

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**CENTURYLINK'S COMMENTS IN OPPOSITION**

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June 14, 2012

## EXECUTIVE SUMMARY

Sprint's petition arises from a primary jurisdiction referral by a federal district court in Louisiana. In its referral order, the court asks the Commission to determine whether CenturyLink's federal tariffs required Sprint to pay terminating interstate access charges for VoIP-originated toll traffic delivered to CenturyLink as interstate access traffic during the relevant period. The answer should be straightforward: Pursuant to CenturyLink's federal access tariffs and applicable Commission rules, CenturyLink was required to charge Sprint, and Sprint was required to pay, interstate access charges for the traffic in question.

The underlying dispute resulted from a scheme hatched by Sprint to improve its bottom line by unilaterally and unlawfully reducing the rates it paid other LECs to terminate toll traffic. In August 2009, Sprint began to withhold payment of access charges to CenturyLink for traffic it claimed to be VoIP-originated, and to unilaterally re-rate CenturyLink's lawfully-tariffed access charges. Sprint also clawed back tariffed access charges going back two years, giving itself a purported "credit" for alleged overpayments on invoices it had never even disputed.

Last year, in a similar dispute, a federal district court in Virginia found that Sprint's access-withholding scheme was based on "efforts to cut costs, rather than on a legitimately held belief" that it was not required to pay access charges. Sprint's arguments for the \$0.0007 rate were "founded on post hoc rationalizations" that were "not at all credible." Moreover, Sprint's policy was conveniently one-sided. Sprint did not apply these lower rates to the toll traffic it terminated for CenturyLink. In other words, while it *paid* CenturyLink \$0.0007 for VoIP-*originated* toll traffic, it *charged* CenturyLink full access charge rates for VoIP-*terminated* toll traffic. For these reasons alone, the Commission should deny the petition.

Sprint's arguments in the petition are equally baseless and conflict directly with positions it took before this and other regulatory commissions about the very same traffic. Sprint's petition claims that the TDM traffic it handed off to CenturyLink constituted an information service exempt from access charges, because it originated in VoIP format before it ever reached the PSTN. Yet this position is directly contrary to what Sprint told this Commission and state commissions when it sought section 251(c)(2) interconnection rights for this traffic, as a wholesale CLEC providing service to cable company customers. There, Sprint assured regulators that it would be responsible for both reciprocal compensation and exchange access obligations, and that the regulatory classification of the retail service provided by the originating VoIP provider is irrelevant to Sprint's regulatory status as a carrier. In the *Time Warner Cable Order*, the Wireline Competition Bureau agreed that the fact that Sprint's traffic would originate in VoIP format did not change Sprint's status or its rights and responsibilities as an interconnecting carrier.

The *USF/ICC Transformation Order* did not directly address intercarrier compensation obligations for VoIP-PSTN exchanged prior to the effective date of the *Order*. However, several of the *Order's* conclusions flatly contradict Sprint's requested declaratory ruling. Most notably, Sprint's asymmetric approach to intercarrier compensation flouts the "symmetrical framework" for VoIP-PSTN compensation employed in the *Order*. Sprint's unilateral flash cut to a made-up rate of \$0.0007 (ignoring CenturyLink's tariffs even for ESPs) also conflicts with the *Order's* "measured transition" for VoIP-PSTN traffic. The *Order* also addressed -- and explicitly rejected -- key legal arguments in the petition. For example, the Commission concluded that it could address intercarrier compensation obligations for VoIP-PSTN traffic *without* resolving the regulatory classification of VoIP traffic; it found that the ESP Exemption does not apply with

respect to a telecommunications carrier serving a VoIP provider, which in turn provides VoIP service to an end user; and it expressly rejected Sprint's section 251(g) argument because it flowed from a "mistaken interpretation" of the statute. The Commission's decisions in the *Order* regarding VoIP-PSTN traffic also rendered irrelevant the inconsistent prior court decisions cited by Sprint in the petition.

Pursuant to CenturyLink's federal tariffs, the classification of VoIP-PSTN traffic (as an information service or telecommunications service) has no bearing on Sprint's obligation to pay access charges. CenturyLink's tariffs do not exempt VoIP-PSTN traffic from switched access charges. Under the Filed Rate Doctrine, CenturyLink therefore was required to charge Sprint, and Sprint was required to pay, access charges for the VoIP-PSTN traffic.

The Commission's pre-*Order* rules and decisions also obligated Sprint to pay access charges for the VoIP-PSTN traffic it delivered to CenturyLink. Pursuant to Rule 69.5(b), "[c]arrier'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." Under the Commission's *Time Warner Cable* decision, there is no question that Sprint used CenturyLink's local exchange switching facilities to provide wholesale telecommunications services to VoIP providers. CenturyLink therefore properly assessed "[c]arrier's carrier charges" on Sprint pursuant to section 69.5(b). Nothing in the *IP-in-the-Middle Order* -- which addressed the classification of the *retail* service provided by AT&T -- suggests otherwise.

Neither section 251(g), nor the ESP Exemption, had any impact on Sprint's obligation to pay access charges in this dispute. As the Commission found in the *USF/ICC Transformation Order*, VoIP-PSTN traffic was subject to "the overarching Commission rules governing

exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of section 251(g).” The petition’s attempt to reargue this issue should be summarily rejected.

There also is no basis for Sprint’s implicit reliance (previously explicit) on the ESP Exemption to claim that VoIP-PSTN traffic is an information service exempt from access charges. The ESP Exemption allowed *ESPs* to be treated as end users (*i.e.*, by paying business line rates and subscriber line charges, rather than carriers’ carrier rates), but it did not create an access charge exemption for the carriers from which the ESPs purchased interstate services. Even then, Sprint did not claim the rate applicable to ESPs, but applied its own, fictitious rate.

The Commission need not reach the other counts in CenturyLink’s court complaint, as they do not require interpretation of federal access tariffs. These other issues can, and should, be addressed by the district court, without needing further guidance from the Commission. In particular, the court can readily take judicial notice of the *USF/ICC Transformation Order’s* finding (released months after the court’s referral order) that VoIP-PSTN traffic is *not* subject to exclusive federal jurisdiction.

For all these reasons, the Commission should deny the petition, and confirm that the VoIP-PSTN traffic delivered to CenturyLink was subject to access charges.

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**CENTURYLINK'S COMMENTS IN OPPOSITION**

**I. INTRODUCTION.**

Sprint's petition<sup>1</sup> seeks a declaratory ruling to justify, after-the-fact, its deliberate disregard of long-standing rules and policy. CenturyLink opposes Sprint's request.

Sprint's petition arises from a primary jurisdiction referral by a federal district court in Louisiana, where CenturyLink filed a collection action to enforce exchange access tariffs of its CenturyTel local operating companies.<sup>2</sup> In a January 2011 *Referral Order*, the court asked the Commission to determine whether CenturyLink's federal tariffs required Sprint to pay interstate access charges for VoIP-PSTN traffic delivered to CenturyLink for termination during the relevant period.<sup>3</sup> The answer should be straightforward: Under both the language of

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<sup>1</sup> Petition for Declaratory Ruling, *In the Matter of 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 (filed Apr. 5, 2012); *Wireline Competition Bureau Seeks Comment on Sprint Petition for Declaratory Ruling on VoIP Originated Traffic*, Public Notice, WC Docket No. 12-105, DA 12-681 (Apr. 30, 2012).

<sup>2</sup> As discussed below, the underlying lawsuit was initiated by CenturyLink's CenturyTel local operating companies. Unless otherwise noted, "CenturyLink" refers to those CenturyTel operating companies.

<sup>3</sup> Unless otherwise specified, "VoIP-PSTN traffic" refers to interstate toll traffic that was originated in VoIP and handed off to Sprint, which converted the traffic to Time-Division Multiplexing (TDM) format and delivered it to CenturyLink for termination to the PSTN over its local exchange facilities.

CenturyLink's federal access tariffs and applicable Commission rules, CenturyLink was required to charge Sprint, and Sprint was required to pay, interstate access charges for the traffic in question.

The underlying dispute resulted from a scheme hatched by Sprint to improve its bottom line by unilaterally and unlawfully reducing the rates it paid other LECs to terminate toll traffic. Sprint reversed its long-standing policy, and abandoned its prior compliance with broad industry practice, by manufacturing its own, sharply lower rates for terminated access for traffic it claimed to be VoIP-originated. In August 2009, Sprint began to withhold payment of access charges to CenturyLink for traffic it claimed to be VoIP-originated, and unilaterally re-rate CenturyLink's lawfully-tariffed access charges. First, it re-rated CenturyLink's invoices to substitute interstate for intrastate access rates for traffic it estimated was VoIP-originated, asserting that such calls are inherently interstate in character regardless of actual jurisdiction. Soon, however, it changed rationales to give itself a yet lower rate, by asserting that the \$0.0007 reciprocal compensation rate applies to VoIP-originated toll traffic. Sprint also clawed back tariffed access charges going back two years, giving itself a purported "credit" for overpayments on invoices it had never even disputed. Sprint's actions were completely unilateral, in the nature of "self-help."

