

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

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

SPRINT'S REPLY TO COMMENTS

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July 16, 2012

EXECUTIVE SUMMARY

The Commission should grant Sprint's Petition and determine (i) that VoIP calls are jurisdictionally interstate in nature such that they are compensable, if at all, at rates no greater than interstate access rates, and (ii) that until December 29, 2011, CenturyLink's federal access tariffs did not impose access charges with respect to VoIP-originated calls. The Commission should reject commenting parties' attempts to focus on Sprint's motives or business practices, which have no bearing on these issues of general applicability to the industry. Nor should the Commission decline to address the treatment of geographically intrastate calls – it would be nonsensical for the Commission to resolve only half of what remains in dispute for prior periods.

On the merits, the Commission should affirm that VoIP service is jurisdictionally interstate (a point not disputed by the commenting carriers), and should confirm that pricing inputs to an interstate service must be set under federal law. The D.C. Circuit has recently upheld the Commission's use of an end-to-end analysis to set interstate prices for geographically intrastate inputs into a jurisdictionally interstate service. The same treatment is warranted here.

Finally, the Commission should hold that because VoIP service does not meet the definition of "telecommunications," interstate access tariffs did not apply to those calls. The Commission should reject arguments that it can break a VoIP call into segments in order to determine intercarrier compensation obligations as the call is exchanged between carriers. Such action is without precedent, and utterly inconsistent with the orders issued by the Commission and the D.C. Circuit with respect to ISP-bound traffic.

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REPLY TO COMMENTS

Sprint Communications Company L.P. ("Sprint") submits this Reply to Comments filed on its Petition for Declaratory Ruling (the "Petition").¹ Verizon's Comments urge the Commission to grant the Petition and declare i) that Sprint's Voice-over Internet Protocol ("VoIP") service is not a telecommunications service and ii) that VoIP service is an inherently inseverable, interstate service for purposes of jurisdiction. CenturyLink, AT&T, Cox, the IUB, the ITTA, and the Associations urge the Commission, for various reasons, to deny the Petition.

BACKGROUND

A. CenturyLink and AT&T Focus on Facts That Are Not Relevant to the Legal Questions Presented

Not surprisingly, CenturyLink attempts to focus this Petition on Sprint's alleged motives and business practices, rather than on the legal questions that, as AT&T points out, the

¹ Comments were filed by Verizon, CenturyLink, AT&T, Cox Communications, Inc. ("Cox"), the Iowa Utilities Board ("IUB"), the Independent Telephone & Telecommunications Alliance ("ITTA"), and a group comprised of the National Exchange Carrier Association, Inc., The Organization for the Promotion and Advancement of Small Telecommunications Companies, the Eastern Rural Telecom Association, and the Western Telecommunications Alliance (collectively the "Associations").

Commission has failed to directly and clearly address for nearly fifteen years.² Yet the facts relevant to the legal questions presented in the Petition have nothing to do with motives or business practices. Nor are there important facts in dispute. CenturyLink does not dispute that the calls at issue were originated in IP, were offered via cable modem platforms, and involved a net change in protocol. As such, the service is like that described in the Commission's *Vonage Order*³ and *Cable Modem Service Declaratory Ruling*,⁴ and the application of the law to that service is not specific to Sprint. The Commission should disregard CenturyLink's focus on extraneous issues that do not inform the legal analysis to be completed.

B. Court Findings in Virginia Should Not be Imported Into this Proceeding

Even if Sprint's alleged motives were relevant to the determination of this industry-wide legal issue – and they are not – the Commission cannot and should not accept as fact the findings of the District Court Judge in *Central Tel. of Va.*⁵ As CenturyLink notes, that case is presently on appeal, in part because the Court usurped the role of state commissions by interpreting the parties' interconnection agreements,⁶ and in part because the presiding judge

² AT&T's Comments at 3.

³ *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util's Comm'n*, Memorandum Opinion & Order, 19 FCC Rcd. 22404, ¶ 7 (2004) ("*Vonage Order*"), *aff'd*, *Minn. Pub. Util's Comm'n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007).

