Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

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Table of Contents

Summary iv

I. INTRODUCTION 1

II. IT IS TIME, FINALLY, FOR THE COMMISSION TO ELIMINATE ALL IMPLICIT SUBSIDIES FROM ICC RATES 2

A. THERE IS NO RECORD EVIDENCE TO SUBSTANTIATE CLAIMS THAT LECs USE THE PROCEEDS OF ACCESS OVERCHARGES FOR BROADBAND DEPLOYMENT 4

B. WITH THE PASSAGE OF 15 YEARS, THE FCC NO LONGER HAS THE DISCRETION TO CONTINUE IMPLICIT SUBSIDIES 8

III. THE FCC SHOULD NOT PERMIT AT&T AND VERIZON TO DICTATE UNILATERALLY THE PACE AND FORM OF PACKETIZED VOICE INTERCONNECTION 9

A. AT&T IS MISTAKEN, BECAUSE IT AND OTHER LECs WILL STILL RETAIN THEIR TERMINATING ACCESS MONOPOLY OVER VOICE TRAFFIC IN AN ALL-IP WORLD 11

B. BECAUSE OF THEIR ENORMOUS SIZE, AT&T AND VERIZON POSSESS SIGNIFICANT MARKET POWER THAT THEY HAVE ALREADY EXERCISED TO DELAY THE AVAILABILITY OF PACKETIZED VOICE INTERCONNECTION 14

C. A TARGETED SET OF HIGH-LEVEL DEFAULT RULES FOR THE EXCHANGE OF PACKETIZED VOICE TRAFFIC SHOULD BE EFFECTIVE IN LIMITING THE ABILITY OF TERMINATING VOICE PROVIDERS TO EXPLOIT THEIR MARKET POWER 17

D. THE COMMISSION POSSESSES AMPLE AUTHORITY TO ADOPT THE RULES THAT SPRINT PROPOSES 23

IV. THE CPNP REGIMES FAVORED BY MOST LECs ARE INCOMPATIBLE WITH LONG-STANDING COST-CAUSATION PRINCIPLES 25

V. THE JOINT BOARD-STATE MEMBERS' ICC REFORM PROPOSAL IS SERIOUSLY FLAWED AND SHOULD NOT BE ADOPTED ...,............ 31

VI. ADOPTION OF PRO-COMPETITIVE USF REFORMS CANNOT BE DELAYED 41

A. "NOT IN MY BACKYARD" 41

B. COMPETITIVE NEUTRALITY 43

VII. CONCLUSION 47

Appendix D, The Commission Has Ample "Ancillary" Authority to Adopt Sprint's Proposed Rules for IP-to-IP Interconnection

Appendix E, Response to the Joint Board-State Members' Legal Analysis

Summary

Last week, Chairman Genachowski challenged the industry to do "more" and act "quickly" to reform the broken intercarrier compensation and universal service mechanisms. Sprint agrees wholeheartedly with the Chairman's directive. In order to foster competition, benefit consumers, promote broadband to all Americans, implement ICC rules which reflect cost-causation, and help ensure the viability of the universal service program, the Commission must adopt the following reforms:

- Eliminate all implicit subsidies from intercarrier compensation rates, and reject proposals to simply transfer existing subsidies to new "replacement" universal service mechanisms or, even worse, to expand the existing flawed access charge regime to intraMTA or Section 251(b)(5) traffic;
- Adopt default interconnection rules for the exchange of packetized voice traffic. Default rules are critical to counter the exercise of terminating access monopoly power, and to accelerate the deployment of all-IP networks;
- Transition expeditiously to a bill-and-keep regime – a system which, unlike a calling-party's-network-pays regime, helps to ensure economic efficiency consistent with cost-causation principles; and
- Adopt pro-competitive USF reforms expeditiously, including phase-out of existing high-cost subsidies. Any new universal service support mechanisms must be carefully targeted, competitively neutral, and explicit.

The Commission must resist calls to avoid or drag out (through excessive transition periods, unwarranted "access replacement" mechanisms, or simple inaction) difficult rule changes. The long-term health of the telecommunications industry and the competitiveness of the telecommunications market demand rationalization of the ICC and USF mechanisms. The Commission has the legal authority and the record support to take the long-overdue actions described above, and should do so expeditiously.

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REPLY COMMENTS OF
SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby respectfully submits its reply to comments filed on April 18, 2011, regarding proposals to reform the existing intercarrier compensation ("ICC") and universal service fund ("USF") mechanisms in a comprehensive fashion.

I. INTRODUCTION.

Last week, Chairman Genachowski issued a challenge to industry regarding intercarrier compensation and universal service fund reform: "We want to see more from stakeholders in this

program, and we want to see it quickly."[1] Sprint agrees wholeheartedly. The current ICC and USF mechanisms are broken, are impeding competition, and are ineffective at fostering broadband deployment to all Americans. If the Commission is to attain the lofty goals reflected in the National Broadband Plan while meeting the principles set forth in the instant Notice of Proposed Rulemaking, it must take the following steps:

- Eliminate all implicit subsidies from intercarrier compensation rates;
- Adopt default rules for the exchange of packetized voice interconnection;
- Transition expeditiously to a bill-and-keep regime; and
- Adopt pro-competitive USF reforms expeditiously, including phase-out of existing high-cost subsidies.

Sprint believes that the ICC and USF reform proposals it provided in its comments are competitively neutral and will help the Commission achieve its goals here. We respond below to the reform proposals offered by other parties, and address the Commission's authority to adopt Sprint's proposals.

II. IT IS TIME, FINALLY, FOR THE COMMISSION TO ELIMINATE ALL IMPLICIT SUBSIDIES FROM ICC RATES

LEC access charges are set well above cost, and even LECs do not claim otherwise. The access revenues that LECs receive above their actual cost of call termination constitute implicit subsidies that regulators built into the access rate regime three decades ago – before competition emerged in the local market and before Congress directed that implicit subsidies should be eliminated and any support be made explicit (*see NPRM* ¶ 46).

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[1] Bill Myers, "Genachowski Demands 'More from Stakeholders' on USF, Intercarrier Comp Reforms," *Communications Daily*, May 20, 2011, p. 1.

One example demonstrates just how bloated LEC rates for intercarrier compensation are. In many areas today, CenturyLink charges $0.0007/minute to terminate a call subject to reciprocal compensation. However, when it terminates an interstate call, CenturyLink charges an average estimated rate of $0.0065/minute – *or a rate over nine times higher even though CenturyLink's termination costs are identical.* And, when CenturyLink terminates an intrastate call, it charges an average estimated rate of $0.032/minute – ***or a rate over 45 times higher than its reciprocal compensation rate even though CenturyLink's termination costs are identical!*** CenturyLink's profit margins on call termination are enormous:

Traffic Category	Termination Rate/MOU	Profit Margin[2]
Reciprocal Compensation	$0.0007	
Access:		
Interstate	$0.0065	829%
Intrastate	$0.0320	4,471%

Industry wide, the size of these implicit subsidies – basically, wealth transfers between for-profit companies – range from $8 billion to $14 billion annually.[3] It is also important to point out that with respect to wireless traffic, these wealth transfer payments are one-way – that is, LECs impose access charges on wireless traffic (and ultimately, the wireless carrier's customers), but neither LECs nor IXCs are required to pay access charges to wireless carriers for LEC-originated traffic. These billions of dollars spent on bloated LEC access charges are in addition

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2 The percentages listed assume the reciprocal compensation rate is cost-based as the Act requires. However, as discussed later, since CenturyLink incurs no additional cost for call termination, a profit margin is really incalculable.

3 *See NPRM* at ¶ 496; National Broadband Plan at 142.

to the billions more wireless customers pay in explicit universal service contributions (most of which are distributed to LECs).

It is time, finally, for the Commission to end this discriminatory arrangement and to eliminate all implicit subsidies contained in current LEC ICC rates. As demonstrated below, these implicit subsidies are not lawful.

A. There Is No Record Evidence To Substantiate Claims That LECs Use The Proceeds of Access Overcharges for Broadband Deployment

Most LECs urge the Commission to adopt "modest" ICC reform only,[4] so they can retain their above-cost access charges and thereby continue to receive implicit subsidies. Indeed, these LECs want the FCC to go even further, and permit them to impose their bloated access charges on providers of interconnected VoIP services – and thereby *increase* the amount of implicit subsidies (or profits) they can receive.

The chief argument that these LECs make is that they need continued above-cost access charges (or a new revenue replacement fund) to help pay for their broadband deployment.[5] For example, CenturyLink claims that continued ICC revenues are "critical to broadband deployment" and that "starving local network operators of access revenue . . . would needlessly delay broadband deployment."[6] CenturyLink further asserts:

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4 *See, e.g.*, CenturyLink Comments at 63.

5 *See, e.g.*, Frontier Comments at 2 ("Frontier is able to make such significant investment in rural broadband thanks to . . . payments from other carriers utilizing our infrastructure (i.e., ICC)."); Rural Associations (NECA *et al.*) Comments at 13-14 ("Interstate and intrastate access charges . . . enable the deployment and ongoing provision of both basic and advanced services."); Fairpoint Comments at 2 ("[I]nter-carrier compensation ("ICC") (and access charges in particular) allow incumbent local exchange carriers ("ILECs") . . . to upgrade their networks to provide advanced telecommunications and information services.").

