Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF VERIZON

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INTRODUCTION

The Commission should address Sprint's Petition by reaffirming that VoIP is exclusively interstate for jurisdictional purposes and should also confirm once and for all that VoIP is an information service.[2] Although the Commission established intercarrier compensation rules for VoIP-PSTN traffic that took effect December 29, 2011,[3] the Commission correctly found that prior to that time there were no FCC rules governing, and the old access charge regime had not been extended to, this traffic. Accordingly, in the absence of governing rules Sprint compensated CenturyLink at a commercially reasonable rate of $0.0007 per minute, which did not violate section 201(b) of the Act. And although the *USF-ICC Transformation Order*, which superseded the old access charge regime, now allows carriers to apply tariffed rates to VoIP-PSTN traffic for a limited transitional period, it expressly does so on a prospective only basis.

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[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc., and Verizon Wireless ("Verizon").

[2] *See* Petition for Declaratory Ruling of Sprint Communications Company, WC Docket No. 12-105 (Apr. 5, 2012) ("Petition").

[3] *See Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF-ICC Transformation Order*" or "*Order*").

DISCUSSION

In the *USF-ICC Transformation Order*, the Commission fundamentally reformed and modernized the intercarrier compensation system. At the same time, the Commission was careful to make clear that the *Order* "does not address intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods."[4] And the Commission also made clear that "nothing in [the *USF-ICC Transformation Order*] alters the *status quo* with respect to the jurisdictional treatment of VoIP traffic or services under existing precedent."[5] The Commission has already found in the *Vonage Order* that VoIP services are subject to its exclusive federal jurisdiction,[6] and "nothing in [the *USF-ICC Transformation Order*] impacts the holding of the *Vonage Order*."[7] With respect to VoIP's regulatory classification, the Commission stated it "has not broadly determined whether VoIP services are 'telecommunications services' or 'information services,'…."[8]

Because the *USF-ICC Transformation Order* established "a prospective intercarrier compensation framework for VoIP traffic,"[9] Sprint notes that the *Order* "'does not resolve the numerous existing industry disputes' regarding compensation for prior periods."[10] Sprint asserts that "the Commission must still resolve the treatment of that traffic for prior periods."[11] The

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[4] *USF-ICC Transformation Order*, ¶ 935 n.1874.

[5] *Id*. ¶ 959 n.1967.

[6] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶¶ 15-37 (2004) ("*Vonage Order*").

[7] *USF-ICC Transformation Order* ¶ 959 n.1969.

[8] *Id*. ¶ 1387. *See also id*. ¶ 63 n.67, ¶ 718, ¶ 954.

[9] *Id*. ¶ 933.

[10] Petition at 6, citing *USF-ICC Transformation Order* ¶ 935.

[11] Petition at 6.

Commission should address Sprint's Petition by reaffirming that all VoIP services, regardless of provider or technology, are inseverable and therefore interstate for jurisdictional purposes. And the Commission should clarify once and for all that VoIP and all IP-enabled services are information services.

A. VoIP is an inherently inseverable, interstate service for purposes of jurisdiction.

As Verizon has explained in this proceeding and elsewhere,[12] the Commission has already found in the *Vonage Order* that VoIP services are subject to its exclusive federal jurisdiction.[13] There the Commission found that applying traditional state telephone company regulation to VoIP providers "outright conflicts with federal rules and policies governing" those communications.[14]

The *Vonage Order* confirms that all VoIP services are practically inseverable[15] and therefore interstate for jurisdictional purposes. The standard for determining whether a communications service is interstate or intrastate in nature is not whether it is somehow technologically possible to carve out a purely intrastate service. Rather, the dispositive question is whether it is "economically feasible," in light of "practical and economic considerations," to separate interstate communications from intrastate communications.[16] That focus on economic and practical considerations reflects the long-standing rule that carriers are not required to

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[12] *See, e.g*, Comments of Verizon and Verizon Wireless, *Connect America Fund*, WC Docket No. 10-90, *et al*., at 19-31 (Apr. 1, 2011).