⁴ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶¶ 9-11 (2002) ("*Cable Modem Service Declaratory Ruling*").

⁵ See CenturyLink's Comments at 12-14 (citing *Central Tel. Co. of Va. v. Sprint Commc'ns Co.*, 759 F. Supp. 2d 789 (E.D. Va. 2011) (*appeal pending*, No. 12-1322 (4th Cir.)) ("*Central Tel. of Va.*").

⁶ *Central Tel. Co. of Va. v. Sprint Commc'ns Co.*, 759 F. Supp. 2d 772, 783, 786 (E.D. Va. 2011) (finding state commissions "ill-equipped" to address disputes arising under interconnection agreements, and refusing to give deference to a Commission decision that resolution of such disputes is the responsibility of the state commissions).

admitted he owned CenturyLink stock at the time he issued his order.⁷ In addition, that case involved enforcement of interconnection agreements with respect to VoIP traffic, and did not purport to resolve the legal issues presented in the Petition.⁸ That Court's findings and conclusions are simply not relevant to this Petition.

The bottom line is that Sprint (like other carriers) has been forced to make decisions whether to pay bills, dispute bills, or reach settlements, without having clear direction from the Commission during the 15-year period up to the effectiveness of the *CAF Order*.⁹ It is time for the Commission to resolve these long standing disputes.

DISCUSSION

I. THE COMMISSION SHOULD DECLARE THAT STATE ACCESS TARIFFS DO NOT APPLY TO VoIP-ORIGINATED CALLS

CenturyLink's Count IV seeks to enforce state access tariffs with respect to VoIP calls that are originated and terminated within a single state. Sprint seeks a declaration that these calls

⁷ *Central Tel. of Va. v. Sprint Commc'ns Co.*, No. 3:09-cv-720, 2011 WL 6178652, at *1 (E.D. Va. Dec. 12, 2011).

⁸ *Central Tel. of Va.*, 759 F. Supp. 2d at 793-94, 805.

⁹ *In the Matter of Connect Am. Fund*, WC Docket No. 10-90 et al., Report & Order & Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*CAF Order*"). During this period Sprint compensated CenturyLink at a per-minute rate of \$0.0007 for the VoIP traffic at issue here. Nonetheless, because CenturyLink believes it had the right to arrogate to itself the right to classify VoIP as a telecommunications service subject to Title II of the Act, it has insisted that Sprint pay its tariffed rates (both interstate and intrastate) for such traffic. In an effort to force Sprint to accede to its demands that Sprint pay CenturyLink's tariffed rates for the traffic during this past period, CenturyLink now refuses to process Sprint's orders for additional FG-D trunks. Thus CenturyLink is engaging the same type of practices condemned by the FCC in its 2007 decision in WC Docket No. 97-135. *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC Rcd 11629 (2007).

are jurisdictionally interstate in nature such that they are compensable, if at all, at rates no greater than interstate access rates, pursuant to Count I.¹⁰

A. The Commission Should Determine Whether Geographically Intrastate VoIP Calls Are Jurisdictionally Interstate

CenturyLink and other commenting parties urge the Commission not to address this issue by arguing CenturyLink's Count IV was not referred to the Commission.¹¹ Sprint disagrees. In fact, the Court, after dismissing Count II, explicitly referred "the remaining counts of Plaintiffs' Complaint to the FCC."¹² Count IV is one of those "remaining counts." It is thus squarely within the scope of the referral.

CenturyLink relies not on the referral language itself, but on language earlier in the Referral Order in which the Court stated it intended the Commission to interpret those counts involving federal access tariffs.¹³ Even if such a statement could be read to trump a clear ordering clause – which it cannot – the Commission cannot provide full guidance regarding the scope of Count I without deciding whether geographically intrastate VoIP calls are addressed under federal tariffs (Count I) or, under state tariffs (Count IV). In other words, a Commission determination on whether geographically intrastate VoIP calls are jurisdictionally interstate is a necessary part of interpreting Count I. As such, it is plainly within the scope of the referral.