6 CenturyLink Comments at 52; and CenturyLink Section XV Reply at 6.

> [I]f ICC rate reform is not accompanied with adequate recovery of lost ICC revenue, it will prevent carriers from being able to make the investment necessary to build out broadband networks . . . . If the Commission took this path, it would only be effectively creating an unfunded mandate for broadband deployment.[7]

Not surprisingly, CenturyLink ignores that carriers forced to pay CenturyLink's above-cost access rates are being denied resources that these carriers could use for expanding *their own* broadband deployment.

It is important to point out that none of the LECs claiming they have used implicit subsidies for broadband deployment submitted in the record any evidence to document their claims. Moreover, CenturyLink's claims appear to be incompatible with the facts. Based on publicly available data for 2010, it appears that CenturyLink realized a total of $327 million in switched access revenues,[8] while it paid dividends totaling $878 million.[9] If CenturyLink had not received last year any access revenues (and assuming it made no other changes to its business), it would have had to reduce its total dividend payments to "only" $551 million (which would have the effect of reducing its dividend payout rank among S&P 500 companies from third to 32nd).[10] *But the important point is that CenturyLink's complete loss of switched access revenue would have had* ***no impact at all*** *on its broadband deployment.*

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7 CenturyLink Comments at 50.

8 Derived from switched access line and access minute trends for 1999 to 2008 from the FCC Statistics of Common Carriers report.

9 CenturyLink 2010, SEC 10K.

10 Also, in 2008 Century increased its annual dividends by tenfold (from $0.27 to $2.90/share). Since then, Century has also gone on a buying spree, acquiring Embarq in 2009 ($11.6 billion) and Qwest this past April ($22.3 billion), and recently announcing plans to acquire Savvis ($3.2 billion).

CenturyLink is not alone, as AT&T and Verizon also pay shareholders dividends at levels far above the S&P average:

	2010 Dividends Paid	Dividend Yield	Rank Among S&P 500
AT&T[11]	$9.9B	6.1%	**6th**
Verizon[12]	$5.4B	5.4%	**17th**
CenturyLink[13]	$0.9B	6.6%	**3rd**
S&P 500 Average		1.7%	

The dividends each of these companies pay are far greater than the total amount of switched access revenue each of them receives.

Sprint wishes to make clear that these LECs did nothing improper in using their implicit subsidies – funded by Sprint and other carriers (many of which pay *no* dividends) – to increase their dividend payout. In this regard, there is a material difference between "explicit" universal service support and "implicit" support. The Act prohibits USF recipients from using explicit subsidies for any purpose other than providing, maintaining, and upgrading facilities and services

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[11] In December, AT&T's board of directors again increased its quarterly stock dividend – for the 27th consecutive year. *See* Press Release, *AT&T Announces 2.4 Percent Dividend Increase, 300 Million Share Repurchase Authorization* (Dec. 17, 2010), *available at* http://www.att.com/gen/press-room?pid=18850&cdvn=news&newsarticleid=31444&mapcode=financial.

[12] Based on "the strength of our cash flow," Verizon announced for the fourth consecutive year an increase in its quarterly stock dividend. *See* Press Release, *Verizon Communications Raises Quarterly Dividend 2.6 Percent to 48.75 Cents per Share* (Sept. 2, 2010), *available at* http://www22.verizon.com/investor/newsatglance/news.htm?dID=6112&dDocName=NEWS_1073&xCategory=News.

[13] CenturyLink has increased its annual dividend substantially in recent years while concurrently claiming it needs access revenues for broadband deployment. The annual dividend rate for the years 2005-2010 were $0.25, $0.26, $2.1675, $2.80, $2.90 respectively. *See, e.g.,* Press Release, *CenturyLink Declares Quarterly Cash Dividend*)Jan. 24, 2001), *available at* http://ir.centurylink.com/phoenix.zhtml?c=112635&p=irol-newsArticle_Print&ID=1519356&highlight=.

for which universal service support is intended.[14] In contrast, no such restrictions are imposed on the use of implicit subsidy revenues generated from above-cost access charges. LECs are thus free to use their inflated access revenues:

- To underwrite the provision of broadband services in areas where they face broadband competition from unsupported broadband carriers (thereby gaining an unfair competitive advantage); <u>or</u>
- For any other purpose they choose, including acquiring additional companies, repurchasing their own stock, or paying hefty dividends to shareowners.[15]

While companies are free to establish dividend policies and repurchase stock as they see fit and to use their implicit subsidies for this private purpose, the fact remains that a dollar paid to a shareholder or used to repurchase stock is a dollar the company has determined it does not need for operating its business and a dollar it has chosen not to invest in its network.

In summary, the Commission should dismiss claims by any of the three largest incumbent LECs, and be very skeptical about claims by other LECs, that high access rates are needed for, or are used in, support of universal service or broadband deployment (as opposed to private purposes).

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[14] *See* 47 U.S.C. § 254(e) ("A carrier that receives such [explicit] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which support is intended.").

[15] The boards of directors of CenturyLink, AT&T and Verizon have each approved stock repurchase plans. Between February 2004 – August 2007, CenturyLink repurchased over $2.5 billion of stock. In December 2010, AT&T's board authorized a repurchase of up to 300 million shares of stock, which equates to approximately $9 billion at $30 per share. In January 2011, Verizon's board authorized a repurchase of up to 100 million shares of stock, which equates to approximately $3.5 billion at $35 per share.

B. With the Passage of 15 Years, the FCC No Longer Has the Discretion to Continue Implicit Subsidies

In the end, the LEC assertion they need continued access to implicit subsidies for broadband deployment (even if the claim were factually accurate) is not relevant to the question before the Commission. This is because broadband deployment has nothing to do with a LEC's "right" to continue to receive (much less, expand) implicit subsidies generated from above-cost access charges. Instead, the issue for the Commission is whether support for broadband deployment must be made with explicit subsidies only, or whether the FCC can also authorize continued use of implicit subsidies in ICC rates.

"Congress in the 1996 Act directed this Commission . . . to eliminate implicit subsidies in access charges."[16] Courts have similarly held that the "plain language" of the Act does "not permit the FCC to maintain *any* implicit subsidies for universal service support":[17]

> [W]e held that the access charges constituted an implicit subsidy in violation of the clear congressional directive that support for universal service be explicit. . . . [I]t [is] clear that the FCC cannot maintain any implicit subsidies whether on a permissive or mandatory basis.[18]

Specifically, Congress in § 254(e) of the Act directed that "[a]ny such support should be *explicit*" (italics added).[19]

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16 *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9623 (¶ 32) (2001). *See also NPRM* at ¶ 222 ("[T]he Telecommunications Act of 1996 directed the Commission to make universal service support explicit, rather than implicitly included in interstate access rates.").

17 *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (italics in original).

18 *Comcast* v. *FCC*, 250 F.3d 931, 939 (5th Cir. 2001). *See also Alenco* v. *FCC*, 201 F.3d 608 (5th Cir. 1999).

19 *See also* H.R. Conf. Rep. No. 104-458, at 123 (1996) ("In keeping with the conferees' intent that *all* universal service support should be clearly identified, this subsection states that such support should be made explicit.") (emphasis added).

In enacting the § 251(g) grandfather provision, Congress may not have required the FCC to remove immediately implicit subsidies contained in ICC rates,[20] but Congress did make clear this exception to cost-based ICC rates was to be for an "interim" period only.[21] As the Commission stated in the *NPRM* with regard to this statutory exception to cost-based ICC rates:

> Section 251(g) singles out access traffic for special treatment and ***temporarily*** grandfathers the pre-1996 rules applicable to such traffic, including rules governing "receipt of compensation" (¶ 514) (emphasis added).

The Commission has noted that as a matter of public policy, hidden subsidies in ICC rates are "not consistent with the[] principles" of transparency, non-discrimination and competitive neutrality.[22] Sprint submits, however, that as a matter of law, the Commission no longer has the discretion to continue authorizing implicit subsidies in access rates. Congress instructed the FCC long ago to eliminate implicit subsidies and to authorize only "explicit" universal service support. Regardless of what Congress meant by giving the FCC an "interim" period to eliminate implicit subsidies from ICC rates, no one can credibly claim that this "interim" – or in the FCC's words, "temporary" – period still exists now that over 15 years have elapsed.

III. THE FCC SHOULD NOT PERMIT AT&T AND VERIZON TO DICTATE UNILATERALLY THE PACE AND FORM OF PACKETIZED VOICE INTERCONNECTION

Competition in voice services cannot occur unless competing voice networks interconnect with each other. The Commission noted that "interconnection for circuit-switched voice traffic is governed by section 251 of the Act" [¶ 679]. To be clear, interconnection under section 251 of the Act for the exchange of voice traffic is technology neutral. As defined by the Com-

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[20] *See NASUCA* v. *FCC*, 372 F.3d 454, 459 (D.C. Cir. 2004).

[21] *See* H.R. CONF. REP. NO. 104-458, at 123 (Jan. 31, 1996).

[22] *Modifying the Commission's Process to Avert Harm to U.S. Competition,* 20 FCC Rcd 14096, 14102 (¶ 13) (2005).

mission's current rules, "*Interconnection* is the linking of two networks for the mutual exchange of traffic."[23] Although there has not historically been IP-specific interconnection rules, the question has now been raised whether any rules are needed when two IP network operators use an IP (vs. TDM) interface to exchange packetized voice traffic.

