint hands-off VoIP-originated calls to a LEC for termination on the PSTN, it is using that terminating LEC's local exchange facilities as an input into the wholesale "telecommunications service" it offers to its VoIP provider customers. As such, the traffic that Sprint delivers to the PSTN is unquestionably subject to access charges under the plain language of former section 69.5(b).[33]

This result, moreover, is not dependent on the regulatory classification of the VoIP services offered by Sprint's wholesale customers (i.e., telecommunications services vs. information services). As Sprint observes, the regulatory classification of the *retail* VoIP services that its cable customers provide to *their own end users* is "irrelevant"[34] to Sprint's status as a provider of wholesale telecommunications services and, consequently, its obligation to pay access charges under section 69.5(b). Indeed, the Commission has held that ESPs who purchase transmission services from interexchange carriers for use as inputs into the ESPs' services do "not thereby create an access charge exemption for those carriers."[35] Thus, irrespective of how the Commission ultimately classifies VoIP, Sprint was clearly obligated to pay access charges under former section 69.5(b) of the Commission's rules when delivering VoIP traffic to the PSTN.

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[32] Sprint Comments, WC Docket No. 06-55, at 24.

[33] *See* former 47 C.F.R. § 69.5(b).

[34] Sprint Comments, WC Docket No. 06-55, at 23.

[35] *Northwestern Bell Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 21 (1987), *vacated as moot on other grounds*, 7 FCC Rcd 5644 (1992).

B. The Commission Should Investigate Sprint's Asymmetrical Behavior and Inconsistent Statements Regarding the Applicability of Access Charges to VoIP-Originated Traffic.

In its Petition and in numerous other filings with the Commission over the last several years, Sprint has argued quite strenuously that "the former access charge rules do not apply to VoIP-originated traffic."[36] In 2008, for example, Sprint responded to an AT&T petition on this subject by stating that: "AT&T's fundamental assumption – that [VoIP] is or should be subject to access charges – is legally unfounded and bad public policy."[37] Last year, Sprint told the Commission that "[t]oday, access charges do not apply to VoIP services."[38] It went on to opine that imposing such charges on VoIP "would be unreasonable and arbitrary."[39] And based on these strongly held views, Sprint has informed the Commission that "many carriers – including Sprint – have withheld payment for access bills rendered by LECs for VoIP traffic terminating on their networks."[40]

But while Sprint vociferously objected to *paying* access charges on VoIP traffic that it sent to other parties on the PSTN, AT&T understands that Sprint had been *collecting* access charges on PSTN-originated VoIP traffic that Sprint delivered to its cable VoIP customers prior to the effective date of the *ICC-USF Order*.[41] To AT&T's knowledge, however, Sprint has never explained to the Commission why allowing *other LECs* to collect access charges on VoIP traffic would be "legally unfounded," "unreasonable and arbitrary," and "bad public policy," but

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[36] Petition at 8.

[37] Sprint Comments, WC Docket No. 08-152, at 3 (Aug. 21, 2008).

[38] *Hold the Phone (Charges) White Paper* at 15.

[39] *Hold the Phone (Charges) White Paper* at 12.

[40] Sprint Comments, WC Docket No. 10-90, et al, at 19 (Aug. 24, 2011).

[41] AT&T also understands that Sprint had been collecting access charges on VoIP-originated 8YY toll calls bound for AT&T and other 8YY service providers.

permitting Sprint to do the very same thing would be just fine.[42] The Commission should require such an explanation from Sprint now.

Similarly, as noted above, when Sprint was seeking to invoke the interconnection provisions of section 251 for its own benefit, it told this Commission repeatedly that the wholesale service it offers to cable VoIP providers is a "telecommunications service."[43] But now that this very same assertion is undermining Sprint's argument that its VoIP-originated traffic is not subject to access charges under former rule 69.5(b), Sprint has done a complete about-face in its advocacy. According to its latest filing, the "Sprint network" performs a protocol conversion on VoIP-originated traffic, which, in Sprint's view, means that this traffic "simply cannot be a telecommunications service" that would have been subject to the Commission's former access charge rules.[44] Again, however, Sprint makes no effort to explain how these two diametrically opposed positions can both be true. To get to the bottom of Sprint's latest flip-flop, the Commission should require a full and accurate explanation from Sprint.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should deny Sprint's Petition and declare that access charges applied to VoIP traffic exchanged between telecommunications

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[42] Sprint previously told the Commission that the wholesale telecommunications service it provides to cable VoIP providers includes "end office switching." Sprint Comments, WC Docket No. 06-55, at 5 (April 10, 2006). Given that the VoIP end of the calls at issue here originated and terminated over IP-based facilities operated by cable companies (coaxial cable, IP-based routers, etc.) rather than Sprint's facilities, it would appear highly unlikely that Sprint was actually providing something functionally equivalent to end office switching under the pre-*ICC-USF Order* rules. But even if Sprint was providing the functional equivalent of end office switching, Sprint offers no explanation as to why it would be appropriate for Sprint to collect access charges for such switching while, at the same time, it would be "unreasonable and arbitrary" for an ILEC to collect access charges for end office switching on the PSTN side of a VoIP-to-PSTN call.

[43] Sprint Comments, WC Docket No. 06-55, at 12-24.

[44] Petition at 4, 7.

carriers under the Commission rules as they existed prior to the effective date of the *ICC-USF Order*.

Respectfully Submitted,

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