[13] *See Vonage Order*, ¶¶ 15-37.

[14] *Id*. ¶ 31; *see also id.* ¶¶ 20-22 (identifying the federal rules and policies with which state regulation conflicts).

[15] *See id*. ¶¶ 29-32.

[16] *See California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994); *see also Vonage Order* ¶ 23.

expend resources or to modify their services "merely to provide state commissions with an intrastate communication they can then regulate."[17]

The Commission concluded that Vonage's VoIP service is practically inseverable for jurisdictional purposes because the characteristics of that service "preclude any practical identification of, and separation into, interstate and intrastate communications."[18] The Commission focused on the "inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[19] The Commission recognized that these "functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it."[20] The Commission then relied on this finding of "practical inseverability" to find that the states are preempted from imposing traditional telephone regulation on Vonage's VoIP service. [21]

The Commission did not limit its inseverability analysis to Vonage's specific service.[22] Instead, the Commission explained that the "integrated capabilities and features" that render Vonage's service inseverable — and, therefore, exclusively interstate for jurisdictional purposes — "are not unique to [Vonage's service], but are inherent features of most, if not all, IP-based services."[23] As a result, the Commission recognized that "other types of IP-enabled services

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[17] *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (2007).

[18] *Vonage Order* ¶ 14.

[19] *Id.* ¶ 25.

[20] *Id.*

[21] *Id.* ¶ 32; *see id.* ¶¶ 14, 31, 47.

[22] *See id.* ¶ 24.

[23] *Id.* ¶ 25 n.93.

having basic characteristics similar to" Vonage's service are also "practical[ly] inseverab[le]."[24] The Commission listed the three "basic characteristics" that render a VoIP service inseverable: a broadband connection, IP-compatible equipment, and "a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically."[25]

The Commission found that "facilities-based providers," including "cable companies," offer VoIP services that share those basic characteristics and, therefore, are practically inseverable, no different from Vonage's service.[26] The Commission cited an array of submissions from cable providers and their trade associations demonstrating that cable companies' VoIP offerings share these basic characteristics.[27] For example, the Commission pointed to Cox Communications' statement that cable VoIP providers' network design permits them " 'to offer a single, integrated service that includes both local and long distance calling and a host of other features that can be supported from national or regional data centers and accessed by users across state lines.' "[28] The Commission also cited a filing from the National Cable & Telecommunications Association (NCTA), which explained that " '[c]able VoIP offers consumers an integrated package of voice and enhanced features that are unavailable from traditional circuit-switched service.' "[29] Other facilities-based providers, including Verizon, offer VoIP services that share these basic characteristics.

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[24] *Id.* ¶ 32.

[25] *Id.*

[26] *Id.* ¶¶ 25 n.93, 32.

[27] *See id.* ¶ 32 n.113.

[28] *Id.*

[29] *Id. See also* Ex Parte Letter from Howard J. Symons, NCTA, to Marlene H. Dortch, FCC, WC Docket Nos. 03-211 & 04-36, at 3 & n.12 (Oct. 28, 2004).

The Commission expressly noted that, "[e]ven . . . if" Vonage were able to "identify[] the geographic location of a [Vonage VoIP] subscriber" at the time she placed a call, the FCC would still find that Vonage's service is inseverable.[30] That is because "the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously" renders that service "far too multifaceted for simple identification of the user's location to indicate jurisdiction."[31] And in the *USF-ICC Transformation Order*, the Commission again rejected claims that it should distinguish among types of VoIP services for regulatory purposes.[32] The Commission also reiterated that "[n]othing" in the *USF-ICC Transformation Order* "impacts the holding of the *Vonage Order*."[33]

Affirmed by the Eighth Circuit, the *Vonage Order* confirms that all VoIP services are practically inseverable and therefore interstate for jurisdictional purposes.