The nation's two largest telecom carriers, AT&T and Verizon, contend that "rules regarding interconnection and interprovider compensation for VoIP services are unnecessary":[24]

> The Commission should facilitate the transition to IP networks but should not impose rules for IP-to-IP interconnection.[25]

Rather, these carriers assert that "any such problems can, and should, be addressed through targeted *ex post* measures."[26]

This position is perhaps understandable. After all, any for-profit firm would love to operate in a market that is completely unregulated while possessing such market power that it could determine unilaterally the prices, terms and conditions its competitors must pay/use in order to obtain an essential input to their services (here, call termination). The question for the Commission, though, is whether such an unregulated environment would promote the public interest.

Congress, in Section 1 of the Act, charged the Commission with providing to "*all* the people of the United States, without discrimination . . . , Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (italics added). Congress has been even more specific relative to broadband voice and other advanced services:

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23 47 C.F.R § 51.5.

24 AT&T Comments at 25.

25 Verizon Comments at 16.

26 AT&T Comments at 25.

> The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans.[27]

Sprint demonstrates below that AT&T's and Verizon's arguments – that they should be free of all government regulation pertaining to their interconnection with competing IP networks for the exchange of packetized voice traffic – lack merit. In fact, the _only_ beneficiaries of the unregulated environment AT&T and Verizon seek would be their shareholders.

A. AT&T Is Mistaken, Because It and Other LECs Will Still Retain Their Terminating Access Monopoly Over Voice Traffic in an All-IP World

AT&T asserts that "no Internet service provider has a 'terminating access monopoly' to its end users."[28] This is because, AT&T says, indirect interconnection acts as "a powerful competitive check" on a terminating broadband Internet provider:

> [I]ndirect interconnection provides many competitive options that discipline the price that market participants can charge for direct interconnection.[29]

However, the Commission has already rejected this argument, in holding that wireline broadband Internet access providers like AT&T have "the ability to act as gatekeepers" – "also known as a 'terminating monopolist.'"[30]

Regardless of whether such broadband providers possess a terminating access monopoly relative to *non-voice* Internet traffic, AT&T and other LECs unquestionably possess such a monopoly in connection with terminating *voice* traffic. As Sprint explained in its comments, "because every telephone number is tied to only one service provider, an originating IP network can

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27 47 U.S.C. § 1302(a).

28 AT&T Comments at 19.

29 *Id.* at 22 and 23.

30 *See Open Internet Order*, 25 FCC Rcd 17905, 17919 (¶ 24 and n.66) (2010).

complete its customers' call attempts only by sending its traffic to the network serving the dialed number":

> In other words, the "terminating access monopoly problem" that the Commission has recognized in the context of PSTN traffic does not disappear simply because network operators begin exchanging voice traffic using IP rather than TDM technologies. And, with this monopoly, terminating carriers (and incumbent LECs in particular) have both the incentive and ability to impose unreasonable terms as a precondition to supporting interconnection.[31]

Thus, whether an IP network operator connects to AT&T's IP network directly or indirectly is irrelevant, because in either case all traffic destined to AT&T's voice customers must still *always* be sent to AT&T's IP network for completion. Whether it uses TDM, IP or a future protocol, AT&T thus controls a bottleneck monopoly over the facilities it uses to terminate calls originating on other networks.

Knowledgeable experts share Sprint's views on the terminating monopoly retained by those terminating voice calls. For example, a consultant retained by the European Commission recently advised the Commission that the use of IP networks will "not remove the termination monopoly in the voice service," explaining:

> In circuit-based legacy networks, an operator completely controls the access to the traffic that is destined to its subscribers, enabling it to charge excessive pricing (absent regulation) for terminating traffic because the calling user can only choose between not making the call or pay whatever charge the terminating network sets for termination. As pointed out by [the European Regulators Group], it is very likely that this problem remains after the transition to NGNs [Next Generation Networks] because to our knowledge, there is no foreseeable mechanism that would enable more than one telephone service provider to terminate voice calls on a single telephone number.[32]

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[31] Sprint Comments at 19.

[32] TERA Consultants, *Study on the Future of Interconnection Charging Methods*, 2009-70-MR-EC, at 10 and 73-74 (Nov. 23, 2010) ("TERA White Paper"), *available at* http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/2009_70_mr_final_study_report_F_101123.pdf. *See also id.* at 69 ("However, the termination monopoly for the

Footnote continued on next page

Earlier, a different consultant made the same point to the European Commission. The consultant noted that the claim AT&T makes here – "the migration to IP will solve the call termination problem, thanks to IP's inherent capabilities to route traffic over multiple paths" – is "simply incorrect":

> As long as a call to a single telephone number must be served by a single operator, the termination monopoly is likely to persist. The bottleneck resource is at the level of the telephone number, not at the level of the IP packet – re-routing at the IP level has no more effect than re-routing at the circuit level. The termination monopoly persists.[33]

The consultant advised the Commission that because of this termination monopoly, "some level of regulatory intervention is required":

> The migration of voice communication services from a circuit-switched basis to a packet-switched basis will change the character of market power; however, our judgment is that market power in regard to interconnection will still be an issue that regulators need to address.[34]

The important point is that all wireline service providers will continue to possess a terminating monopoly, regardless of the technology they use in call termination and regardless of the technology they use for interconnection. This terminating monopoly gives these providers the incentive and ability to leverage their market power over the interconnection of packetized voice traffic if that market power is not controlled by appropriate regulation. Consequently, some rules

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voice service based on the telephone number will remain present in a multi-service NGN [Next Generation Network].").

[33] WIK-Consult, *The Future of IP Interconnection: Technical, Economic and Public Policy Aspects*, at 7 (Jan. 29, 2008) ("WIK White Paper"), *available at* http://ec.europa.eu/information_society/policy/ecomm/doc/library/ext_studies/future_ip_intercon/ip_intercon_study_final.pdf.

[34] *Id.* at 15 and 75.

will be needed to minimize the ability of broadband wireline voice providers to exercise their terminating monopoly.[35]

B. Because of Their Enormous Size, AT&T and Verizon Possess Significant Market Power That They Have Already Exercised to Delay the Availability of Packetized Voice Interconnection

Through a series of corporate takeovers, AT&T and Verizon have become huge firms. They serve more consumers than all other competitors combined. AT&T's and Verizon's sheer size gives each of them enormous market power relative to their competitors. As one neutral observer has stated, "[w]here network effects are present, a special form of market power can come into play in connection with interconnection":

> If, however, one market player has a sufficiently large share of network customers, both in terms of the overall market and also relative to its next largest competitor, then that large player may be motivated to implement less than optimal interconnection. The large player derives market power from its control over access to customers. Perfect interconnection would interfere with its ability to exploit its interconnection.[36]

This observer asks, "might [large firms] be motivated to exploit their market power in anticompetitive ways, and if so, how? In the absence of regulation, would these operators refuse to interconnect with their most capable competitors? Might they block access to certain destinations? Might they relegate competitors to best-efforts service, keeping superior QoS as a competitive advantage for their own affiliated offerings?"[37]

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[35] Technically, wireless carriers also possess a monopoly over call termination, but they have never exercised this power (*e.g.*, they exchange all traffic with each other on a bill-and-keep basis). Moreover, in prohibiting wireless carriers from filing tariffs, the FCC has effectively precluded wireless carriers from attempting to exercise their market power in exchanging traffic with wireline carriers.

[36] WIK White Paper at 46.

[37] *Id.* at 91.

AT&T and Verizon nonetheless assert that new rules governing packetized voice interconnection are "unnecessary" and would be "suboptimal."[38] They claim that the Commission need not worry about attempts to exploit their market power because they have "every incentive to reach commercially reasonable agreements with other network operators."[39] Verizon goes so far as to assert that there are today "many examples of different networks interconnecting on commercially negotiated terms in the absence . . . of any regulatory mandate to negotiate or interconnect in the first place."[40]

These claims are not credible. AT&T and Verizon both offer retail packetized voice services and have in their corporate business portfolios significant IP networks and assets providing them with the ability to interconnect their packetized voice traffic *via* IP. One would ordinarily expect them to solicit interconnection agreements with other packetized voice providers so as to lower their cost of service and enable their customers to enjoy a packetized voice service that does more than "merely mimic the circuit-switched offerings of the past" (*NPRM* ¶ 611). Yet, AT&T has not publicly announced having entered into a packetized voice interconnection agreement with anyone, while Verizon has identified only one such agreement with a small VoIP provider.[41] Both firms have been reluctant to establish IP-interconnection with Sprint for the exchange of voice traffic, and Sprint has the impression that other packetized voice providers are encountering the same problem with AT&T and Verizon.

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[38] AT&T Comments at 25; Verizon Comments at 16.

[39] AT&T Comments at 19.

[40] Verizon Comments at 8.

[41] *See* Verizon Comments at 12 n.17. Sprint assumes this arrangement with Bandwidth.com involves exchange of VoIP traffic using an IP interconnection (versus TDM interconnection) and is not simply a VoIP compensation agreement.

Thus, despite their current possession of necessary technical capabilities and despite their assertion they have "every incentive" to negotiate packetized voice interconnection agreements with their competitors, they have not done so to date – even though such interconnection would provide enormous benefits to American consumers generally and to their own customers in particular. AT&T and Verizon have already delayed the availability of packetized voice interconnection. And, they now want the FCC to adopt a "no rules" regime whereby *they alone* will determine whether to interconnect *via* IP with their competitors for the exchange of packetized voice traffic; when; and under what terms and conditions.