Even if the referral language were read as proposed by CenturyLink, the Commission can and should decide this issue as it was presented by Sprint in the Petition. The Commission is fully empowered to issue a declaratory order "terminating a controversy or removing

¹⁰ See Sprint's Petition for a Declaratory Ruling and CenturyLink's Complaint filed with the Federal Court for the Western District of Louisiana attached thereto as Exhibit A for a description of the Counts that, as Sprint has explained, have been referred to the Commission.

¹¹ See CenturyLink's Comments at 35-36; Associations' Comments at 9.

¹² Petition Ex. A, Referral Order at 3.

¹³ CenturyLink's Comments at 35-36.

uncertainty.”¹⁴ There is certainly a controversy on this question that is within the Commission’s jurisdiction, and the resolution of that controversy will remove ongoing uncertainty.¹⁵ Having finally addressed VoIP compensation issues going forward in the *CAF Order* – by deciding that during the transition to a bill-and-keep methodology LEC interstate access rates will apply to all VoIP calls regardless of the points of origination and termination – it would be nonsensical for the Commission to resolve only half of what remains in dispute for prior periods.

B. VoIP Service is Jurisdictionally Interstate

No carrier opposing the Petition disputes that VoIP service – including the VoIP service at issue in the Petition – is jurisdictionally interstate and subject to regulation by the Commission rather than the states. As Verizon notes, the Commission determined in the *Vonage Order*¹⁶ that any service with characteristics similar to Vonage’s service was jurisdictionally interstate and beyond state regulation (except regulation specifically permitted by the Commission).¹⁷ Having decided that VoIP service offered to consumers is jurisdictionally interstate, the Commission should confirm that any compensation liability created by those calls must be interstate in nature as well, and at rates no greater than interstate access charges.

Both CenturyLink and Cox cite to the *CAF Order* for the proposition that, for intercarrier compensation purposes, the jurisdiction of the wholesale service provided by CenturyLink to Sprint can be separated from the jurisdiction of the retail service provided to the person making the call.¹⁸ While the Commission noted this wholesale/retail distinction, it did not rely on the

¹⁴ 47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

¹⁵ *CAF Order*, ¶¶ 937-39 (discussing widespread disagreement and disputes caused by Commission inaction).

¹⁶ *Vonage Order*, ¶¶ 15-37.

¹⁷ Verizon’s Comments at 4-5.

¹⁸ CenturyLink’s Comments at 25; Cox’s Comments at 6.

distinction in the *CAF Order*.¹⁹ Of equal importance, neither CenturyLink nor Cox cite any precedent for using intrastate pricing as an input into pricing an interstate service. It would be absurd to suggest that carriers' intrastate access charges apply because one component of an interstate call may be geographically intrastate when viewed in isolation. Yet that is exactly what CenturyLink and Cox propose.

The D.C. Circuit Court of Appeals effectively rejected CenturyLink and Cox's argument when it held that an end-to-end analysis makes an ISP-bound call jurisdictionally "interstate," even if the termination service provided is considered "local."²⁰ Further, the Court recognized that "the FCC has consistently applied [the end-to-end] analysis to determine whether communications are interstate for purposes of § 201."²¹ This end-to-end analysis applied not just to set the regulatory status of the retail service, but also to set the jurisdiction of service provided between carriers on a wholesale basis. As applied to the instant dispute, because CenturyLink is providing an input into a jurisdictionally interstate VoIP service, interstate rates must apply (if any rates apply). Accordingly, the Commission should reject CenturyLink's novel assertion that it can bill its intrastate tariff charges on jurisdictionally interstate calls.