Sprint's new policy was also conveniently asymmetrical. Sprint did not apply these lower rates to the toll traffic it terminated for CenturyLink. In other words, while it paid only \$0.0007 for TDM toll traffic it claimed originated in VoIP, it charged CenturyLink full access charge rates for TDM traffic it delivered to VoIP providers. Sprint was ignoring industry practice. In CenturyLink's experience, the large majority of carriers, including other CLECs

serving cable companies, have honored their obligation to pay access charges on VoIP-PSTN traffic.

Last year, a federal district court in Virginia reviewed Sprint's actions in detail. It found the access-withholding scheme was simply "based on efforts to cut costs, rather than on a legitimately held belief that [it was not required] to pay at the [access charge] levels which, for years, it had paid without protest."<sup>4</sup> After a bench trial and testimony of witnesses, the Virginia court concluded there was "no doubt" that the motivating force for the \$0.0007 rate was "not that Sprint honestly perceived" that rate to be applicable, but that, "to the exclusion of all other considerations, [that] rate permitted the greatest savings for the company."<sup>5</sup> Sprint's arguments for this rate were "founded on post hoc rationalizations" that were "not at all credible."<sup>6</sup> Sprint's arguments in the petition are equally baseless and conflict directly with positions it took, and representations it made, before this Commission and other regulatory commissions regarding the very same traffic.

While the *USF/ICC Transformation Order* did not specifically address intercarrier compensation obligations for VoIP-PSTN traffic exchanged before the *Order's* effective date, a number of the *Order's* conclusions further demonstrate Sprint's obligation to pay access charges on the VoIP-PSTN traffic delivered to CenturyLink. For example, the declaratory ruling sought by Sprint conflicts with the *Order's* policies of ensuring a "symmetrical framework" for VoIP-PSTN traffic (rather than Sprint's imposition of access charges on VoIP-terminated but refusal to pay access charges for VoIP-originated toll calls) and a "measured transition" away from

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<sup>4</sup> *Central Telephone Co. of Va. v. Sprint Communications Co.*, 759 F. Supp. 2d 789, 797 (E.D. Va. 2011), *appeal pending*, No 12-1322 (4<sup>th</sup> Cir. 2012) (*Central Tel. of Va.*). A copy of the ruling is attached to these comments as Exhibit 1.

<sup>5</sup> *Id.* at 797.

<sup>6</sup> *Id.* at 792.

existing intercarrier compensation regimes for VoIP-PSTN traffic (rather than the flash cut unilaterally imposed by Sprint). In addition, contrary to Sprint's arguments here, the Commission concluded that it could address intercarrier compensation obligations for VoIP-PSTN traffic without resolving the regulatory classification of VoIP traffic; it found that the ESP Exemption does not apply to a telecommunications carrier, such as Sprint, that serves a VoIP provider; and it expressly rejected Sprint's section 251(g) argument because it flowed from a "mistaken interpretation" of the statute. The *Order*'s rulings regarding VoIP-PSTN traffic also rendered irrelevant the inconsistent prior court decisions cited by Sprint in the petition.

Even prior to the *USF/ICC Transformation Order*, both CenturyLink's tariffs and the Commission's rules obligated Sprint to pay access charges for VoIP-PSTN traffic. Under CenturyLink's federal tariffs, the classification of VoIP-PSTN traffic (as an information service or telecommunications service) had no bearing on Sprint's obligation to pay access charges. Under the Filed Rate Doctrine, CenturyLink therefore was required to charge, and Sprint was required to pay, access charges for the VoIP-PSTN traffic.

The Commission's pre-*Order* rules and decisions also obligated Sprint to pay access charges for the VoIP-PSTN traffic it delivered to CenturyLink. Pursuant to section 69.5(b) of the Commission's rules, "[c]arrier'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."<sup>7</sup> Under the Commission's *Time Warner Cable Order*, there is no question that Sprint used CenturyLink's local exchange switching facilities to provide wholesale telecommunications services to VoIP providers.<sup>8</sup> CenturyLink therefore properly

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<sup>7</sup> 47 C.F.R. § 69.5(b).

<sup>8</sup> See *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*

assessed “[c]arrier’s carrier charges” on Sprint pursuant to section 69.5(b). Nothing in the *IP-in-the-Middle Order* -- which addressed the classification of the *retail* service provided by AT&T -- suggests otherwise.<sup>9</sup>

Neither section 251(g), nor the ESP Exemption, had any impact on Sprint’s obligation to pay access charges in this dispute. As the Commission found in the *USF/ICC Transformation Order*, VoIP-PSTN traffic was subject to “the overarching Commission rules governing exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of section 251(g).”<sup>10</sup> The petition’s attempt to reargue this issue should be summarily rejected. There also is no basis for Sprint’s implicit reliance (previously explicit) on the ESP Exemption to claim that VoIP-PSTN traffic is an information service exempt from access charges.

Interexchange carriers (IXCs) that carry traffic originated by enhanced service providers (ESPs) or information service providers (ISPs) have always been obligated to pay access charges for

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*Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (*Time Warner Cable Order*).

<sup>9</sup> *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

<sup>10</sup> *In the Matter of 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 an 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, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*), *Order Clarifying Rules*, 27 FCC Rcd 605 (rel. Feb. 3, 2012) (*Clarification Order*), Erratum to *USF/ICC Transformation Order* (rel. Feb. 6, 2012), Application for Review pending, USCC, *et al.*, filed Mar. 5, 2012, *Further Clarification Order*, DA 12-298, 27 FCC Rcd 2142 (2012), Erratum to *Clarification Order* (rel. Mar. 30, 2012), Second Erratum to *USF/ICC Transformation Order*, DA 12-594 (rel. Apr. 16, 2012), *pets. for recon. granted in part and denied in part*, Second Order on Recon., FCC 12-47 (rel. Apr. 25, 2012), Third Order on Recon., FCC 12-52 (rel. May 14, 2012), Erratum to *Second Order on Recon.* (rel. June 1, 2012), *Order Clarifying Rules*, DA 12-870 (rel. June 5, 2012), Erratum to *Order Clarifying Rules* (rel. June 12, 2012), *pets. for rev. of USF/ICC Transformation Order pending, sub nom. In re: FCC 11-161* (10th Cir. No. 11-9900, Dec. 16, 2011).

interexchange calls terminated to LECs.<sup>11</sup> The ESP Exemption allowed *ESPs* to be treated as end users (*i.e.*, by paying business line rates and subscriber line charges, rather than carriers' carrier rates), but it did not create "an access charge exemption" for the carriers from which the *ESPs* purchased services.<sup>12</sup> The Commission need not reach the remaining counts in CenturyLink's court complaint, because they do not require the interpretation of federal access tariffs. The district court can decide these other issues without needing further guidance from the Commission. In particular, the court can readily take judicial notice of the *USF/ICC Transformation Order's* finding (released months after the court's referral order) that VoIP-PSTN traffic is *not* subject to exclusive federal jurisdiction.<sup>13</sup>

For all these reasons, the Commission should deny Sprint's petition. It should instead confirm that the VoIP-PSTN traffic Sprint delivered to CenturyLink in TDM format was subject to access charges.

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<sup>11</sup> In unilaterally re-rating its VoIP-PSTN traffic, Sprint ignored CenturyLink's tariffed ESP rates, which would be the reciprocal compensation rates applicable to particular service areas. Instead, Sprint simply made up its own universal rate of \$0.0007.

<sup>12</sup> *In re Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶ 21 (1987).

<sup>13</sup> While CenturyLink believes the issues in Counts III and IV of its complaint are not properly before the Commission, it reserves the right to pursue and address these issues in any appropriate forum.

## II. BACKGROUND.

### A. The Petition Arises From Sprint's Failure To Pay Tariffed Charges For Exchange Access Service.

As the Commission is aware, the referral underlying Sprint's petition stems from a collection action filed in 2009 by CenturyLink's local operating companies.<sup>14</sup> The history of this dispute bears recounting.

CenturyLink's lawsuit resulted from Sprint's failure to pay more than \$6.4 million in terminating access due under legacy CenturyTel's federal and state tariffs.<sup>15</sup> For many years, Sprint properly paid these tariffed access charges without dispute or protest. Beginning in August 2009, however, Sprint suddenly refused to pay the tariffed rates on traffic that it claimed to be VoIP-originated, asserting, for the first time, that this traffic was exempt from these tariffed charges.

Rather than follow proper dispute procedures, and ignoring tariff provisions and the Filed Rate Doctrine, Sprint unilaterally substituted a much lower rate -- ultimately \$0.0007 per minute -- and withheld the remainder of the tariffed amounts. Sprint compounded this unlawful self-help by clawing back amounts it had paid over the previous two years through additional withholding. Sprint never challenged CenturyLink's access tariffs, and never filed a rate complaint at the Commission or any state commission. Nor did Sprint petition for a declaratory ruling on the issue generally.

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<sup>14</sup> CenturyLink's local operating companies are comprised of the ILEC companies of legacy CenturyTel, Embarq and Qwest. Sprint's petition arises from a dispute with CenturyTel's local operating companies.

<sup>15</sup> Complaint, *CenturyTel of Chatham, LLC, et al. v. Sprint Communications Co.*, Civ. No. 09-1951 (filed Nov. 23, 2009) (attached to the petition at Exhibit A). Sprint's obligation under the CenturyTel companies' federal and state access tariffs has continued to rise, and is now about \$9 million.