AT&T's comments also give competitors a glimpse of the type of packetized voice interconnection AT&T plans to offer once it finally decides to offer such interconnection. According to AT&T, it will offer "settlements free" interconnection when *AT&T* determines that such an arrangement is "mutually beneficial to both networks."[42] With smaller competitors (basically, everyone but perhaps Verizon), AT&T says that it will instead "enter into a paid peering arrangement" whereby the smaller provider "makes payments to" AT&T for enjoying the benefits of this AT&T interconnection (at rates that apparently will be determined by AT&T itself without any regulatory oversight).[43] In other words, AT&T wants the Commission to condone the very asymmetrical compensation arrangements that existed before the 1996 Act, where incumbent LECs "imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks."[44]

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42 AT&T Comments at 18.

43 *See id.*

44 *Local Competition Order*, 11 FCC Rcd 15499, 16044 (¶ 1094) (1996).

The "no rules" position that AT&T and Verizon espouse today is the same position they advocated 15 years ago, when they argued that rules implementing Section 251 of the 1996 Act were unnecessary. The Commission rejected this argument, noting that negotiations with incumbent LECs are "not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires":

> [I]ncumbent LECs have strong incentives to resist such [interconnection] obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power.[45]

The Commission further noted that targeted national rules would "expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish."[46]

Sprint submits that the Commission should reject AT&T's and Verizon's "no rules" position for the same reasons it rejected this argument in 1996.

C. A Targeted Set of High-Level Default Rules For The Exchange of Packetized Voice Traffic Should Be Effective in Limiting the Ability of Terminating Voice Providers to Exploit Their Market Power

Below are a proposed set of targeted, high-level rules that the Commission should adopt expeditiously to promote the deployment of all-IP networks, to accelerate the date when IP net-

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45 *Id.* at 15528 (¶ 55).

46 *Id.* at 15520 (¶ 41).

works begin exchanging packetized voice traffic, and to minimize the ability of any terminating voice provider to exploit its market power.[47]

It is important to emphasize at the outset that Sprint's proposed packetized voice interconnection rules would be default rules only. All IP network operators should be free, if not encouraged, to adopt additional or different terms if such arrangements would better meet their respective needs. Default rules would, however, greatly expedite packetized voice interconnection negotiations by removing what traditionally have been the most contentious subjects involved with interconnection negotiations – and subjects that experience has shown are the areas where terminating carriers have often sought to exploit their market power.

A. Any firm (including its affiliates) that provides packetized voice services to retail customers should, upon request, be required to negotiate in good faith a packetized voice interconnection agreement. Today, the use of an IP interface to exchange packetized voice traffic is limited. IP interconnection for the exchange of voice traffic will not be promoted so long as voice providers, and incumbent LECs in particular, retain the flexibility to refuse even to discuss such interconnection. Accordingly, the Commission should promptly make clear that if a firm (including any of its affiliates) provides packetized voice service to retail customers, it must, upon receipt of a *bona fide* request for IP interconnection, negotiate in good faith with other IP network operators to interconnect directly.[48] This right to direct IP interconnection should also in-

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[47] Sprint discussed some of these proposed rules in its comments. *See* Sprint Comments at 18-28.

[48] As Sprint has previously explained, "in order to make actual interconnection more efficient, the Commission should require carriers that have IP/IP connectivity capability to use that capability, when requested, beginning in 2011. This will allow money that would have been spent on TDM/IP conversion equipment to be better spent on new IP equipment and better utilize the broadband connections that are being built to meet the goal of national broadband availability

Footnote continued on next page

clude the right to deliver packetized voice traffic originated by other providers (that do not have their own direct IP interconnection agreements). The Commission should further adopt a dispute resolution process so disagreements between two parties can be resolved expeditiously.

B. The FCC should require all providers, no later than January 1, 2016, to accept IP interconnection to exchange packetized voice traffic. In other transitions to new technology (*e.g.*, cellular analog to digital, broadcast TV analog to digital), the Commission has set a specific date by which the conversion must be completed. A similar specific deadline will be required for the conversion from TDM to IP at the point of interconnection. Establishing such a deadline is especially important because some LECs have already announced their intention to delay the availability of IP interconnection (by offering TDM interconnection only) in an attempt to retain their continued receipt of per-minute ICC revenue – even though the use of an IP interconnection should dramatically reduce their own transport costs.[49]

Sprint had previously proposed a deadline of January 1, 2016, when all voice service providers must begin exchanging packetized voice traffic and assume any IP/TDM conversion costs (to the extent they still provide TDM-based service to some retail customers).[50] This date would serve only as the deadline to achieve universal IP-to-IP interconnection for the exchange of packetized voice traffic. Under the rule proposed above, a carrier wishing to begin obtaining

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and connectivity." Sprint NBP Public Notice #25 Comments, GN Docket No. 09-51, at 15-16 (Dec. 22, 2009).

[49] *See, e.g.*, Kansas Corporation Commission Comments at 37 ("Most of Kansas' ILECs already have the capability to terminate either TDM (circuit-switched) or IP traffic, but because of the certainty associated with access charges, these carriers elect to terminate traffic as TDM.").

[50] *See* Sprint NBP Public Notice #25 Comments, GN Docket No. 09-51, at 16 (Dec. 22, 2009).

IP interconnection need not wait until 2016, as it could request IP interconnection and begin exchanging packetized voice traffic on an expedited basis with any other IP network operator that provides (or through an affiliate provides) packetized voice services to its customers.

C. The Commission should confirm that every packetized voice provider has the right to interconnect indirectly with the terminating packetized voice provider. As AT&T has correctly observed, today "the default method of interconnection on the Internet is *indirect* interconnection."[51] Consistent with Section 251(a)(1) of the Act, packetized voice providers should have a right to interconnect directly or indirectly with a terminating packetized voice provider. Specifically, no terminating provider should be allowed to require a competitor to connect directly with its IP network (including asymmetrical "paid peering" arrangements) at centralized POIs, when the competitor determines that indirect interconnection via another IP network provider's connection would be more efficient. Likewise, the Commission should not permit a terminating voice service provider to undermine the value of indirect IP-to-IP interconnection by, for example, blocking a competitor's packetized voice traffic until it negotiates an interconnection agreement acceptable to the terminating provider. Interconnection agreements are unnecessary when two networks interconnect indirectly and when traffic is exchanged on a settlements-free basis.

D. The Commission should rule that absent agreement between two parties, packetized voice traffic will be exchanged on a settlement-free basis. Sprint has previously demonstrated that it is doubtful IP network operators incur any additional costs in transporting and terminating packetized voice traffic, and that even if they do, policy considerations overwhelmingly dictate

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[51] AT&T Comments at 17 (italics in original).

that per-minute charges for the exchange of packetized voice traffic should be prohibited.[52] As one AT&T Vice President noted recently, "[i]f regulators were to take away the regulated inter-carrier compensation meter and require providers to recover costs from their own customers (potentially including willing wholesale customers as in the broader IP transit market) or, when appropriate, from explicit subsidy mechanisms, the industry would be free to move to more rational, more competitive, and less confusing for consumers, business practices":

> It would be a world without regulated rates for arbitrary "services." In such a world, "long distance" would increasingly be a wholesale service purchased by local access providers in order to connect their customers to everyone else. "Local interconnection" would fade away as carriers interconnected at higher capacities and at fewer locations. And rate-driven arbitrage, like traffic pumping, would cease. The single biggest obstacle to getting there is the continued existence of regulated rates for intercarrier compensation.[53]

The Commission should therefore declare that, absent the parties agreeing to other terms, packetized voice traffic will be exchanged on a settlements-free basis. It should further clarify that each provider shall be responsible for any transport and termination costs on its side of the IP point of interconnection. A default settlements-free environment will ensure that all IP network operators are incented to route packetized voice traffic in the most efficient manner.

One neutral observer has noted that the "elimination of call termination fees is simple, it minimizes economic distortions, and it involves the fewest impediments to the evolution over time of interconnection arrangements as networks evolve to an IP basis."[54] The rule Sprint envisions would not preclude use of different compensation arrangements under appropriate circum-

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52 *See* Sprint Comments at 21 and Appendix B at B.1-B.5.

53 AT&T Public Policy Blog, Hank Hultquist, AT&T Vice President, *Unsafe at Any Rate* (Nov. 24, 2010), *available at* http://attpublicpolicy.com/government-policy/unsafe-at-any-rate/.

54 WIK White Paper at 142.

stances (*e.g.*, an agreement to use a quality of service better than that specified in industry standards).

E. The Commission should adopt a default set of competitively neutral POI location rules. The Commission has observed that "issues related to the location of the POI and the allocation of transport costs are some of the most contentious issues in interconnection proceedings."[55] Sprint has already explained that the POIs needed for the efficient exchange of packetized voice traffic will be radically different than the LATA-based POI rules developed for TDM interconnection.[56] Sprint has therefore encouraged the Commission to refer this subject to the Technological Advisory Committee so the Commission can act with the benefit of TAC's recommendations. Sprint again encourages the Commission to make this referral expeditiously, so this important work can begin. And again, it is important to emphasize that POI designations would be default rules only, so that two IP network operators could always agree to exchange their packetized voice traffic at different locations.

F. The Commission should confirm that packetized voice interconnection negotiations and obligations will include all affiliates of the terminating voice provider. There are many legitimate reasons why a firm may provide services using separate subsidiaries and other affiliates. But there is no legitimate reason to permit a terminating voice provider to require its competitors to negotiate separately with each affiliate, to send separately voice traffic to each affiliate, or to allow any affiliate with packet voice capabilities to avoid IP interconnection obligations - especially when the effect of such actions would be to increase the costs incurred by the competitor

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55 *See Intercarrier Compensation Further NPRM,* 20 FCC Rcd 4685, 4724-28 (¶ 91) (2005).