CenturyLink ultimately puts great weight on the fact that, in the *CAF Order*, the Commission "declined to find that all VoIP-PSTN traffic must be subject exclusively to federal jurisdiction."²² While true, the Commission's decision to take action on alternative grounds is certainly not determinative of the issue presented. In fact, the Commission's decision in the *CAF Order* is consistent with Sprint's position that geographically intrastate VoIP traffic has always

¹⁹ *CAF Order*, ¶ 959.

²⁰ *Core Comms, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010).

²¹ *Id.*

²² CenturyLink's Comments at 35-36.

been jurisdictionally interstate. Indeed, as stated, in the *CAF Order*, the Commission ordered that during the transition to bill-and-keep, absent an agreement otherwise, LECs may apply their interstate access rates to all VoIP-PSTN traffic. LECs were authorized by the Commission to file such rates in both interstate and intrastate tariffs.²³ Because LECs were given this permission for the first time, and only as a transition mechanism, those stated tariffs could not have applied in prior periods.²⁴ Moreover, the Commission ordered LECs to set rates to match interstate rate levels.²⁵

C. The IUB Provides No Substantive Basis to Find That VoIP Traffic is Intrastate

The IUB opposes Sprint's Petition, arguing a decision that VoIP traffic is interstate "could potentially disrupt decisions made by state regulatory commissions."²⁶ Yet the Commission has noted that there are many decisions going both ways on this open issue,²⁷ which means any decision by the Commission will be at odds with state commission and/or court orders. Such conflicts are inevitable when the Commission finally resolves this issue.

In addition, the IUB's decision to enforce state access tariffs as to VoIP traffic was predicated in large part on Commission inaction:

Ultimately, the FCC may decide in the IP-Enabled Services rule making that the type of VoIP calling involved in this case is an information service subject to

²³ See *CAF Order*, ¶ 960 ("Carriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs.").

²⁴ The Commission's approach here is consistent with Sprint's position that any access service provided on these jurisdictionally interstate calls be at rates established under federal law, not subject to the regulatory authority of 50 separate states.

²⁵ See *CAF Order*, ¶ 960.

²⁶ IUB's Comments at 3.

²⁷ *CAF Order*, ¶ 937.

exclusive federal regulation, but it could classify such VoIP calling as a telecommunications service.²⁸

...

The Board finds that Sprint's traffic is jurisdictionally intrastate because the FCC has not ruled that cable telephony is an interstate information service, and, in the end, may not make that classification.²⁹

The IUB is incorrect to suggest that a Commission decision on the compensation due during past periods would somehow undermine state authority. The Commission should be confident that its decision on this federal issue will be implemented and applied by the IUB and other state agencies.

II. THE COMMISSION SHOULD DECLARE THAT UNTIL DECEMBER 29, 2011, CENTURYLINK'S FEDERAL TARIFFS DID NOT IMPOSE CHARGES WITH RESPECT TO VoIP-ORIGINATED CALLS OTHERWISE COMPENSABLE AS SWITCHED ACCESS

Sprint's Petition argues that the Commission's access regime applies to interstate telecommunications services, and that the VoIP calls in dispute do not meet the definition of "telecommunications" because they involve a change in protocol.³⁰ Sprint also asserts there was no per-minute of use access charge obligation that existed for VoIP traffic in 1996, so no such obligation could have been preserved by Section 251(g).³¹

A. VoIP-Originated Traffic Undergoes a Change in Protocol, Which Means it Cannot be a Telecommunications Service

The traffic that is the subject of the Petition was originated in IP, converted to TDM, and then delivered in and terminated in TDM. No commenting party disputes that the traffic

²⁸ *Sprint Commc'ns Co. v. Iowa Telecomms. Servs., Inc.*, FCU-2010-0001, Order, at 35 (Ia. Utils. Bd. Feb. 4, 2011).

²⁹ *Id.* at 47.

³⁰ Sprint's Petition at 8.