CenturyLink filed two lawsuits to enforce Sprint's obligations to pay federal and state tariffed access charges. In one, legacy Embarq sued for breach of contract to enforce the terms of its interconnection agreements with Sprint, the terms of which expressly acknowledged that access charges apply to VoIP-originated traffic. In March 2011, a Virginia federal district court ruled for Embarq, later issuing a final judgment against Sprint for about \$24 million.<sup>16</sup> CenturyLink will address that ruling in more detail later in this Opposition.

In a second lawsuit, from which Sprint's petition arises, legacy CenturyTel sued to enforce its federal and state access tariffs. In January 2011, Judge James of the U.S. District Court for the Western District of Louisiana granted Sprint's request to refer the case to the Commission, to allow the Commission to determine whether tariffed access charges apply to what Sprint claims is VoIP-PSTN traffic.

CenturyTel had opposed referral, for a variety of reasons, including that the referral was unnecessary and would cause unfair delay. Indeed, it was not until April 5, 2012 -- more than a year after the referral -- that Sprint filed the petition. CenturyLink also noted that the Commission lacks authority over state tariffs.

**B. Sprint Unlawfully Stopped Paying Access Charges To Gain An Advantage Over Carriers Following The Commission's Intercarrier Compensation Rules.**

**1. Sprint Long Acknowledged its Obligation to Pay Tariffed Access Charges on VoIP-PSTN Traffic.**

After years of consistently paying access on IP-originated traffic, Sprint abruptly and unilaterally changed the rules for itself after a downturn in its business -- refusing to pay access charges for this traffic. When it made this dramatic change, Sprint also exercised unreasonable and unlawful self-help. It ignored tariffed and contract dispute procedures, and gave itself a

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<sup>16</sup> See Exhibit 1, *Central Tel. of Va.*

“credit” equal to its estimate of two years’ “overcharges.” The result for most LECs was that Sprint stopped making any access payments at all, until it exhausted its self-declared credit, then paid only at its unilaterally-dictated reduced rate. At first, it said that rate was the interstate tariffed rate, arguing that VoIP-PSTN traffic is inherently interstate and therefore not subject to intrastate tariffed access charges. However, Sprint soon changed its position, subsequently claiming that VoIP-PSTN traffic was not subject to access but that Sprint was willing to pay a \$0.0007 reciprocal compensation rate.

That was a sharp departure from Sprint’s prior public statements. When it entered the business of providing wholesale telecommunications services to VoIP-based voice providers, principally cable companies, Sprint represented to state commissions that it would be responsible for access charges on the traffic. For example, in seeking interconnection rights for wholesale, IP-originated traffic, Sprint told the Pennsylvania Public Utility Commission that the calls it handled for its wholesale customers were “telecommunications” traffic, even though they typically originated in VoIP. Sprint stated that it would be “providing exchange access service in its own name, which in itself is a telecommunications service, because it will be responsible for all intercarrier compensation for both local and toll traffic.”<sup>17</sup> The Pennsylvania Commission expressly relied on Sprint’s representations that it was providing a telecommunications service, not an Internet service. Quoting directly from Sprint’s filed brief, it noted that Sprint and its cable partner would be “offering a traditional basic local exchange telephone service replacement. The mere fact that Sprint uses Internet Protocol -- a particular technology adopted

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<sup>17</sup> Sprint Initial Brief, *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Pa. P.U.C. Docket No. A-310183F0002AMA, at 9 (filed Feb. 23, 2006).

by most of the cable industry for placing voice traffic into a hybrid fiber coax network -- does not render Sprint's service an Internet service."<sup>18</sup>

The New York Public Service Commission also noted Sprint's commitment to pay intercarrier compensation on this traffic, when it approved Sprint's right to interconnect over rural ILECs' objections. The state commission found that "Sprint's agreement to provide Time Warner Cable with interconnection, number portability order submission, intercarrier compensation for local and toll traffic, E911 connectivity, and directory assistance, for Time Warner to offer customers digital phone service, meets the definition of 'telecommunications services.'"<sup>19</sup> All this discussion of "telecommunications" -- and particularly "toll traffic" -- being subject to "intercarrier compensation arrangements" would have made little sense if IP-originated traffic had always been exempt from tariffed access charges, as Sprint's petition now claims.

In a similar order, the Illinois Commerce Commission found that Sprint's cable company customer "has outsourced much of the network functionality, operations, and back-office systems to Sprint," such that "Sprint is also responsible for all inter-carrier compensation, including exchange access and reciprocal compensation."<sup>20</sup>

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<sup>18</sup> *Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Pa. P.U.C. Docket No. A-310183F0002AMA, Order, at 35-36 (2006 Pa. PUC Lexis 97) (Dec. 1, 2006).

<sup>19</sup> *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Independent Companies*, NYPSC Case No. 05-C-0170, Order Resolving Arbitration Issues, at 5 (May 24, 2005).

<sup>20</sup> *Cambridge Telephone Company, et al., Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief*, Illinois CC Docket Nos. 05-0259, *et seq.*, Order, at 4 (July 13, 2005). The

Eventually the issue of interconnection rights for VoIP traffic reached this Commission. In 2006, Time Warner Cable sought a declaratory ruling that CLECs may obtain section 251 interconnection to provide wholesale telecommunications services to VoIP providers.<sup>21</sup> In support of Time Warner Cable's petition, Sprint represented that it "provides wholesale telecommunications services to many cable companies, [which] utilize a variety of technologies, including VoIP technologies, to provide their own services to end users. . . ."<sup>22</sup> It stated that Sprint is "unquestionably a 'telecommunications carrier,' as defined by the Act. . . ."<sup>23</sup> And it acknowledged that Sprint provides telecommunications service, "without change in the form or content of the information as sent and received' . . . when it serves third party service providers like TWC, whether or not they are classified as VoIP providers."<sup>24</sup> Critical to its petition here, Sprint also noted that when providing wholesale services to cable companies and VoIP providers, it offered to pay "intercarrier compensation, *including exchange access* and reciprocal compensation."<sup>25</sup>

Sprint urged the Commission to declare that "[a] provider of telecommunications services to cable companies or VoIP providers to support their provision of services to their end-users is a

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Illinois Commission emphasized that, in favoring Sprint's position on the right to interconnect with Petitioners, the commission "fully expect[ed] Sprint to abide by its sworn affidavits, especially its responsibility for all intercarrier compensation arrangements." *Id.* at 14.

<sup>21</sup> See Petition of Time Warner Cable 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, WC Docket No. 06-55 (filed Mar. 1, 2006) (Time Warner Petition).

<sup>22</sup> Sprint Nextel Corporation's Comments in Support of Petition for Declaratory Ruling, WC Docket No. 06-55, at 14 (dated Apr. 10, 2006) (Sprint Comments in Support of PFDR).

<sup>23</sup> *Id.* at 15

<sup>24</sup> *Id.* at 13.

<sup>25</sup> *Id.* at 5.

telecommunications carrier” entitled to section 251 interconnection.<sup>26</sup> Sprint asserted that “[t]he classification of the customer’s own retail service offering is irrelevant to the wholesale carrier’s status under the Act.”<sup>27</sup> In particular, “[i]t does not matter whether a wholesale carrier’s customer uses voice over Internet protocol or any other technology in providing its own services to end users.”<sup>28</sup>

Sprint did not represent in any of these regulatory proceedings that its traffic was anything other than telecommunications traffic, nor that it was not subject to tariffed state and federal access charges. Indeed, initially Sprint did honor its intercarrier compensation obligations on this traffic. It paid tariffed or contract charges to CenturyLink companies and other LECs. Only later did it change its rationale. Last year, a federal court explained why.

**2. Sprint Has Engaged in a Scheme to Reduce Its Intercarrier Compensation Expenses, Regardless of the Requirements in the Commission’s Rules.**

In March 2011, the U.S. District Court for the Eastern District of Virginia issued a ruling in the lawsuit brought by legacy Embarq challenging Sprint’s failure to pay access charges on VoIP-originated toll traffic. The court found that Sprint’s shifting position on the rates it was “willing to pay for VoIP originated traffic . . . illustrates that its disputes were based on efforts to cut costs, rather than on a legitimately held belief that [it was not required] to pay at the levels which, for years, it had paid without protest.”<sup>29</sup> The court also noted “that Sprint [had] challenged [access] bills in stages, progressively lowering the rate at which it was willing to

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<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 23.

<sup>28</sup> Letter from Vonya B. McCann to Ms. Marlene H. Dortch, WC Docket No. 06-55 at 4 (dated June 30, 2007) (Sprint McCann Letter).

<sup>29</sup> Exhibit 1, *Central Tel. of Va.*, 759 F. Supp. 2d at 797.

compensate the Plaintiffs.”<sup>30</sup> At first, Sprint sought to justify its short-payment (and its disregard of proper dispute procedures) by arguing “‘the most that [it] can be charged for VoIP traffic is interstate access,’ because, in Sprint’s estimation, the FCC had determined that VoIP traffic is interstate in nature.”<sup>31</sup> So Sprint re-rated intrastate charges to lower interstate rates.