56 *See* Sprint Comments at 22-25.

or deny IP-to-IP interconnection benefits or obligations. In other words, packetized voice traffic that is exchanged at a centralized IP POI should include all traffic to affiliates.

D. The Commission Possesses Ample Authority to Adopt the Rules That Sprint Proposes

The Commission possesses ample authority to adopt Sprint's proposed IP-to-IP interconnection rules, whether packetized voice traffic is classified as an information service or a telecommunications service. Of course, Title II gives the Commission explicit authority to adopt such rules as applied to telecommunications services. But as Sprint demonstrates in Appendix D, the Commission also possesses ample authority under its Title I, ancillary jurisdiction to adopt rules for the exchange of packetized voice traffic.

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It has been said that "those who cannot remember the past are condemned to repeat it."[57] The federal government has pursued three antitrust actions against the Bell System over the past century – two of which involved its interconnection practices relative to its competitors:[58]

- The provision of local telephone service became an intensely competitive industry after the original Bell patents began to expire in 1893, and by 1904 "independent" telcos served more customers than the Bell companies. AT&T's profits plummeted following this competition, and in response, AT&T both refused to interconnect with its competitors and began to acquire them. The Department of Justice ("DoJ") filed its first monopolization lawsuit, and AT&T settled the case in what is known as the 1913 Kingsbury Commitment. This Commitment required AT&T's long distance company to interconnect with competitors and precluded AT&T

[57] This quote has been attributed to George Santayana, *The Life of Reason*, Vol. 1: *Reasons in Common Sense* (1095) (see http://en.wikiquote.org/wiki/History).

[58] The third antitrust case, filed in 1949 and resulting in a 1956 Consent Decree, principally involved the Bell System's monopolization of the telecom equipment market. *See United States* v. *AT&T*, 552 F. Supp. 131, 135-38 (D.D.C. 1982).

from acquiring additional competitors without first securing government approval.[59]

Unfortunately, this Commitment had the effect of quickly re-monopolizing the market. Regulators permitted AT&T to acquire competitive systems so long as it sold an equal number of exchanges to its competitors. As a former Common Carrier Bureau Chief wrote, "This provision allowed Bell and the independents to exchange telephones in order to give each other geographical monopolies. As long as only one company served in a given geographical area there was little reason to expect price competition to take place."[60]

- Competition in the long distance market began to emerge in the 1970s. Initially, AT&T refused altogether to permit its competitors to interconnect with its Bell operating companies. After the FCC ordered interconnection, AT&T then refused to provide equal access, thereby requiring MCI and Sprint customers to dial extra digits to make toll calls. DoJ filed its third monopolization lawsuit and in 1982, after the antitrust court denied its motion to dismiss, AT&T entered into a Consent Decree with DoJ. Under this Decree, AT&T was required to divest its ownership in the RBOCs, the RBOCs were required to provide "equal access," and they were precluded from providing any "interLATA" services.[61]

AT&T and Verizon, effectively the "new" Bell System,[62] basically want the Commission to return to the regime that applied to the Bell System before 1913. Specifically, they want the Commission to approve a regime whereby they can determine unilaterally whether and how to interconnect with competing voice providers *via* an IP interconnection – and if they decide to permit any interconnection, set unilaterally the prices, terms and conditions of such interconnection. They say that IP interconnection rules for the exchange of packetized voice traffic are un-

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[59] *See generally* Adam Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, THE CATO JOURNAL, Vol. 14, No. 2 (Fall 1994), *available at* http://www.cato.org/pubs/journal/cj14n2/cj14n2-6.pdf.

[60] Gerald Brock, *The Telecommunications Industry: The Dynamics of Market Structure*, at 156 (1981).

[61] *See generally United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

[62] The new Bell System also includes MCI (the old Bell System's largest competitor) and McCaw, which had been the largest wireless carrier until SBC (now, AT&T) acquired it.

necessary because any problems that might arise can always be addressed after the fact – "*ex post*."[63]

Congress has specified that the Commission "shall encourage" the deployment of broadband services on a "timely basis . . . to all Americans."[64] Delegating to AT&T and Verizon the authority to determine when their competitors can interconnect with them *via* IP (if ever) for the exchange of packetized voice traffic would not promote deployment of advanced broadband networks and will not make advanced broadband voice services available on a "timely basis . . . to all Americans." Besides, as Chairman Genachowski advised Congress earlier this month, the "no rules" environment that AT&T and Verizon seek is "not a practical solution":

> [A]ntitrust enforcement is expensive to pursue, takes a long time, and kicks in only after the damage is done.[65]

Sprint urges the Commission to reject AT&T's and Verizon's "no rules" position and to adopt the handful of targeted, high-level, packetized voice interconnection rules that Sprint has proposed.

IV. THE CPNP REGIMES FAVORED BY MOST LECS ARE INCOMPATIBLE WITH LONG-STANDING COST-CAUSATION PRINCIPLES

Most LECs submitting comments oppose use of bill-and-keep and instead propose to retain in a post-reform world a per-minute-based, calling-party's-network-pays ("CPNP") form of intercarrier compensation. CPNP regimes, the Commission has observed, are based on the premise that "the originating caller receives all the benefits of a call and should, therefore, bear the

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[63] *See, e.g.*, AT&T Comments at 25.

[64] 47 U.S.C. § 1302(a).

[65] Written Statement of Chairman Genachowski, Hearing on "Ensuring Competition on the Internet: Network Neutrality and Antitrust Law," before the House Subcommittee on Intellectual Property, Competition, and the Internet, at 4 (May 5, 2011).

costs of both origination and termination."[66] Of course, the assumption that only calling parties benefit from calls, while called parties never benefit, is not credible on its face. As an AT&T Vice President succinctly wrote recently: "What a mound of malarkey!"[67]

An example makes the point. If A calls B and they talk for one hour, CPNP regimes dictate that A's network pays B's network for one hour of termination. If, however, A instead texts B ("Call me") and B later makes the call and they talk for one hour, B's network pays A's network for one hour of termination – even though the use and cost of network facilities in both calls is identical.

The Commission specifically asked parties to address cost-causation principles relative to their ICC reform proposals (*see NPRM* ¶ 525). It is not surprising that no LEC advocating continued use of CPNP regimes attempted to reconcile its position with fundamental principles of cost causation; once one acknowledges the fact that called parties also benefit from calls, one cannot credibly justify a CPNP regime.

The Commission has "long standing precedent that rates and rate structures must be cost-causative."[68] More specifically, it has "long recognized that economic efficiency in a competitive market requires cost-recovery to reflect cost-causation principles":

> Cost-causation principles thus counsel that regulators should seek to align the recovery of costs with the way they are incurred. When a cost causer does not internalize all the costs it causes, the incentives of both providers and users may be distorted.[69]

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66 *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9624 (¶ 37) (2001).

67 AT&T Public Policy Blog, Hank Hultquist, AT&T Vice President, *Unsafe at Any Rate* (Nov. 24, 2010), *available at* http://attpublicpolicy.com/government-policy/unsafe-at-any-rate/.

68 *Expanded Interconnection Order*, 12 FCC Rcd 18730, 18745 (¶ 23) (1997).

69 *Video Relay Service NOI*, 25 FCC Rcd 8597, 8614-15 (¶ 60) (2010).

In its 1983 *Access Charge Order*, the first time the FCC developed rules for intercarrier compensation, the Commission determined that costs "should be recovered from the cost-causative ratepayer whenever it is possible to do so."[70] The FCC accordingly determined that fixed costs (*e.g.*, local loops) should be recovered through flat fees while variable costs should be recovered through usage-based rates.[71] For variable costs (and the fixed costs not recovered from end users), the Commission adopted in its *Access Charge Order* a CPNP regime, and it later adopted the same approach for reciprocal compensation in its 1996 *Local Competition Order*.

Importantly, in neither of these *Orders* did the Commission evaluate the cost-causative principles underlying use of a CPNP regime – namely, whether the calling party is the sole cost-causer of a call, or whether the calling and called parties are simultaneous cost-causers. It bears noting that use of CPNP with access charges initially posed no competitive problems, because LECs and IXCs did not compete with each other (as the AT&T Decree prohibited the RBOCs from providing interLATA services). The use of per-minute access charges also did not distort the provision of most retail long distance services, because IXCs at the time primarily used per-minute pricing for their retail services.

The Commission reflexively adopted the same CPNP regime for reciprocal compensation (although in fairness, Congress gave the FCC only six months to complete a new rulemaking on

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70 *MTS/WATS Market Structure*, 93 F.C.C.2d 241, 278 (¶ 121) (1983).

71 Of course, the FCC did not fully implement this regime in this 1983 *Order* "because of concerns that allowing the flat charges to rise above the specified limits might cause customers to disconnect their telephone service." *First Access Charge Reform Order*, 12 FCC Rcd 15982, 15993 (¶ 24) (1997).

the interconnection provisions of the 1996 Act).[72] But as a former FCC Deputy Chief Economist recognized, use of CPNP regimes in competitive markets creates additional, "more serious inefficiencies":

> [CPNP regimes] do not consider many of the problems facing today's interconnection regimes, such as the ISP reciprocal compensation problem, the arbitrage problem caused by IP telephony, and the terminating access problem caused by competitive LECs not subject to rate regulation.[73]

The Commission began to "question" the assumption underlying CPNP regimes a decade ago:

> If a caller telephones a catalog merchant, surely that merchant benefits at least as much as the caller. When a LEC terminates a call originating on the network of another LEC, it provides a benefit to both the originating caller *and* to its customer, the called party. As a consequence, there may be no reason why *both* LECs should not recover the costs of these benefits directly from their end users.[74]

By 2005, the Wireline Competition Bureau became convinced that bill-and-keep was more consistent with cost causation principles than CPNP regimes, recognizing that the purpose of a telephone call is to "facilitate communications between two or more parties":

> These communications enable the exchange of information between the parties, not just the relaying of information to a recipient. Although the calling party decides to place the call, the called party must decide to answer and continue the communication. The communication therefore is a two-way joint interaction between the calling party and called party. Each party is capable of

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72 See, 47 U.S.C. §251(d)(1), "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section [251]."