³¹ Sprint's Petition at 9. The Petition does not ask the Commission to determine whether the specific calls at issue are outside the scope of the tariffs for reasons other than their origination in IP.

undergoes a net change in protocol. This net change in form means the calls at issue do not qualify as “telecommunications” under the definition adopted by Congress.³²

1. The *Time Warner Order* did not decide this issue.

Opposing Commenters take various indirect approaches toward rendering this change of form irrelevant. Both AT&T and CenturyLink claim this issue was resolved by the Commission’s decision that Sprint was operating as a “telecommunications carrier” in the *Time Warner Order*.³³ Of course, in resolving that Petition, the Commission expressly declined to determine whether access charges applied to the underlying calls.³⁴ Moreover, an information service is – by definition – routed via telecommunications,³⁵ which is a point neither CenturyLink nor AT&T addresses. If the presence of a telecommunications component means a call is necessarily a telecommunications service subject to Title II of the Act, no calls could ever meet the definition of “information service.” The Commission should reject such a nonsensical analysis.

2. The Commission cannot break a VoIP call into segments in order to determine intercarrier compensation obligations.

CenturyLink and AT&T also argue this change in form is irrelevant by claiming that, because Sprint provides a telecommunications input into a VoIP information service call, the per-minute compensation obligation is determined under the regime that applies to common

³² See 47 U.S.C. § 153(50) (“The term ‘Telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”).

³³ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exch. Carriers May Obtain Interconnection Under Section 251 of the Commc’ns. Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers*, Memorandum Opinion & Order, 22 FCC Rcd. 3513 (2007) (“*Time Warner Order*”); CenturyLink’s Comments at 24; AT&T’s Comments at 7.

³⁴ *Time Warner Order*, ¶ 17.

³⁵ See Sprint’s Petition at 12-13.

carrier telecommunications services.³⁶ The years of litigation over compensation for ISP-bound calls demonstrate that this argument falls flat. The typical ISP-bound call was originated by an ILEC customer in TDM, delivered by the ILEC to the CLEC in TDM, and then delivered by the CLEC to its ISP customers in TDM.³⁷ The ISP customer accomplished a change in the protocol. Breaking this call into segments (as CenturyLink and AT&T do), the ILEC provided a telecommunications service to its customer, the ILEC and CLEC exchanged telecommunications, and the CLEC provided a wholesale communications service to its ISP customer. Yet when the Commission first analyzed the issue of intercarrier compensation, it did not break the call into these segments. Instead it said:

[W]e analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.

...

We find that [the CLECs'] argument is inconsistent with Commission precedent, discussed above, holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts.³⁸

If the Commission had focused on just one segment, rather than the nature of the traffic, there would have been no basis to distinguish ISP-bound traffic from traditional traffic for compensation purposes. But of course it did no such thing.

The Commission's 1999 *ISP Declaratory Ruling* used the longstanding end-to-end analysis to determine (1) ISP-bound traffic was interstate, (2) such traffic is not "local," and (3)

³⁶ CenturyLink Comments at 24; AT&T Comments at 7-8.

³⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecomms. Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 & Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd. 3689, ¶ 7 (1999) ("*ISP Declaratory Ruling*").

³⁸ *Id.* ¶¶ 13,15.

therefore, such traffic is not subject to compensation rules implementing Section 251(b)(5).³⁹

The D.C. Circuit affirmed the use of the end-to-end analysis, but vacated the Commission's second conclusion because the Commission had not fully explained why the end-to-end analysis was determinative with respect to the application of Section 251(b)(5).⁴⁰

On remand, the Commission used a different rationale to achieve a similar outcome. The Commission no longer limited the scope of Section 251(b)(5) to "local" traffic, but instead expanded it to include all traffic not specifically exempted by Section 251(g).⁴¹ Importantly, the Commission again rejected arguments that it should decide per-minute compensation by chopping a call into smaller pieces and regulating each segment differently.⁴² Instead, the Commission held that the ISP-bound traffic is – on an end-to-end basis – information access "because it is traffic destined for an information provider":

We conclude that this definition of "information access" was meant to include all access traffic that was routed by a LEC "to or from" providers of information services, of which ISPs are a subset.⁴³

The D.C. Circuit again reviewed the Commission's decision and remanded, finding Section 251(g) to be a transitional device that could not be relied on as authority to promulgate new rules.⁴⁴ In 2008 the Commission construed Section 251(b)(5) very broadly and held Section

³⁹ *Id.* ¶¶ 18, 22.