Later, “Sprint reached the conclusion that even re-rating traffic billed at intrastate rates to interstate rates did not produce the cost savings that it sought to realize. In consequence, Sprint decided that it would only pay the Plaintiffs \$.0007 per minute for termination of VoIP-originated traffic[.]”<sup>32</sup> According to the court, the record left “no doubt [that] the motivating force in selecting that rate was not that Sprint honestly perceived the \$.0007 rate more appropriate than the rates at which it had been billed by the Plaintiffs. What mattered for Sprint, to the exclusion of all other considerations, was that the \$.0007 rate permitted the greatest savings for the company. Sprint therefore had no qualms overlooking the inconvenient detail that the \$.0007 rate it chose did not apply to the type of VoIP traffic for which Sprint had received the Plaintiffs’ termination services.”<sup>33</sup> The court found that Sprint’s arguments were “founded on post hoc rationalizations developed by its in-house counsel and billing division as part of [its] cost cutting efforts,” and were “not at all credible.”<sup>34</sup>

In that lawsuit, the court was considering a breach of contract claim, in which CenturyLink’s Embarq companies sought to enforce express terms in their interconnection agreements. Nevertheless, the court’s findings about Sprint’s change in practice for paying

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<sup>30</sup> *Id.* at 796-97.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 797.

<sup>34</sup> *Id.* at 792.

intercarrier compensation, its motives for changing that practice and its changing purported legal rationales all apply equally to the petition.<sup>35</sup>

### **III. THE COMMISSION SHOULD DECLARE THAT SPRINT IS REQUIRED TO PAY ACCESS CHARGES FOR THE VOIP-ORIGINATED TRAFFIC IN QUESTION.**

In its petition, Sprint asks the Commission to declare that, prior to the effective date of the *USF/ICC Transformation Order*, CenturyLink's federal access tariffs did not impose access charges with respect to VoIP-originated calls. However, this proposed declaration would be inconsistent with the *USF/ICC Transformation Order*, the language in CenturyLink's tariffs, and governing law at the time Sprint delivered the traffic to CenturyLink.

#### **A. The *USF/ICC Transformation Order* Confirms The Applicability Of Access Charges To This Traffic.**

In the *USF/ICC Transformation Order*, the Commission set default intercarrier compensation rates for toll VoIP-PSTN traffic equal to interstate access rates applicable to non-VoIP traffic, on a prospective basis.<sup>36</sup> While the Commission did not specifically address intercarrier compensation obligations for VoIP-PSTN traffic for prior periods, both the policies and legal conclusions reflected in the *Order* further support the applicability of access charges to Sprint's VoIP-PSTN traffic.

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<sup>35</sup> This was not the first time Sprint had been called to task by authorities for failing to honor obligations under access tariffs. Only a short time before, the Iowa Utilities Board likewise had rejected Sprint's claims that VoIP-PSTN traffic is not subject to access charges. The Board agreed that intrastate access tariffs apply, and also found it unreasonable to assert that reciprocal compensation rates should apply to VoIP-PSTN traffic. *Sprint Communications Co. v. Iowa Telecommunications Services*, Docket No. FCU-2010-001, Order at 34, 44-45 (Iowa Utils. Bd. Feb. 4, 2011), *recon. and stay denied*. A copy is attached as Exhibit 2. The Board ordered Sprint to pay Windstream's billed access charges, and criticized Sprint's withholding of intrastate tariffed charges as unlawful self-help. *Id.* at 70-71.

<sup>36</sup> *USF/ICC Transformation Order*, 26 FCC Red at 18008 ¶ 944.

For example, the Commission rejected proposals for an “asymmetric approach” to intercarrier compensation, whereby different compensation rates would apply to IP-originated and IP-terminated traffic.<sup>37</sup> In doing so, the Commission sought to avoid “marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.”<sup>38</sup> Yet this is exactly the type of improper and unreasonable advantage that Sprint has sought to gain for itself.<sup>39</sup>

In 2010, Sprint publicly acknowledged Sprint’s asymmetric approach to intercarrier compensation for VoIP-PSTN traffic. In testimony before a federal district court in Virginia, Sprint’s witness confirmed that Sprint billed access charges for VoIP-terminated toll calls even though it claimed that VoIP-originated calls are an information service exempt from access charges.<sup>40</sup> According to Sprint’s rationale, if the calling party is a VoIP customer, “that is an information service because of the protocol that is involved with origination of that traffic.”<sup>41</sup> However, if the calling party is a TDM customer, “that’s plain old telephone service, it isn’t [an] information service, and, therefore, [Sprint is] . . . due compensation on the terminating side[.]”

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<sup>37</sup> See *id.* at 18007-08 ¶ 942. In its *Second Order on Recon.*, the Commission treated originating and terminating access somewhat differently from one another. However, the Commission still confirmed that both originating and terminating traffic are subject to tariffed access rates, just at different jurisdictional rates. *Second Order on Recon.* ¶¶ 30, 34.

<sup>38</sup> *USF/ICC Transformation Order* 26 FCC Rcd at 18007-08 ¶ 942.

<sup>39</sup> As CenturyLink has explained, a federal district court in Virginia found that “the motivating force” in Sprint selecting the \$0.0007 rate “was not that Sprint honestly perceived the \$0.0007 rate more appropriate” than access rates. “What mattered to Sprint, to the exclusion of all other considerations, was that the \$.0007 rate permitted the greatest cost savings to the company.” *Central Tel. of Va.*, 759 F. Supp. 2d at 797. See also *id.* (“The fact that Sprint so cavalierly has shifted its position on the rates it is now willing to pay for VoIP-originated traffic further illustrates that its disputes were based on efforts to cut costs, rather than on a legitimately held belief” about the applicable rate.)

<sup>40</sup> Direct Examination of James Appleby, *Central Tel. Co. v. Sprint Comm’n’s Co.*, Transcript at 681-83 (E.D. Va. Aug. 26, 2010) (Appleby Testimony).

<sup>41</sup> *Id.* at 683.

even if the called party is a VoIP customer.<sup>42</sup> In particular, Sprint collected access charges for VoIP-terminated toll traffic “[i]n accordance with [its] tariffs[.]”<sup>43</sup> CenturyLink’s records for 2010 and 2011 confirm that fact as well. According to those records, Sprint charged CenturyLink full access charges for all non-local traffic CenturyLink delivered to Sprint for termination as a CLEC. At the same time, Sprint’s petition asks the Commission to allow it to avoid its legal obligation to pay access charges for the VoIP-originated toll traffic that it delivered to CenturyLink. The Commission cannot, and should not, condone this blatantly anticompetitive conduct.

In addition to being asymmetric, Sprint’s self-imposed flash cut to \$0.0007 also conflicts with the *Order*’s “measured transition” away from existing intercarrier compensation regimes for VoIP-PSTN traffic.<sup>44</sup> The Commission found in the *Order* that an immediate adoption of bill-and-keep for this traffic would not “appropriately balance[] other competing policy objectives,” because the Commission sought “a more measured transition away from carriers’ reliance on intercarrier compensation as a significant revenue source.”<sup>45</sup> The Commission further found that approaches that would adopt reciprocal compensation charges for VoIP traffic -- as advocated here by Sprint -- would be “almost as significant a departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past as a bill-and-keep approach.”<sup>46</sup>

Sprint’s implicit reliance on the ESP Exemption also is incompatible with the Commission’s conclusion in the *Order* that, “as a policy matter,” it should not “adopt the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 687.

<sup>44</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18003 ¶ 935, 18012-13 ¶ 952.

<sup>45</sup> *Id.* at 18012-13 ¶ 952.

<sup>46</sup> *Id.* at 18013 ¶ 953.

equivalent of the ESP Exemption in this context.”<sup>47</sup> The Commission distinguished situations where the ILEC is providing exchange access directly to an ISP, and those, like here, where a telecommunications carrier is serving a VoIP provider, which furnishes VoIP service to the end user. The ESP Exemption applies only in the first scenario.<sup>48</sup>

The logic of the *USF/ICC Transformation Order* necessarily supports a finding that access charges properly applied to Sprint’s traffic -- in two other important ways. *First*, the Commission found in the *Order* that it could address intercarrier compensation obligations for VoIP-PSTN traffic without resolving the classification of VoIP traffic, because -- as is the case here -- the exchange of VoIP-PSTN traffic “typically occurs between two telecommunications carriers, one or both of which are wholesale carrier partners of retail VoIP service providers.”<sup>49</sup> *Second*, the Commission rejected Sprint’s interpretation of section 251(g), finding that the argument “flows from a mistaken interpretation of section 251(g).”<sup>50</sup>

Hence, the policies and logic of the *USF/ICC Transformation Order* inevitably lead to the conclusion that Sprint’s VoIP-PSTN traffic was subject to access charges. The same conclusion follows from a review of CenturyLink’s interstate tariffs and the Commission’s rules and decisions prior to the *Order*.

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<sup>47</sup> *Id.* at 18008-09 ¶ 945, n. 1905.

<sup>48</sup> *See id.* at 18015-17 ¶ 957.

<sup>49</sup> *Id.* at 18013-14 ¶ 954. The Commission also noted its earlier conclusion that the telecommunications carriers involved in originating or terminating a VoIP communication via the PSTN are by definition offering telecommunications. *Id.*

<sup>50</sup> *Id.* at 18015 ¶ 956. *See infra* Section III.C.2.