73 Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime,* OPP Working Paper No. 33, at 16 (Dec. 2000) ("DeGraba OPP Paper 33").

74 *Unified Intercarrier Compensation NPRM,* 16 FCC Rcd 9610, 9624 (¶ 37) (2001) (italics in original). *See also Unified Intercarrier Compensation Further NPRM,* 16 FCC Rcd 4685, 4694 (¶ 17) (2005) ("Developments in the ability of consumers to manage their own telecommunications services undermine the premise that the calling party is the sole cost causer and should be responsible for all costs of a call.").

> taking measures to avoid call-related costs, if any. . . . [T]he need or desire to exchange information causes the communications, rather than the party initiating the communication.[75]

While the Bureau noted many additional benefits from use of bill-and-keep over CPNP regimes,[76] it further observed it is doubtful as a practical matter that "minutes-of-use are a significant determinant of costs given developments in telecommunications technologies."[77]

CPNP proponents today acknowledge that called parties benefit from "some, but not all calls," but they suggest that the benefit received by the calling and called parties is not always equal.[78] At most, this is an issue only for consumers who subscribe to plans with per-minute charges for receiving calls (vs. flat rated plans), and even if the consumer subscribes to such plans, she can minimize the cost impact by immediately hanging up or, if she has Caller ID, simply not answering the call at all.

In the end, any ICC approach that the Commission adopts must generalize the relative benefits to some degree, because it is not realistic to adopt a regime that perfectly reflects the relative benefit for each call. The relevant question, though, is judging from the policy goals that the Commission wants to achieve with intercarrier compensation, whether the simplifying assumptions underlying bill-and-keep are preferable to the assumptions underlying a CPNP regime. As the Wireline Bureau has observed, there is "no evidence" that the assumption that "all

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75 Wireline Competition Bureau, A Bill-and-Keep Approach to Intercarrier Compensation Reform, CC Docket No. 01-92, at 98-99, Appendix C to *Unified Intercarrier Compensation Further NPRM*, 16 FCC Rcd 4685 (2005) ("Wireline Bureau Bill-and-Keep Analysis").

76 *See id.* at 102-108.

77 *Id.* at 101-102.

78 *See, e.g.*, Joint Board - State Members Comments at 152.

the benefits flow to the calling party and none to the called party is more realistic than an assumption that the benefits flow to each party equally":

> Indeed, because consumers have the incentive and the ability to avoid, or reduce the duration of, unwanted calls, we believe that the better assumption is one that reflects some benefit to both the calling party and the called party.[79]

Bill-and-keep is "consistent with the assumption that both the calling party and the called party may benefit from any given call, and, therefore, that the originating and the terminating networks should share the costs associated with the call by recovering their costs from their own end-user customers."[80] In contrast, the CPNP regimes that most LECs favor is incompatible with this reality. For that reason alone, the Commission should reject LEC arguments to continue to endorse CPNP-based ICC regimes once its transitional reform plan is completed.

Of course, as Sprint, the Wireline Competition Bureau and many others have pointed out, there are many additional reasons why bill-and-keep is a superior intercarrier compensation arrangement. Among other things, bill-and-keep eliminates arbitrage opportunities; reduces significantly the terminating access monopoly problem; promotes more efficient end-user retail prices and more efficient network usage; and eliminates the expense all networks currently incur in billing each other for call termination.[81] And perhaps most importantly of all, requiring all carriers to recover their network costs from their own customers (or where appropriate, an explicit support mechanism) has the added benefit of maximizing efficiency and price competition. As the Wireline Competition Bureau has recognized:

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79 Wireline Bureau Bill-and-Keep Analysis at 100-101.

80 *Id.*

81 *See, e.g.,* Sprint Comments, Appendix B at B.3-B.5; Wireline Bureau Bill-and-Keep Analysis at 102-108; DeGraba OPP Paper 33 at 6-8 and 22-29.

> Under [bill-and-keep], success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers. . . . Bill-and-keep therefore encourages the development of competition by rewarding carriers based on their ability to serve customers efficiently rather than their ability to shift costs to other carriers.[82]

For all the reasons above, Sprint urges the Commission to adopt bill-and-keep as the "end point" of ICC reform.

V. THE JOINT BOARD – STATE MEMBERS' ICC REFORM PROPOSAL IS SERIOUSLY FLAWED AND SHOULD NOT BE ADOPTED.

Sprint below responds to the comments filed on May 2, 2011 by the State Members of the Federal-State Joint Board on Universal Service ("State Members") regarding ICC reform.

The State Members begin their comments by endorsing the laudable principles that universal service support should be (1) limited to cases of demonstrated necessity; (2) limited to areas where there is no private sector business case to provide broadband and high quality voice service; and (3) based on a "total company" view of carrier finances (*see* p. v). Unfortunately, the State Members' ICC proposal fails to adhere to these principles. Moreover, their proposal makes no meaningful progress toward eliminating the high per-minute rates which the FCC has correctly concluded are fundamentally incompatible with an all-broadband world. The State Members' ICC proposal would largely maintain the access regime which slants the playing field in favor of landline incumbents, harms consumers, and encourages counter-productive activities such as traffic pumping.

A. FCC's Authority to Adopt ICC Reform. The State Members contend that the "FCC lacks legal authority to mandate rate changes to intrastate telecommunications service rates" (p. vii). As demonstrated in Sprint's legal analysis, Congress has given the FCC clear authority to

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[82] Wireline Bureau Bill-and-Keep Analysis at 103 and 104.

phase down and eliminate rates for intrastate access and termination rates of any type as to wireless traffic.[83]

B. The State Members' Projected Estimates Regarding the Impact of ICC Reform. The State Members state that adoption of an *unspecified* "combination of three proposals from the NPRM" would lead to unreasonable rates for local telephone service in certain rural areas:

> When looking at a particular combination of three proposals from the NPRM, the analysis suggests that a significant portion of carriers in 32 States would have to raise rates by at least $20.00 per month, and in 15 States a significant number of customers would see rate increases of at least $50 per month.[84]

The State Members acknowledge, however, that their estimated rate impacts are based on "very limited" and "unaudited" data (p. vi). The State Members also did not "fully explore[]" the role of revenues from non-regulated services such as video and broadband Internet access, even though these services use the same loop plant utilized with POTS service.[85] Further, contrary to its espoused principle that support should be limited to cases of demonstrated need (*see* pp. 3-4), there apparently was no examination of whether ILECs would be placed in real financial jeopardy by examining their rate of return performance or whether they could reasonably operate more efficiently. And finally, the State Members do not acknowledge that the incumbent LECs submitting data to them are major recipients of universal service subsidies today – and thus have powerful incentives to inflate their costs in the hope of convincing State regulators and

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83 *See* attached Appendix E; *see also* Sprint Comments, Appendix A.

84 State Members Comments, p. xii.

85 *Id.*, p. vii.

the FCC to maintain (if not increase) current subsidy levels. These flaws must be corrected before the State Members' analysis can be incorporated into the FCC's decision-making.[86]

Moreover, the State Members' prediction that ICC reform will increase local service rates for many incumbent LECs by "at least" $20-$50 is belied by actual experience. In the several States that have already reduced intrastate access charges to interstate rate levels, Sprint is not aware of any case in which such ICC rate reductions resulted in local service rate increases even close to $20/month – much less $50/month.

Sprint emphasizes that its ICC reform plan for incumbent LECs other than the three largest would, in the near term, only reduce their intrastate access charges to interstate rate levels. As noted above, actual experience suggests that reducing intrastate access charges to the interstate rate level will have *at most* a modest impact on local service rates.

C. The FCC May Not Lawfully Adopt the State Members' ICC Reform Plan. The State Members agree that the current ICC regime – where different rates are applied for call termination depending on the regulatory classification of the call – must be "eliminat[ed]" and replaced with "a single rate" (p. 147). Their plan would "[m]ove to *uniform* per-minute rates in which each purchaser of access pays the same rate" (p. 153; italics in original). Under the State Members' proposal, the new uniform rate would be the lower of a LEC's:

1. current per-minute interstate termination rate; or
2. an "average [ICC] terminating rate" (p. 154). This average rate would be determined by taking all of a LEC's "current terminating [ICC] revenue divided by the sum of terminating minutes."[87]

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[86] If the State Members want the FCC to consider their estimates, they should, at minimum, produce all the data they reviewed in developing the estimates so interested parties can make an independent assessment of that data.

The FCC should reject the State Members' proposal because it lacks authority from Congress to adopt it.

Under the State Members' plan, all rates for reciprocal compensation traffic would be increased to either an ILEC's interstate access charge rates or a new blended rate (developed using that LEC's interstate and intrastate access rates). Congress has been very clear, however, that the most an incumbent LEC can recover in reciprocal compensation are its "additional costs" of call termination (*see* § 252(d)(2)(A)(ii)). The State Members' new proposed rate for traffic currently subject to § 251(b)(5) – whether interstate access or a new blended rate – would be higher than what is permitted under § 252(d)(2), and thus would contravene this statute.