B. VoIP is an information service.

Although the Commission has not yet ruled on VoIP's regulatory classification, the Act's text and Commission precedent make clear that VoIP is an information service and not a telecommunications service. Indeed, at least three federal district courts have found that VoIP services are information services.[34]

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[30] *Vonage Order* ¶ 23.

[31] *Id.* ¶¶ 23, 25; *see id.* ¶ 25 (explaining that the "geographic location of the end user at any particular time is only one clue to a jurisdictional finding" and that the "other clue" is the "geographic location of the 'termination' of the communication," which is "difficult or impossible to pinpoint" because of the "multiple service features" that utilize "different websites" and "server[s]" during a single VoIP "communication session").

[32] *See USF-ICC Transformation Order* ¶ 954 n.1942.

[33] *Id.* ¶ 959 n.1969.

[34] *See PAETEC Commc'ns Inc. v. CommPartners, LLC*, No. 08-cv-0397, 2010 U.S. Dist. Lexis 51926, *7 (D.D.C. Feb. 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv.*

VoIP meets the Communications Act's statutory definition of "information service":

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[35]

VoIP is an information service because it "offers customers a suite of integrated capabilities and features that allow[] the user to manage personal communications dynamically"[36] and to "generate, acquire, store, transform, process, retrieve, utilize, or make available information via telecommunications."[37] VoIP providers offer these information-processing capabilities and features as part of a single, integrated service; there is no separate "telecommunications" offering to consumers within those VoIP services. As the Commission recognized in the *Vonage Order*, "integrated features and capabilities" like these—which are "inherent features of most, if not all, IP-based services," including "those offered or planned by facilities-based providers"—allow customers to "control their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized."[38] Because those capabilities are offered as part of a single, integrated, any-distance service—and cannot practicably be broken apart into component pieces—these services, at a minimum,

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Comm'n, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 555 U.S. 1099 (2009); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004).

[35] 47 U.S.C. § 153(24).

[36] *Vonage Order* ¶¶ 7, 25 n.93.

[37] 47 U.S.C. § 153(24).

[38] *Vonage Order* ¶¶ 8, 25 n.93.

"combine both telecommunications and information components" and are accordingly "treated as information services."[39]

In the *Brand X*[40] decision, the United States Supreme Court addressed what it means to offer consumers a suite of integrated capabilities and features that allow customers to "generate[], acquire[], store[], transform[], process[], retrieve[], utilize[], or ma[k]e available…information…via telecommunications." The Court considered the status of cable modem service, the broadband Internet access service that cable companies sell and which includes both a data transport element (telecommunications) and Internet access (information). The Court explained that the test for determining whether that service is a single information service and not two distinct services is to look at what the customer perceives as the finished product. If the various features are offered as a single, integrated service, without a "transparent transmission path" to provide a telecommunications service separate from any information processing — as was the case in *Brand X* [41]— the service is properly classified as an information service.[42] Thus, the manner in which a provider *offers* its services in the marketplace is critical to the question of whether a service is an information service. As the Court noted, "a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing."[43]

Further, all VoIP services must utilize databases that associate IP addresses with 10-digit telephone numbers, just as Internet access providers use Domain Name Server (DNS) databases

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[39] *PAETEC*, 2010 U.S. Dist. LEXIS 51926, *6.

[40] *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1010 (2005).

[41] *Brand X*, 545 U.S. at 990.

[42] *See id.* at 990-91, 998-1000.

[43] *Id.* at 992.

to associate a web page name like www.fcc.gov with an IP address like 192.104.54.5. In *Brand X*, the Supreme Court agreed that this integrated feature, alone, was sufficient to render cable modem service an information service.[44]

In addition, VoIP offers the capability to perform a "net protocol conversion" from IP to TDM, and vice versa.[45] As the Commission has explained, a service that enables "an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information" and therefore "constitute[s]…information services under the 1996 Act."[46] The Supreme Court also recognized in *Brand X* that a protocol conversion is the "ability to communicate between networks that employ different data-transmission formats."[47] VoIP services "offer[] [the] capability" to perform that conversion, even if that capability is not used in every communication.[48] The Commission has long classified services that require or have an integrated capability of a net protocol conversions as "enhanced services,"[49] which are defined as services that "employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information."[50]

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[44] *See id*. at 987, 990-91, 998-1000

[45] *See Southwestern Bell*, 461 F. Supp. 2d at 1082 (explaining that VoIP "involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN" and, therefore, VoIP "is an information service").