**B. CenturyLink's Federal Tariffs Required CenturyLink To Charge, And Sprint To Pay, Interstate Access Charges For VoIP-PSTN Traffic.**

Sprint does not dispute that it delivered interexchange voice calls to CenturyLink for termination to its end-user customers during the relevant period.<sup>51</sup> It claims, however, that none of these calls were subject to access charges under CenturyLink's federal access tariffs because the calls were originated in VoIP, even though they were delivered to CenturyLink in TDM. Sprint's argument overlooks the fact that Sprint actually ordered switched access facilities under CenturyLink's state and local tariffs, including by submitting access service requests (ASRs) specifically to carry VoIP-PSTN traffic from cable company customers. Regardless, CenturyLink's tariffs contain no limitation on access charges for TDM traffic that originated off the PSTN using VoIP technology.

Section 6 of CenturyLink's access tariffs defines the rates, terms and conditions for CenturyLink's switched access service, including Feature Group D service.<sup>52</sup> Switched Access Service provides an interconnecting carrier with the ability "to terminate calls from a customer designated premises [(i.e., an IXC POP)] to an end user's premises in the LATA where [the Switched Access Service] is provided."<sup>53</sup> That is exactly how Sprint used CenturyLink's local exchange facilities -- to terminate its toll traffic to CenturyLink's end-user customers. From a terminating LEC's perspective, VoIP-originated toll traffic is functionally the same as traditional toll traffic, whether it is classified as an information service or a telecommunications service. Thus, Sprint's VoIP-PSTN traffic used CenturyLink's common terminating, switching and

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<sup>51</sup> Petition at 1 ("The VoIP originated calls were . . . delivered to CenturyLink via Feature Group D facilities for termination by [the] CenturyLink company serving the called party.").

<sup>52</sup> Feature Group D access provides trunk side access to CenturyLink's end office switches. *See, e.g.,* CenturyLink FCC Tariff No. 7 § 6.8.1(A).

<sup>53</sup> *See, e.g., id.* § 6.1.

trunking facilities and common subscriber plant as would any other interconnecting carrier purchasing terminating exchange access service. CenturyLink's tariff does not exempt VoIP-PSTN traffic from switched access charges. Sprint was delivering this traffic in TDM format for termination on access facilities it ordered from CenturyLink, and CenturyLink handled that traffic as its federal and state tariffs required. Under the Filed Rate Doctrine, CenturyLink was required to charge interstate and intrastate access for those calls. Under the Filed Rate Doctrine, Sprint was required to pay those tariffed access charges for the traffic.

Rather than address this straightforward reading of CenturyLink's tariffs, Sprint attempts to contort the definitions in the tariffs in a way that conflicts both with the plain language of the tariffs and Commission decisions interpreting similar tariff language. In particular, Sprint asserts that CenturyLink's tariffs define access service "with reference to the service being purchased by the individual making the call," because that individual is a "customer" and/or "end user" for purposes of the tariffs.<sup>54</sup> Under Sprint's theory, if the calling party purchased a non-telecommunications service (from its VoIP provider), then access charges are not applicable pursuant to the terms of CenturyLink's tariffs. Under CenturyLink's tariffs, however, an "end user" is "any *customer* of an interstate or foreign telecommunications service that is not a carrier,"<sup>55</sup> and a "customer" is an individual or entity that "subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users."<sup>56</sup> Since they did

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<sup>54</sup> Petition at 11 ("Under the business model employed by VoIP based cable providers, the 'customer' is the person or entity making the call in IP format."). Sprint's argument appears to be based on the tariff provision stating that CenturyLink's "Switched Access Service . . . is available to *customers* for their use in furnishing their services to *end users*["].") See, e.g., CenturyLink FCC Tariff No. 7 § 6.1 (emphasis supplied).

<sup>55</sup> CenturyLink FCC Tariff No. 7 § 2.6 (emphasis supplied). In addition, a carrier may be considered an end user in certain circumstances not relevant here. *Id.* See also 47 C.F.R. § 69.2(m) (employing an identical definition of "end user").

<sup>56</sup> CenturyLink FCC Tariff No. 7 § 2.6.

not subscribe to services offered under CenturyLink's tariffs, the *calling* parties were not "end users" for purposes of those tariffs. In *Qwest v. Farmers II*, the Commission came to the same conclusion based on similar language in Farmers' tariff.<sup>57</sup>

Sprint's theory also ignores the fact that Sprint was plainly the customer of the LEC, not least because it was delivering this traffic primarily on facilities it ordered from CenturyLink specifically to terminate access traffic. Sprint was CenturyLink's wholesale customer purchasing switched access services to reach CenturyLink's retail end user customers. Sprint cannot assert that CenturyLink does not have an end user at the end point of the call, and that means switched access clearly applies under the tariff.

With respect to Sprint's VoIP-PSTN services, Sprint was the "customer" under CenturyLink's tariff, and the *called* parties (not the *calling* parties) were the "end users" to which Sprint's calls were terminated. As a result, for purposes of applying access charges to Sprint's VoIP-PSTN traffic, it is irrelevant whether the calling party received a telecommunications service from its third-party VoIP provider. Consistent with the strict terms of its federal tariff,<sup>58</sup> CenturyLink was authorized and compelled to apply interstate access charges to the VoIP-PSTN traffic delivered by Sprint for termination. CenturyLink's interstate and intrastate access tariffs clearly apply.

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<sup>57</sup> *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Company*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14805 ¶ 10 (2009) ("[A] person or entity is not an 'end user' unless the person or entity is also a 'customer.' The tariff requires that to be a customer, the person or entity must subscribe to the services offered under the tariff.").

<sup>58</sup> Contrary to Sprint's assertions otherwise, *see* Petition at 10-11, CenturyLink's assessment of access charges on Sprint's VoIP-PSTN traffic also was fully consistent with sections 201 and 203 of the Act and the Commission's decision in *AT&T v. YMax*. In that case, the Commission found that YMax had violated sections 203(c) and 201(b) of the Act by assessing switched access charges that were not authorized by its tariff. *AT&T Corp. v. YMax Commun'ns Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011). As discussed above, the switched access charges billed to Sprint were fully justified by the language of CenturyLink's tariffs.

**C. Existing Law Prior To The *USF/ICC Transformation Order* Required Sprint To Pay Access Charges For This Traffic.**

This interpretation of CenturyLink's tariffs is further supported by applicable law during the relevant period. Even prior to the *USF/ICC Transformation Order*, the Commission's rules and decisions required Sprint to pay access charges for its VoIP-PSTN traffic delivered to CenturyLink for termination.

**1. Pursuant to Part 69 of the Commission's Rules, CenturyLink was Authorized to Assess Interstate Access Charges on Sprint's VoIP-PSTN Traffic.**

Under section 69.5(b) of the Commission's rules, "[c]arrier'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."<sup>59</sup> Each of these elements was present with respect to the VoIP-PSTN traffic that Sprint delivered to CenturyLink. Acting as an interconnecting carrier for its wholesale customers, Sprint used CenturyLink's local exchange switching facilities, in the form of exchange access services, "for the provision of interstate or foreign telecommunications services."<sup>60</sup> CenturyLink therefore properly assessed "[c]arrier's carrier charges" on Sprint pursuant to section 69.5(b) of the Commission's rules.<sup>61</sup>

As discussed below, the regulatory classification of the VoIP services provided by the third parties that originated the VoIP-PSTN traffic, and the classification of the VoIP-PSTN traffic itself, has no bearing on Sprint's duty to pay access charges for the VoIP-PSTN traffic.

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<sup>59</sup> 47 C.F.R. § 69.5(b); *IP-in-the-Middle Order*, 19 FCC Rcd at 7466 ¶ 14 ("Under our rules, access charges are assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.").

<sup>60</sup> See 47 C.F.R. § 69.5(b).

<sup>61</sup> *Id.* The Commission could establish an exemption from section 69.5(b) with regard to certain telecommunications services only through a rulemaking in conformity with the Administrative Procedure Act. See *IP-in-the-Middle Order*, 19 FCC Rcd at 7467 ¶ 16.

**a. Consistent with Section 69.5, CenturyLink Provided Exchange Access Service to Sprint to Terminate Its VoIP-PSTN Traffic.**

Sprint terminated its VoIP-PSTN traffic to CenturyLink’s end-user customers through the purchase of CenturyLink’s exchange access services, which have long been tariffed and long been classified as a telecommunications service.<sup>62</sup> Sprint’s assertion that CenturyLink needed a Commission ruling to federally tariff this service is wrong.<sup>63</sup>

In fact, Sprint “obtain[ed] the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers,” and that Sprint service imposed “the same burdens on the local exchange” as TDM-originated interexchange calls.<sup>64</sup> Indeed, as an interconnecting carrier, Sprint delivered the traffic in TDM format indistinguishable from any other call. It is therefore reasonable that Sprint “pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN[.]”<sup>65</sup>

In short, Sprint, acting as a wholesale carrier, clearly “use[d]” CenturyLink’s “local exchange switching facilities” to terminate the VoIP-PSTN traffic delivered to CenturyLink.<sup>66</sup>

**b. Regardless of the Classification of VoIP, It is Clear that Sprint Provided a Telecommunications Service with Respect to the VoIP-PSTN Traffic Delivered to CenturyLink.**

Sprint also satisfied the second requirement of section 69.5(b) by using CenturyLink’s exchange access services “for the provision of interstate or foreign telecommunications

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<sup>62</sup> See *In re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78 ¶ 785 (1997) (subsequent history omitted).