The State Members' plan further assumes that the Commission possesses the authority to move traffic currently subject to § 251(b)(5) into the access charge exception contained in § 251(g). In fact, the Commission does not possess such authority. To the contrary, the D.C. Circuit Court has squarely held that § 251(g) "on its face" provides only for the "continued enforcement" of certain pre-Act regulatory "restrictions and obligations," and the Court reversed the FCC when it attempted to bring ISP-bound traffic within the scope of § 251(g) because there had been no pre-Act obligation concerning such traffic.[88] Consequently, traffic currently subject to § 251(b)(5) must remain subject to that statute and cannot be re-categorized such that it becomes subject to higher rates.

Another flaw in the plan is that the State Members want the Commission to retain indefinitely – "at least" through 2017 and "thereafter until a new system is adopted" (p. 154) – the cur-

[87] State Members Comments, n. 245. Of course, use of such an average or blended rate assures revenue neutrality for the incumbent LEC.

[88] *See WorldCom* v. *FCC*, 288 F.3d 429, 432-34 (D.C. Cir. 2002).

rent levels of implicit subsidies that competitive carriers have been paying to incumbent LECs. But as discussed in Section II above, Congress has directed the FCC to remove all implicit subsidies from ICC rates, and Sprint believes that with the passage of 15 years, the Commission must begin to remove these subsidies immediately. The FCC cannot, as the State Members propose, retain these implicit subsidies indefinitely, when Congress made clear in 1996 that implicit subsidies may be continued only for an "interim" period – or in the FCC's words, for a "temporary" time only. ***Retaining above cost access charges for 15 years (or under the State Members' proposal, for over 21 years), when Congress has directed that the implicit subsidies be removed, cannot reasonably be considered to be "interim" or " temporary."***

D. The State Members' ICC Proposal Harms Competition and Consumers. Many states have acted to remove jurisdiction over VoIP services and wireless services. Others have detariffed or largely deregulated interexchange services. As a result, the service that is most heavily regulated at the State level is incumbent LEC local service, particularly that provided by rural LECs.

State regulators pay particular attention to those they regulate most closely and often champion continued implicit subsidies for rural LECs (or revenue replacement) even when other providers operate in the area without such subsidies. For example, wireless carriers operating in ILEC areas are precluded from charging any access charges for completing toll calls originated by incumbent LECs, while ILECs receive significant implicit subsidies from access.

Allowing implicit subsidies to LECs, while denying their competitors operating in the same area similar support, harms competition – the LEC is not disciplined by the market, and the competitor cannot be as successful as it would otherwise be if an implicit subsidy were not provided only to the preferred company.

Furthermore, continuing payment of implicit subsidies is not justified by "carrier of last resort" obligations of rural LECs.[89] In reality, there is a carrier of last resort only where there is no competitor, an increasingly rare situation. In the vast majority of areas, other firms are available to provide service, but their success is being undermined by a misguided system that provides implicit subsidies to one party serving an area but not another.

Implicit subsidies to a certain class of carrier also harms consumers. Experience has shown that when access charges were reduced, the price of long distance calling also fell. The same will hold true for the price of all-distance services – as access charges are reduced, all-distance service prices also will fall, to the benefit of all-distance service subscribers. Today, every consumer who makes long distance calls or purchases an all-distance plan pays more than is necessary for that plan because of the implicit subsidy contained in the ILEC access rates.

E. The FCC Should Reject the State Members' Proposal to Eliminate the MTA Rule. The current ICC regime discriminates against wireless carriers (and their customers) because wireless traffic is assessed access charges by wireline carriers while wireless carriers are effectively prohibited from collecting any access charges from wireline carriers.[90] The State Members' reform plan recommends that this discriminatory arrangement be expanded to intraMTA traffic that ILECs deem to be non-local, proposing (p. 154) that wireless carriers be required to recognize wireline local exchange boundaries for purposes of paying access on intrastate traffic. The State Members do not explain the reason for, or legal rationale to support, this proposal.

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89 State Members Comments, pp. 125-6.

90 *See* Sprint Comments at 13-15. Sprint also noted in its opening comments that access charges do not apply to wireless traffic. Nothing in these Reply Comments is intended to contradict that position.

This proposal should be rejected. Incumbent local calling areas are increasingly irrelevant to an incumbent LEC's own customers, as the ILECs themselves offer and successfully market all-distance plans. Indeed, MTA boundaries lose all relevance once call termination rates are unified (a goal endorsed by the State Members).

Moreover, it would take considerable time and expense for wireless carriers to comply with an order eliminating the MTA rule:

- If the MTA rule were eliminated, wireless operators may be forced to make short-lived and unnecessary modifications at a time when they are devoting large amounts of capital to make 4G services widely available. In other words, the State Members' proposal would have valuable engineering time be diverted from IP network deployment to modifying existing wireless arrangements to match LEC rate centers – even though many of those rate centers were developed a century ago and even though all of this work would be wasted when, even under the State Members' proposal, intercarrier compensation is quickly unified.
- The underlying premise of the State Members' proposal is to decrease the volume of traffic subject to the Act's pro-competitive reciprocal compensation regime, and expand the volume of traffic subject to the monopoly era, above-cost access charge regime. Subjecting mobile traffic to above-cost access rates would increase the cost of providing wireless service and therefore increase the cost to wireless consumers. Such a result would clearly not be in the public interest. Moreover, since most wireless customers choose to use a post-paid plan under a two-year contract, there would be no opportunity to recover any of the new costs the State Members propose to impose on wireless carriers for two years.
- In addition to new network costs and new costs to consumers, there would be new administrative, legal, and regulatory costs associated with this change. Existing interconnection agreements and related administrative ICC operating expenses are generally based upon the MTA rule and not on thousands of ILEC local callings areas. The modification of these existing agreements and operations would take years and considerable industry and commission resources to implement, efforts that are completely wasted as, even under the State Members own proposal, all ICC is quickly unified.

Given the lack of identified public interest benefits – and Sprint believes there are none that can be identified – to be gained by eliminating the MTA rule, there is no justification for forcing the industry to devote resources in this manner.

F. The State Members Have Misconstrued § 254(k) of the Act. The State Members contend that Section 254(k) "requires intercarrier compensation payments to cover a reasonable portion of network costs that are commonly used with wholesale access services" (p. 150). Specifically, they contend that under this statute, ICC termination rates must include some portion of an incumbent LEC's "fixed joint and common costs of facilities" above those that might be considered "marginal cost" (*id.*).

The State Members have misconstrued this section of the Act. Section 254(k) – titled "Subsidy of competitive services prohibited" – has nothing to do with the *recovery* of joint and common costs; rather, it is limited in scope to the *allocation* of such costs between competitive and non-competitive services and between USF-supported services and non-supported services.[91]

The statute that *is* relevant to ICC termination rates is Section 252(d)(2), which limits incumbent LECs to recovering their "additional costs" in call termination. While the State Members' comments assume that incumbent LECs incur additional costs for call termination, they submit no evidence in support of this assumption. In fact, the Commission and several State regulators have found that incumbent LECs do not incur any such additional costs.[92] Federal appellate courts have further held that bill-and-keep is the <u>only</u> intercarrier compensation arrange-

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91 *See, e.g., CALLS Order*, 15 FCC Rcd 12962, 12998-13001 (¶¶ 91-96) (2000); *TOPUC* v. *FCC*, 265 F.3d 313, 323-24 (5th Cir. 2001). *See generally* 47 C.F.R. § 64.901(c); *Section 254(k) Implementation Order*, 12 FCC Rcd 6415 (1997).

92 *See, e.g., Virginia Arbitration Cost Order*, 18 FCC Rcd 17722 (2003); *Virginia Arbitration Cost Compliance Order*, 19 FCC Rcd 1259 (2004); *Investigation into Reciprocal Compensation Rates*, 2003 Minn. PUC LEXIS 99 (Sept. 24, 2003), *recon. denied*, 2003 Minn. PUC LEXIS 144 (Dec. 24, 2003); *Hamilton County Telephone Co-op, et seq. Petitions for Arbitration to Establish Terms and Conditions with Verizon Wireless*, Docket No. 05-0644, at 38, 2006 Ill. PSC LEXIS 5 *94-95 (Jan. 25, 2006).

ment that is lawful under the Act when the terminating carrier incurs no additional call termination costs.[93]

G. The State Members Do Not Understand How Wireless Carriers Use Special Access Facilities. The State Members contend that use of bill-and-keep would place "existing point-to-point services at a competitive disadvantage" because carriers that purchase ILEC special access facilities supposedly "would have a financial incentive to use free switched telecommunications network services" (pp. 149-50). This reasoning reflects a lack of understanding of how wireless carriers use special access facilities.

Wireless carriers are one of the major (if not the largest) purchasers of ILEC special access facilities. Wireless carriers use these ILEC facilities for backhaul (to connect their base stations or cell sites to their mobile switching centers); and for interconnection (to connect their networks to the ILEC networks so wireless customers can send their calls to and receive calls from others). Switched access services cannot be used for backhaul facilities; dedicated facilities are required for such purpose. And while ICC rates are relevant to the traffic that flows over interconnection facilities, regardless of the rate charged for switched access, a wireless carrier still needs a physical facility (or trunk) to connect its network to an ILEC's network.