[46] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 104 (1996) ("*Non-Accounting Safeguards Order*") (subsequent history omitted).

[47] *Brand X*, 545 U.S. at 977.

[48] 47 U.S.C. § 153(24).

[49] *See Non-Accounting Safeguards Order*, ¶¶ 102-107.

[50] 47 C.F.R. § 64.702(a).

As one federal district court recently recognized, all VoIP and IP-based services are properly classified as information services because they allow subscribers to originate or terminate real-time, two-way voice communications over an IP-generated dial-tone and a broadband connection that, when delivered to or received from the PSTN, undergo a net protocol conversion to enable them to exit or enter the network in a different protocol (the TDM-based protocol used on the PSTN).[51] The Commission has similarly held that "an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information," and therefore qualifies as both an "enhanced service" and an "information service" under federal law.[52] That is precisely what happens in the case of a VoIP service that permits customers to receive or make communications that originate or terminate on the PSTN.

C. In the absence of rules, Sprint compensated VoIP traffic at the reasonable rate of $0.0007 per minute.

The Commission has correctly concluded that it had "never addressed whether interconnected VoIP is subject to intercarrier compensation rules, and, if so, the applicable rate for such traffic."[53] The 2010 district court decisions in *PAETEC v. CommPartners* and *MetTel v. GNAPS*[54] underscore that there were no FCC rules governing VoIP-PSTN traffic and that the old access regime had not been extended to that traffic.

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[51] *See PAETEC*, 2010 U.S. Dist. LEXIS 51926, *5-7.

[52] *Non-Accounting Safeguards Order* ¶ 104.

[53] *Connect America Fund, et al.*, Second Order on Reconsideration, WC Docket No. 10-90, *et al.*, ¶ 31 n.91 (Apr. 25, 2012) (citing *Universal Service Reform*; *Mobility Fund*, Notice of Proposed Rulemaking, 25 FCC Rcd 14716, ¶ 608 (2010)).

[54] *See PAETEC, supra.*; *see Manhattan Telecomms. Corp. v. Global NAPs, Inc.*, No. 08-Civ-3829, 2010 U.S. Dist. LEXIS 70973 (S.D.N.Y. Feb. 13, 2009).

In the absence of rules, $0.0007 per minute was a reasonable compensation rate for VoIP traffic because it was based on the rate the Commission adopted in a related context for interstate ISP-bound traffic. The Commission adopted $0.0007 per minute in the *ISP Remand Order*[55] "[t]o limit arbitrage opportunities that arose from 'excessively high reciprocal compensation rates."[56] It is now widely used in the industry and is the default rate for a substantial portion of the traffic exchanged between carriers, including intraMTA wireless and ISP-bound traffic.

Regardless, the Commission made clear in the *All American Order* that a carrier paying less than what was billed cannot in and of itself constitute a Section 201(b) violation.[57] As the Commission has noted, "[D]uring the past twenty years, the Commission has repeatedly held than an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c)."[58] Sprint's practice of compensating VoIP-originated traffic at $0.0007 per minute therefore could not violate Section 201(b).

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[55] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 78 (2001) ("*ISP Remand Order*").

[56] *High-Cost Universal Service Support, et al*., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 24 (2008) (internal citation omitted).

[57] *See All American Tel. Co.* v. *AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011) ("*All American Order*").

[58] *All American Order*, ¶ 10.

CONCLUSION

The Commission should address Sprint's Petition consistent with Verizon's comments.

Respectfully submitted,

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