<sup>63</sup> See Petition at 3. Indeed, the Commission’s rules prior to the *USF/ICC Transformation Order* imposed access charge requirements on IXCs without regard to the nature of the traffic being exchanged. See 47 C.F.R. § 69.5.

<sup>64</sup> See *IP-in-the-Middle Order*, 19 FCC Rcd at 7466 ¶ 15.

<sup>65</sup> *Id.*

<sup>66</sup> 47 C.F.R. § 69.5(b).

services.”<sup>67</sup> The petition acknowledges that Sprint is a telecommunications carrier that acted as a “wholesale provider” and CLEC with respect to the VoIP-PSTN traffic handed off to CenturyLink, and that it provided wholesale telecommunications to the VoIP providers that originated this traffic.<sup>68</sup> As noted, in obtaining authority to obtain section 251 interconnection for VoIP-PSTN traffic, Sprint also repeatedly asserted to this Commission and state commissions that it was providing a telecommunications service, which was confirmed in the *Time Warner Cable Order*.<sup>69</sup>

That the *Time Warner Cable Order* declined to rule on the applicability of access charges to VoIP-PSTN services has no bearing on its import in this context. The Wireline Competition Bureau did not find it “appropriate or necessary” to address complex issues pending in other dockets, including appropriate compensation for VoIP-PSTN traffic.<sup>70</sup> That issue was outside the scope of Time Warner Cable’s petition and probably beyond the scope of the Bureau’s delegated authority. For purposes of section 69.5(b), it is sufficient that the *Time Warner Cable Order* confirmed that Sprint utilized the exchange access services of ILECs like CenturyLink “for the provision of interstate [] telecommunications services.”<sup>71</sup>

**c. The Classification of VoIP Traffic is Irrelevant to Sprint’s Obligation to Pay Access Charges on the VoIP-PSTN Traffic it Delivered to CenturyLink for Termination.**

Faced with these clear facts and legal conclusions, Sprint now asserts that section 69.5(b) does not apply because, “VoIP-PSTN traffic undergoes a change in form and is not a

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<sup>67</sup> *Id.*

<sup>68</sup> Petition at 1-2.

<sup>69</sup> *Time Warner Cable Order*, 22 FCC Rcd at 3517-19 ¶¶ 9-12. *See supra* Section II.B.1.

<sup>70</sup> *See id.* at 3522-33 ¶ 17.

<sup>71</sup> 47 C.F.R. § 69.5(b).

telecommunications service.”<sup>72</sup> As noted, however, the VoIP-PSTN calls that were delivered to CenturyLink were initiated by third-party VoIP providers -- not by Sprint. Rather, Sprint was a carrier that provided wholesale telecommunications services, including interconnection, to these third-party VoIP providers.

In the *Time Warner Cable Order*, the Commission concluded that the statutory classification of a third-party’s VoIP service as an information service or a telecommunications service is “irrelevant” regarding the rights of Sprint and other wholesale carriers under section 251.<sup>73</sup> Such classification is likewise irrelevant in determining Sprint’s regulatory rights and obligations, as Sprint has previously told the Commission: “The classification of the customer’s own retail service offering is irrelevant to the wholesale carrier’s status under the Act.”<sup>74</sup> In particular, “[i]t does not matter whether a wholesale carrier’s customer uses voice over Internet protocol or any other technology in providing its own services to end users.”<sup>75</sup> Sprint is not offering a VoIP service; it is offering a wholesale telecommunications service. Thus, Sprint was properly required to pay access charges for this traffic pursuant to section 69.5.<sup>76</sup>

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<sup>72</sup> Petition at 8.

<sup>73</sup> *Time Warner Cable Order*, 22 FCC Rcd at 3517 ¶ 9.

<sup>74</sup> Sprint Comments in Support of PFDR at 23.

<sup>75</sup> Sprint McCann Letter at 4.

<sup>76</sup> The Commission’s *Interim ICC NPRM* also noted that “interconnected VoIP traffic is ‘telecommunications’ traffic, regardless of whether interconnected VoIP services were to be classified as a telecommunications service or an information service.” *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 an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4748 ¶ 615 (2011), referring to 47 U.S.C. § 251(b)(5) (*Interim ICC NPRM*). Thus, even if the regulatory classification of VoIP were relevant -- which it is not -- access charges were properly assessed. See 47 C.F.R. § 69.2(b) (defining access service to include “services and facilities provided for the . . . termination of any interstate or foreign telecommunication.”) (emphasis added).

The petition claims that Sprint's argument is supported by the *IP-in-the-Middle Order*, because that decision recognized (in a background section) that “generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services.”<sup>77</sup> The petition further argues that if an IXC's status as a telecommunications carrier was “determinative,” the Commission would not have needed to determine whether IP-in-the-middle traffic is a telecommunications service or an information service.<sup>78</sup>

However, a finding that Sprint's VoIP-PSTN traffic was subject to access charges is fully consistent with the *IP-in-the-Middle Order*. Because AT&T's IP-in-the-middle service was a *retail* service provided to end users, the Commission found it necessary to address the classification of that service to determine whether AT&T was subject to access charges under section 69.5(b). Here, the Commission has already found that the *wholesale* service that Sprint provided -- using CenturyLink's exchange access service -- is a telecommunications service, so the classification of the *retail* service provided by the VoIP providers is irrelevant.<sup>79</sup> This important distinction was again recognized in the *USF/ICC Transformation Order*.<sup>80</sup>

**d. Industry Practice Demonstrates that Access Charges Apply to IP-PSTN Calls.**

The large majority of carriers have consistently honored their obligations to pay access charges on VoIP-PSTN traffic, including other CLECs serving VoIP providers, as well as cable

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<sup>77</sup> Petition at 8 (quoting *IP-in-the-Middle Order*, 19 FCC Rcd at 7459 ¶ 4) (emphasis added).

<sup>78</sup> *Id.* at 13.

<sup>79</sup> See *Time Warner Cable Order*, 22 FCC Rcd at 3517-19 ¶¶ 9-12.

<sup>80</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18017-18 ¶ 959 (“As a threshold matter, the *Vonage Order* addressed a retail VoIP service. By contrast, VoIP-PSTN intercarrier compensation typically involves the exchange of traffic between two carriers, one (or both) of which are providing wholesale inputs to a retail VoIP service -- not the retail VoIP service itself”).

companies themselves. This demonstrates the industry's recognition that VoIP-PSTN traffic has always properly been subject to the Commission's long-standing access regime, notwithstanding a few opportunistic outliers. Although the *USF/ICC Transformation Order* declined to address explicitly the intercarrier compensation obligations of VoIP-PSTN traffic prior to the *Order*,<sup>81</sup> this does not mean that VoIP-PSTN traffic has ever been exempt from the Commission's long-standing intercarrier compensation rules.<sup>82</sup> It has not.

**2. Section 251(g) Preserved the Pre-1996 Act Access Obligations Applicable to VoIP-PSTN Traffic.**

In the *USF/ICC Transformation Order*, the Commission specifically rejected Sprint's position "that VoIP-PSTN traffic did not exist prior to the 1996 Act, and thus cannot be part of the access charge regimes 'grandfathered' by section 251(g)."<sup>83</sup> As the Commission found, "[t]his argument flows from a mistaken interpretation of section 251(g)."<sup>84</sup> The essential question under section 251(g) is not whether VoIP existed prior to the Act, but whether there was "a pre-Act obligation relating to intercarrier compensation for particular traffic exchanged between a LEC and interexchange carriers and information service providers."<sup>85</sup> The Commission concluded that there was, because this traffic was subject to "the overarching Commission rules governing exchange access prior to the 1996 Act."<sup>86</sup>

Sprint now argues that "because there was no pre-1996 intercarrier compensation obligation that applied to VoIP originated traffic, such charges were not preserved by Section

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<sup>81</sup> *Id.* at 18008 ¶ 945.

<sup>82</sup> *See Interim ICC NPRM*, 26 FCC Rcd at 4744 ¶ 604.

<sup>83</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18015 ¶ 956 (citing Sprint Section XV Comments at 5-6).

<sup>84</sup> *Id.* at 18015 ¶ 956.

<sup>85</sup> *Id.* (quotations omitted).

<sup>86</sup> *Id.* at 18015-17 ¶ 957.

251(g)'s carve-out for the legacy access charges regime.”<sup>87</sup> However, the Commission rejected that argument as well. It found that, “[r]egardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs’ compensation for the provision of exchange access to an IXC or an information service provider.”<sup>88</sup> These findings confirm the Commission’s conclusion in the *IP-in-the-Middle Order* that “toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP.”<sup>89</sup>

### 3. Sprint’s Traffic was Not Subject to the ESP Exemption.

Before the *USF/ICC Transformation Order* appeared, Sprint had argued that its VoIP-PSTN traffic was exempt from access charges under the ESP Exemption.<sup>90</sup> The petition does not explicitly make that claim. It is, however, the only exception to the application of access charges to that TDM traffic, and a brief review of the history of that exemption reveals that it did not apply here.