⁴⁰ *Bell Atl. Tel. Cos. v. F.C.C.*, 206 F.3d 1, 3 (D.C. Cir. 2000).

⁴¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecomms. Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand & Report & Order, 16 FCC Rcd. 9151, ¶ 3 (2001) ("ISP Remand Order").

⁴² *Id.* ¶¶ 62-65.

⁴³ *Id.*; cf. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Servs. Are Exempt From Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd. 7457, ¶ 12 (2004) ("IP in the Middle Order") (describing difference between telcommunications service and information service).

⁴⁴ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

251(g) memorialized a temporary exception, not a statutory exclusion from Section 251(b)(5).⁴⁵ Because there was no preexisting intercarrier compensation obligation for ISP-bound traffic, the Commission found the exception in Section 251(g) did not apply.⁴⁶ That conclusion has since been affirmed.⁴⁷

At no point in this long process did the Commission suggest that per-minute of use compensation for ISP traffic would be determined by looking solely at what was taking place between the two carriers exchanging the call. Instead, the call had to be examined on an end-to-end basis, and the jurisdictional treatment of the call then drove the per-minute compensation that applied. The arguments made by CenturyLink and AT&T that per-minute compensation is determined by segmenting the calls, or by looking solely at the protocol as the call is exchanged, have no legal support. If compensation rules were blind to what happens on the originating end, compensation would always be the same on the terminating end. This is not the law, and such an argument is directly contrary to the Commission's analysis of and resolution of compensation issues for ISP-bound traffic.

B. There is No Pre-1996 Obligation To Pay Per-Minute Access Charges for VoIP-Originated Traffic

Because there was no pre-1996 intercarrier compensation obligation that applied to VoIP-originated traffic, such charges were not preserved by Section 251(g)'s carve-out for the legacy access charge regime.

⁴⁵ *In the Matter of High-Cost Universal Serv. Support Fed.-State Joint Bd. on Universal Serv. Lifeline and Link Up Universal Serv. Contribution Methodology, Order on Remand & Report and Order & Further Notice of Proposed Rulemaking*, 24 FCC Rcd. 6475, ¶ 16 (2008) (“2008 Remand Order”).

⁴⁶ *Id.*

⁴⁷ *Core Commc'ns, Inc.*, 592 F.2d 139.

CenturyLink again attempts to break the calls at issue into segments, arguing that the access charges applicable to traditional long distance traffic before 1996 were preserved and applied to VoIP calls because they flow through a telecommunications carrier (here Sprint).⁴⁸ CenturyLink purports to find support in this argument in the *CAF Order*, where the Commission explained that there were rules that applied to the provision of access to information service providers.⁴⁹ This does not, however, end the inquiry. The Commission's recognition that there were obligations to pay "local business rates and interstate subscriber line charges" before 1996 does not mean there was a per-minute of use access charge compensation obligation imposed on VoIP traffic that does not qualify as a telecommunications service.

Again, the Commission's reasoning in the context of ISP-bound traffic is instructive. In 1999 the Commission recognized it had no prior rule "addressing the specific issue of inter-carrier compensation for ISP-bound traffic."⁵⁰ This conclusion was affirmed by the D.C. Circuit,⁵¹ and reaffirmed by the Commission in 2008.⁵² In drawing this conclusion the Commission did not look narrowly at whether compensation obligations existed for TDM traffic exchanged between telecommunications carriers, but instead (consistent with its end-to-end analysis) looked at whether there were preexisting compensation obligations related to the exchange of traffic (in TDM) that was ultimately delivered to an ISP. This is exactly the analysis the Commission must do with respect to the VoIP-originated calls at issue in this case, and no

⁴⁸ CenturyLink's Comments at 17.