Access charges apply broadly. The Commission has recognized that access revenue is necessary so that ILECs can recover costs of providing the ubiquitous local networks that make up the PSTN. As carriers-of-last-resort, ILECs are required to build, maintain, and operate their

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<sup>87</sup> Petition at 8.

<sup>88</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18015-17 ¶ 957. “Interexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements.” *Id.* n.1955.

<sup>89</sup> *Id.* at 18015-17 ¶ 957 (emphasis supplied) (footnote omitted) (citing *IP-in-the-Middle Order*, 19 FCC Rcd at 7466-70 ¶¶ 14-19).

<sup>90</sup> Sprint asserted this position in comments on interim intercarrier compensation issues, for example. Comments of Sprint Nextel Corp., *In the Matter of Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, and 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Apr. 1, 2011).

networks even in high cost and rural areas where it is uneconomic without access revenue. Carriers with large high cost areas like CenturyLink have been especially reliant on access charges to invest in their rural networks to ensure service quality and modern network capabilities. Under long-standing Commission rules, ILECs have been expected to bill access charges to other carriers for all non-local traffic delivered to them for termination on the PSTN. The ESP Exemption is a very narrow *exception* to that rule.<sup>91</sup>

In the *IP Enabled Services* proceeding, the Commission explained that the “cost of the PSTN should be borne equitably among those that use it in similar ways.”<sup>92</sup> That means that “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”<sup>93</sup> Access charges have applied equally to all carriers’ voice traffic terminated or originated on the PSTN, regardless of whether that traffic is originated or terminated, respectively, in IP.

IXCs that carry ESP-originated calls have always been obligated to pay access charges for interexchange calls terminated to LECs. The Commission created the ESP Exemption as an outgrowth of the comprehensive access charge regime it adopted in 1983.<sup>94</sup> When it established that system, the Commission granted ESPs (now generally referred to as ISPs) a “temporary exemption” from access charges to protect them from the “shock” of access costs during the

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<sup>91</sup> Sprint’s credibility is further undermined by the fact that it ignored CenturyLink’s tariffed rates for ESPs, which mirror the various reciprocal compensation rates in CenturyLink service areas. Instead, Sprint simply dictated its own arbitrary rate of \$0.0007.

<sup>92</sup> *IP Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 ¶ 61 (2004).

<sup>93</sup> *Id.*

<sup>94</sup> *In re MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (*MTS and WATS Order*).

industry's transition to the new access system.<sup>95</sup> The Commission created this exemption to prevent "calls" between ESPs and their customers from being subject to access charges merely because ISPs routed information to their customers across local exchange boundaries.<sup>96</sup> The ESP Exemption allowed ESPs to be treated like end users, by "pay[ing] business line rates and the appropriate subscriber line charge, rather than interstate access rates."<sup>97</sup> The Commission explained that the exemption was based on the recognition that ESPs do not "use the PSTN in a manner analogous to IXCs." Instead, "characteristics of ISP traffic (such as large numbers of incoming calls to Internet service providers)" make them more like "other classes of business customers."<sup>98</sup> Early ESPs included Westlaw dedicated research terminals and automated teller machines, later followed by dial-up Internet service providers.

Here, Sprint received the VoIP-PSTN traffic from VoIP providers, carried it across exchange boundaries and delivered it to CenturyLink. Even if VoIP providers were considered "end users," Sprint was plainly subject to access charges for this traffic.<sup>99</sup> Sprint is not an ESP or ISP. Sprint is a telecommunications carrier that provides the connection between VoIP providers and terminating LECs, including CenturyLink. The ESP Exemption has never applied to carriers

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<sup>95</sup> *Id.* at 715 ¶ 83.

<sup>96</sup> *Id.* at 711-12 ¶ 78.

<sup>97</sup> *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16132 ¶ 342 (1997).

<sup>98</sup> *Id.* at 16132 ¶ 342, 16133 ¶ 345. In upholding the Commission's *Order*, the Eighth Circuit highlighted the cornerstone of the exemption. ESPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8<sup>th</sup> Cir. 1998).

<sup>99</sup> 47 C.F.R. § 69.5.

that provide telecommunications services to ESPs.<sup>100</sup> Moreover, when Sprint hands off a VoIP-PSTN call to CenturyLink for termination to the PSTN, that call is no longer in IP format.<sup>101</sup> It is delivered in TDM format and indistinguishable from any other PSTN call. Thus, Sprint's VoIP-PSTN traffic uses CenturyLink's local telecommunications network in the same way as traditional voice traffic and is indistinguishable from that traffic. To both the calling and called party, the VoIP services from which this traffic originates are a direct substitute for traditional voice services.<sup>102</sup>

As a result, Sprint cannot fairly claim that it is entitled to a regulatory advantage over voice competitors simply because of the technology choice of the voice provider originating the call. Sprint "utilize[d] LEC services and facilities in the same way [and] for the same purposes as other customers" subject to access charges.<sup>103</sup> Sprint's traffic imposed the same burden on the PSTN, and used the same facilities, as traditional voice traffic. Consequently, Sprint had every reason to expect to contribute its full share to support the PSTN, and indeed, until August 2009, Sprint had long paid access on this traffic without any dispute.<sup>104</sup> For years, access revenue has

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<sup>100</sup> See *In re Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶ 21 (1987) (While ISPs are treated as end users for purposes of the Commission's access charge rules, their "purchase [of] interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.").

<sup>101</sup> Petition at 4.

<sup>102</sup> It makes no difference whether the VoIP provider originating Sprint's VoIP-PSTN traffic may offer other "integrated" services, such as call forwarding, networking, voicemail or unified messaging. The inherent nature of VoIP-PSTN traffic is not altered simply because it is offered with additional features. The core functionality of VoIP-PSTN service is the ability of a customer to have a real-time voice conversation with a customer of another service provider on the PSTN.

<sup>103</sup> *Southwestern Bell Tel. Co.*, 153 F.3d at 542.

<sup>104</sup> Sprint had significant whole cable traffic by 2005, and it was properly paying interstate and intrastate access until 2009. Sprint's compliance with tariffed access obligations continued even after its 2006 spin-off of its ILEC operations as Embarq Corporation (now part of CenturyLink).

provided implicit universal service support that has been critical to maintain and extend the network deployment on which all traffic depends, especially for consumers in rural areas where broadband investment has been most difficult to justify.

#### **4. Sprint's Selective Citation of Outdated Court Cases is Equally Unavailing.**

As the Commission recognized in the *USF/ICC Transformation Order*, the prior “lack of clarity” regarding intercarrier compensation obligations for VoIP traffic led to differing decisions by state commissions and courts on that issue.<sup>105</sup> Now that the Commission has provided some additional clarity on key legal questions, the court decisions cited by Sprint have effectively been superseded. Both the *Southwestern Bell* and *PAETEC* decisions, for example, relied on an interpretation of section 251(g) that was expressly rejected by the Commission in the *USF/ICC Transformation Order*.<sup>106</sup> Those decisions also turned on the courts’ finding that VoIP is an information service,<sup>107</sup> which, again, is irrelevant to Sprint’s obligation to pay access charges for VoIP-PSTN traffic.<sup>108</sup> As noted, Sprint is merely a wholesale carrier terminating calls that were

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<sup>105</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 18003-04 ¶ 937.

<sup>106</sup> Compare *Southwestern Bell*, 461 F. Supp. 2d 1055, 1080 (2006) (“Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation which could have governed it, and therefore § 251(g) is inapplicable) and *PAETEC Comm’ns. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51936 \*9 (D.D.C. 2010) (“There cannot be a pre-Act obligation relating to inter-carrier compensation for VoIP, because VoIP was not developed until after the 1996 Act was passed”) with *USF/ICC Transformation Order*, 26 FCC Rcd at 18015 ¶ 956 (“We reject the claims . . . that VoIP-PSTN traffic did not exist prior to the 1996 Act, and thus cannot be part of the access charge regimes ‘grandfathered’ by section 251(g)”).

<sup>107</sup> *Southwestern Bell v. Missouri PSC*, 461 F. Supp. 2d at 1081-83; *PAETEC Comm’ns. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51926 \*8 (D.D.C. 2010). See also *USF/ICC Transformation Order*, 26 FCC Rcd at 18013-14 ¶ 954 (finding it unnecessary to address the classification of interconnected VoIP services).

<sup>108</sup> Like AT&T in the *IP-in-the-Middle* case, and unlike Sprint here, CommPartners was a retail provider of VoIP-originated traffic. *PAETEC Comm’ns. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51926 \*2-3 (D.D.C. 2010). The court thus found it necessary to address the regulatory classification of that traffic. *Id.* at \*5-9.

originated on its customers' VoIP networks. Finally, contrary to the petition's claim, the *Manhattan Telecommunications* decision actually does not support Sprint's position. In that case, the Commission declined to "enter the melee" regarding the appropriate classification of VoIP services and therefore did not "attempt to apply the filed rate doctrine to the facts of [that] case."<sup>109</sup> Rather, the court found that, under equity principles, interstate access rates should apply in that case.

The Commission therefore should give no weight to Sprint's selective citation to these outdated cases.