⁴⁹ *CAF Order*, ¶¶ 957-58.

⁵⁰ *ISP Declaratory Ruling*, ¶ 26.

⁵¹ *WorldCom*, 288 F.3d at 433.

⁵² *2008 Remand Order*, ¶ 16.

commenting party has identified a preexisting per-minute of use access charge obligation for such traffic that could have been “preserved” by Section 251(g).

C. Other Arguments Made By Commenting Parties Do Not Justify Denying the Petition

Opposing commenting parties make numerous other arguments that should be easily dismissed by the Commission. For example, both CenturyLink and AT&T suggest the Petition should be denied because Sprint has assessed access charges on inbound calls to those receiving VoIP service.⁵³ Even assuming these facts are accurate, they cannot possibly drive the Commission’s legal analysis of an issue with general applicability. And, if the Commission issues a ruling that implicates past practices, carriers will be fully able to take any action they deem necessary to protect their rights and implement the decision. The Commission should not deny the Petition simply because its decision will implicate past practices.

Commenters also attempt to argue that the Commission should deny the Petition in order to provide equal treatment for all interconnected VoIP services. For example, CenturyLink and Cox argue it would be inequitable for interconnected VoIP services to be exempt from access charges obligations when other carriers providing voice service are subject to such obligations.⁵⁴ Yet, as the Commission has noted, past practice on this issue has run the gamut from paying no charges, to paying reduced rates, to paying full access rates.⁵⁵ As such, no Commission decision on the Petition will create complete competitive neutrality. If competitive neutrality was the goal, the Commission presumably could have easily set the rates for the VoIP traffic at issue

⁵³ CenturyLink Comments at 15-16; AT&T Comments at 9-10.

⁵⁴ CenturyLink Comments at 33-34; Cox Comments at 8.

⁵⁵ *CAF Order*, ¶ 938.

years ago. The fact that it did not suggests that the issue is complicated and implicates the Commission's telecommunications policies. It certainly does not justify a denial of the Petition.

Finally, CenturyLink and ITTA point to terms of CenturyLink's tariffs and argue there is no exclusion for VoIP-originated traffic.⁵⁶ Yet that is not the point – if the nature of these calls is such that they are not telecommunications services, or were not subject to a per-minute access charge compensation obligation before 1996, then the charges simply do not apply, regardless of whether or not there is a specific exemption for VoIP traffic in the ILEC's tariffs.

III. THE COMMISSION SHOULD DECLARE THAT SPRINT CANNOT HAVE VIOLATED SECTION 201(b) BY COMPENSATING VoIP-ORIGINATED TRAFFIC AT \$0.0007 PER MINUTE (CENTURYLINK'S COUNT III)

Only Cox provides substantive comments with respect to Sprint's assertion that it could not have violated the Communications Act by compensating CenturyLink \$0.0007 per minute for VoIP traffic.⁵⁷ Cox asks the Commission to decide that, in "egregious cases, failure to abide by tariff terms can violate Section 201(b)."⁵⁸ Such a conclusion would require the Commission to reverse its conclusion in the *All-American* case⁵⁹ that:

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). This is true even if the customer is itself a carrier.⁶⁰

It also presumes that there are differing degrees of tariff violation, a concept antithetical to the longstanding filed rate doctrine.

⁵⁶ CenturyLink's Comments at 19-20; ITTA's Comments at 3.

⁵⁷ Cox Comments at 9.

⁵⁸ *Id.*

⁵⁹ *All-Am. Tel. Co. v. AT&T Corp.*, No. EB-10-MD-003, Memorandum Opinion & Order, 26 FCC Rcd. 723 (2011) ("*All-American*").

⁶⁰ *Id.*, ¶ 2.

No commenting party has presented any sound substantive reason to conclude that CenturyLink's Count III states a claim, and so the Commission should grant this portion of the Petition.

CONCLUSION

For the above reasons, Sprint respectfully requests the Commission grant its Petition.



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July 16, 2012