**D. Providers Of VoIP-PSTN Services Have Long Been Required To Contribute To Universal Service, Including Through The Payment Of Access Charges.**

In the *USF/ICC Transformation Order*, the Commission has taken major steps to reform and restructure universal service and intercarrier compensation, gradually replacing intercarrier compensation charges with targeted, explicit universal service support. Until that time, access charges will continue to play a key role in ensuring the availability of affordable, high quality services in all geographic areas. Because they are a substitute for traditional telephone services, the Commission has required providers of VoIP-PSTN services to support universal service, including through the payment of access charges.

**1. Access Charges have Long Been Essential to Support Service and Investment in High Cost Areas.**

Under the Commission's long-standing intercarrier compensation regime, access charges have played a critical role in supporting universal service to rural and high-cost areas. Until the

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<sup>109</sup> *Manhattan Telecomm'ns Corp. v. Global Naps, Inc.*, 49 Comm. Reg. 1296 \*7-8 (S.D.N.Y. 2010). The court also noted that from the perspective of both the terminating LEC and customers, "all the traffic is the same, regardless of whether it began in internet protocol." *Id.* at \*4.

*USF/ICC Transformation Order* is implemented, the nation's universal service system will have been based *principally* on access charge revenues. Indeed, access revenues have accounted for the majority of support for operating, maintaining, and upgrading the PSTN in high-cost and rural areas. As a universal service funding mechanism, reliance on access revenues predated the 1996 Act and creation of the universal service fund and has continued to date.

**2. Competitive Neutrality Compels VoIP Providers to Support the PSTN Through Explicit *and* Implicit Universal Service Mechanisms.**

In the *Interim Contribution Methodology Order*, the Commission concluded that providers of interconnected VoIP services must contribute to the federal universal service fund.<sup>110</sup> All service providers that interconnect to the PSTN benefit from universal service policies. The public interest therefore dictates that they share the same obligation as other interconnecting service providers to support universal service funding systems.<sup>111</sup>

The *Interim Contribution Methodology Order* also recognized that the principle of “competitive neutrality” requires that interconnected VoIP providers contribute to universal service funding systems. In this context, competitive neutrality “means that ‘universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.’ . . . As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to

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<sup>110</sup> *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7536 ¶ 34 (2006), *aff'd in rel. part*, *Vonage Holdings Corp. v. FCC*, 487 F.3d 1232 (D.C. Cir. 2007) (*Interim Contribution Methodology Order*).

<sup>111</sup> *Id.* at 7540-41 ¶ 43.

exclude interconnected VoIP service providers from universal service contribution obligations.”<sup>112</sup>

The Commission also recognized that any other conclusion would distort the marketplace and encourage and reward regulatory arbitrage. The Commission did not want “contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice service to customers or to create opportunities for regulatory arbitrage.”<sup>113</sup> The Commission also noted that “the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers.”<sup>114</sup>

These same principles apply to implicit universal service support provided through access charge revenues. Allowing Sprint’s VoIP-originated toll traffic to avoid the payment of access charges when its traffic is terminated to the PSTN would give Sprint an unfair competitive advantage over non-VoIP providers that used the terminating network in the same manner.

#### **IV. THE COMMISSION NEED NOT REACH THE OTHER ISSUES PENDING BEFORE THE DISTRICT COURT.**

Sprint’s petition includes three counts in CenturyLink’s complaint. The Commission need not address Counts III and IV because they do not require the interpretation of federal access tariffs.

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<sup>112</sup> *Id.* at 7541 ¶ 44, quoting *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 at ¶ 42 (2005) (*CALEA Order*).

<sup>113</sup> *Id.* at 7541 ¶ 44.

<sup>114</sup> *Id.* ¶ 45.

**A. The Court Asked The Commission Only “to interpret those counts involving Federal Access Tariffs.”**

With the district court’s dismissal of Count II, there are three remaining counts in CenturyLink’s complaint. Count I -- which this Opposition has addressed up until now -- alleges that Sprint has failed to meet its obligation to pay *interstate* access charges pursuant to CenturyLink’s federal access tariff. Count III contends that Sprint engaged in unjust and unreasonable practices in violation of section 201(b) of the Communications Act. Count IV alleges that Sprint has breached its duty to pay *intrastate* access charges due under CenturyLink’s state tariffs.

Sprint sought to refer to the Commission “the issues related to compensation for VoIP-originated long distance traffic, including whether state and federal tariffs apply as pled.”<sup>115</sup> In response, CenturyLink pointed out that the Commission does not have jurisdiction to interpret CenturyLink’s state access tariffs, nor specialized expertise to address CenturyLink’s section 201 claim.<sup>116</sup>

In the *Referral Order*, the court found that “the best exercise of its discretion is to stay [the] case and refer the remaining counts” of CenturyLink’s complaint to the Commission.<sup>117</sup> The court noted that “the main issue in this case is whether [CenturyLink’s] tariffed rates are . . . applicable to VoIP originated calls,” and that “the State Access Tariffs involve only one count in

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<sup>115</sup> Memorandum in Support of Sprint’s Motion to Dismiss Count II and To Refer Remaining Counts to the FCC, *CenturyTel of Chatham, LLC v. Sprint Comm’n’s Co.*, Civil Action No. 3:09-CV-01951 RGJ/MLH, at 1 (filed Jan. 13, 2010).

<sup>116</sup> CenturyLink’s Opposition to Sprint’s Motion to Dismiss, *CenturyTel of Chatham, LLC v. Sprint Comm’n’s Co.*, Civil Action No. 3:09-CV-01951 RGJ/MLH, at 13, 22-23 (filed Feb. 3, 2010).

<sup>117</sup> *CenturyTel of Chatham, LLC v. Sprint Comm’n’s Co.*, 2011 U.S. Dist. LEXIS 7132 \*6 (2011).

Plaintiffs' Complaint."<sup>118</sup> The court clarified that "[b]y referring this matter to the FCC, the Court intends for the FCC to interpret those counts involving Federal Access Tariffs."<sup>119</sup>

**B. Counts III And IV Do Not Require The Interpretation Of Federal Access Tariffs.**

Count I is the only count in CenturyLink's complaint that requires an interpretation of CenturyLink's federal access tariffs, and therefore is the only issue that the Commission need address in response to the *Referral Order*.

With respect to Count III, Sprint asks the Commission to declare that Sprint's payment of \$0.0007 per minute for the VoIP-PSTN traffic did not constitute a violation of section 201(b).<sup>120</sup> This question is outside the scope of the court's referral. Once the Commission has confirmed that federal tariffed accessed charges applied, the court can readily determine whether Sprint's conduct violated section 201, without a need to interpret CenturyLink's federal tariff.

With respect to Count IV, Sprint urges the Commission to declare that state access tariffs do not apply to VoIP-originated calls that it claims meet the definition of an information service.<sup>121</sup> However, the Commission has no jurisdiction to interpret, or determine the applicability of, CenturyLink's state tariffs.<sup>122</sup> The court also can readily determine on its own that the Commission has already rejected Sprint's position on Count IV. In the *USF/ICC Transformation Order*, released many months after the court granted Sprint's referral request, the Commission declined to find that all VoIP-PSTN traffic must be subject exclusively to federal

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (emphasis omitted).

<sup>120</sup> Petition at 15.

<sup>121</sup> *Id.* at 13-14.

<sup>122</sup> As the petition acknowledges, Enforcement Bureau staff advised Sprint and CenturyLink that they believed the Commission does not have authority to review the state tariff issues. *Id.* at 2.

jurisdiction and permitted the tariffing of charges for toll VoIP-PSTN traffic to occur through both federal and state tariffs.<sup>123</sup> While this framework applied only on a prospective basis, the logic underlying that framework applies here as well.

Although CenturyLink believes that these issues are not properly before the Commission, CenturyLink naturally reserves its rights to pursue and address these issues in any appropriate forum.

## V. CONCLUSION.

In the *USF/ICC Transformation Order*, the Commission did not address directly the intercarrier compensation obligations of VoIP-PSTN traffic delivered prior to the effective date of the *Order*. Nevertheless, the fact that the agency has not yet provided a definitive resolution does not mean that VoIP-PSTN traffic has ever been exempt from the Commission's long-standing intercarrier compensation rules. By law, Sprint was obligated to pay the invoiced charges, subject to dispute, and could have sought the Commission's guidance by complaint or declaratory ruling at that time, and should have done so. Sprint's unlawful self-help, and indeed its entire handling of this issue, CenturyLink believes, shows only contempt for the Commission's authority as much as its determination to exploit other carriers. The lack of clear guidance by the Commission never gave Sprint or any other carrier freedom to pretend the rules were whatever they wanted them to be.

In failing or refusing to comply with intercarrier compensation obligations for VoIP-PSTN traffic, Sprint has acted unreasonably and unlawfully, and showed disdain for Commission and state commission authority. The Commission should not reward such bad behavior. The

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<sup>123</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18002-03 ¶ 934. See also *id.* at 18017-18 ¶ 959 (“we do not rely on the contention that the Commission has legal authority to adopt this regime because all VoIP-PSTN traffic should be treated as interstate.”).

Commission should deny Sprint's request, and should instead confirm that IP-PSTN traffic was always subject to the same intercarrier compensation charges -- intrastate access, interstate access, and reciprocal compensation -- as other voice telephone service.

Respectfully submitted,

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