Although the State Members use the term "free switched access," the term used in the 1996 Act, "bill-and-keep," is the widely recognized compensation mechanism for the common practice of mutual traffic exchange. Bill-and-keep for the exchange of traffic over interconnection facilities in no way replaces any instance where a carrier needs to lease facilities from an-

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[93] *See Ace Telephone v. Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2005) ("If no additional costs are incurred, there is nothing to pay.").

other carrier to connect its own customers to its own or other networks. As a practical matter, special access bypass is a non-issue.

H. If Only Wireless Carriers Could Invest Billions of Dollars More In Their Own Networks. The wireless industry is investing billions of dollars to provide mobile broadband services to consumers, including those residing in rural areas. Wireless carriers and their customers are contributing billions more in USF surcharges which are subsequently distributed to incumbent LECs. And, wireless carriers and their customers are paying billions of dollars more in inflated ICC rates charged by incumbent LECs.[94] These facts are unremarked upon in the State Members' comments. Yet Sprint is confident that had the State Members considered how wireless carriers could improve and expand their own networks with these billions of dollars, the State Members surely would have proposed that wireless carriers (and their customers) pay less, not more, in implicit subsidies to incumbent LECs.

* * *

The State Members' reform proposal is seriously flawed in numerous respects, and should not be adopted. While the proposal certainly benefits incumbent LECs, it does little to solve the undisputed problems with the current ICC system, and increases the burden of implicit subsidies on wireless carriers and their customers paid to wireline carriers. The State Members' proposal highlights that a "uniform national policy is necessary and in the public interest."[95]

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[94] As explained in Section II above, LECs are using these implicit subsidies for any purpose they choose, including payment of generous dividends to their shareholders, without any transparency obligation.

[95] S. 1134, Title IV, § 402(13) (June 22, 1993), *incorporated by reference in* H.R. REP. NO. 103-213, at 481.

VI. ADOPTION OF PRO-COMPETITIVE USF REFORMS CANNOT BE DELAYED.

A. "NOT IN MY BACKYARD"

The comments reflect widespread agreement that reform of the existing high-cost USF mechanism is critically important and long overdue, and that a re-alignment of legacy support will both help ensure the viability of the universal service program and help promote national broadband deployment. A number of carriers, both incumbent and competitive, vigorously advocated specific reforms to reduce legacy high-cost subsidies. Many of these comments were unhelpfully one-sided, with parties recommending adoption of rule changes that impact support provided to *other* carriers and *other* industry segments, while emphasizing why their own high-cost support is critical and should remain largely untouched, at least until it is replaced, apparently in full, by new USF mechanisms. For example:

- Windstream stated that "[u]ntil the Connect America Fund ("CAF") replaces all existing support and implicit subsidies, the Commission must take care to preserve funds that are essential to maintaining existing facilities and enabling the transition to next-generation networks" (p. 6). According to Windstream, the FCC should "maintain essential sources of high-cost support for mid-sized price cap companies that serve high-cost areas," including the preservation of frozen ICLS, and an examination of "the role and sufficiency of Interstate Access Support ("IAS") - particularly with regard to mid-sized carriers - before considering a phase-down of support." Furthermore, there should be "reasonable transitions and a meaningful opportunity for carriers to recover revenues" that are negatively impacted by intercarrier compensation reforms (*id.*). In contrast, according to Windstream, the FCC should eliminate "all legacy high-cost support" to CETCs as such support is "duplicative" and "inefficient" (p. 5).

- The Rural Associations (NECA *et al.*) objected to many of the FCC's near-term proposals that would reduce support to incumbent LECs (*e.g.*, changes to HCLS reimbursement rates, eliminating recovery of corporate operating expenses through high-cost support, elimination of the safety net additive support, elimination of LSS, capping total annual per-line support, mandatory disaggregation of RLECs' support, eliminating support in

"competitive" areas), while urging adoption of reforms that reduce support to non-ILECs (*e.g.*, elimination of the equal support rule for CETCs).[96]

- AT&T asserted (unsurprisingly without any support) that legacy high-cost support to CETCs "is likely to be far greater than necessary to ensure ubiquitous mobile broadband service" (p. 108). Therefore, excess Advanced Mobility Fund support "should be distributed to fixed broadband providers…," including, presumably, AT&T's own wireline affiliates. AT&T, one might note, has publicly stated that it would agree as a merger condition to refrain from seeking USF support for its LTE broadband roll-out[97] (and thus would not benefit in any material way from an Advanced Mobility Fund), but has made no such disavowal regarding USF support for its wireline operations.

This is not, of course, the path to success. The goals of robust competition and universal service improvements cannot be achieved by pushing subsidy reductions around a circle to another party. Carriers do not become more efficient or market-oriented if their existing subsidies are merely renamed ("replaced") but not rationalized. Competition is not fostered, and competitive neutrality is not achieved, if one industry segment maintains its legacy support indefinitely or takes a disproportionate share of any new USF at the expense of another industry segment. And broadband deployment in unserved and underserved areas will be slow in coming unless the Commission resists the call to defer necessary phase-outs of legacy support and instead acts boldly to eliminate outmoded subsidies and adopt new, highly targeted, purposeful support mechanisms.

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[96] *See* joint comments of NECA, NTCA, OPASTCO, Western Telecommunications Alliance and 32 other concurring associations, pp. 39-57.

[97] *See* testimony of Randall Stephenson, President and CEO of AT&T, before the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Senate Judiciary Committee, May 11, 2011, hearing entitled *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?*, transcript, p. 51:

> Sen. Kohl: ….Mr. Stephenson, would you accept as a condition of the merger a prohibition on AT&T from using any universal service fund money for its broadband build out?
>
> Mr. Stephenson: For its LTE build-out, yes, sir.

If the Commission is serious about weaning carriers from their dependence on existing high-cost USF support, it should adopt the approach Sprint has recommended – an expeditious phase-out or elimination of existing high-cost subsidies, implemented with a firm end date, applied equitably and consistently to all categories of carrier (incumbent or competitive, wireline or wireless).[98] Specifically, the Commission should take the following steps in implementing a new broadband universal service program:

- Phase out remaining CETC high-cost USF by the end of 2014, or within 3 years from adoption of an order mandating such phase-out, whichever is later;
- Decrease the current HCLS support percentages (to 55% and 65%) for incumbent LECs with 200,000 or fewer loops, and eliminate HCLS for incumbent LECs with more than 200,000 loops, effective immediately;
- Eliminate IAS immediately;
- Eliminate LSS and ICLS immediately; and
- Remove caps on end user charges to enable carriers to maximize the recovery of their legitimate costs from their own end user customers.

B. Competitive Neutrality

While there is broad consensus that competitive neutrality is a key universal service principle,[99] several parties have advocated policies for the new Connect America Fund (CAF) that would confer unwarranted competitive advantages upon wireline carriers (and ILECs in particular). Three recommendations are of special concern: (1) opposition to imposing wholesale obligations on the

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[98] *See also*, Verizon, p. 46 (eliminate all remaining CETC high-cost support without delay) and p. 51 (eliminate any access replacement support to price cap and rate-of-return carriers on a common schedule); and Ad Hoc, pp. 11-38 (reduce/eliminate current high-cost support to ILECs, and eliminate identical support rule for CETCs).

[99] *See, e.g.*, comments of Sprint, p. 39; XO, p. 47; US Cellular, p. 12; Verizon, p. 62; American Cable Association, p. 24; Windstream, p. 21; T-Mobile, p. 6; CTIA, p. 22; Frontier, p. 22.

single carrier chosen to receive CAF support in a given market (assuming that the FCC decides to limit support to a single carrier); (2) excessive reliance upon speed standards to determine which carrier receives CAF and whether the carrier has met CAF performance standards; and (3) granting incumbent LECs a "right of first refusal" to receive CAF support.

A Commission decision to limit CAF support to a single service provider in a given market poses the real threat of foreclosing the development of competition in that market, since the CAF endows the chosen carrier with a significant and perhaps insurmountable financial advantage. As Public Knowledge and Benton Foundation have correctly observed, "the process of subsidizing only one provider per area will likely establish that winning provider as a local monopoly for at least the near future, discouraging potential entrants" (p. 12).

That said, Sprint recognizes that the CAF well is not bottomless, and that limits are necessary to keep the CAF at a sustainable size while maximizing the number of markets in which CAF support can be made available. To balance these considerations, if the Commission does adopt a "single supported carrier" approach, it should also impose wholesale requirements on that carrier. Requiring the supported carrier to provide backhaul (in the case of wireline carriers) and data roaming (in the case of wireless carriers) at forward-looking economic rates, collocation, and IP packet-based interconnection would help to encourage competition in markets in which entry by multiple service providers in competition with the subsidized carrier might otherwise be economically infeasible.[100] A carrier that does not wish to accept such wholesale obligations always has the option of declining to participate in the CAF.

AT&T has opposed a facilities-sharing obligation as "unnecessary" because "the vast majority of Americans will have access to several different voice-service providers, and all will have ac-

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[100] *See* comments of Sprint, p. 42; Public Knowledge and Benton Foundation, p. 12.

cess to mobile broadband service."[101] However, if CAF support is granted only in unserved areas, then by definition consumers in those areas do not have competitive broadband alternatives (and may lose voice-service alternatives as a result of single provider, *i.e.*, monopoly, support). If competition is ever to develop (and be sustained) in these areas, the CAF-supported carrier must be required to make the subsidized services and facilities available to other service providers at reasonable and economic rates, terms and conditions.

The second area of concern involves excessive emphasis on minimum speed standards. To help ensure that new broadband universal service funds promote competition or at least are competitively neutral, any minimum speed requirements adopted must reflect differences among different technologies. Conditioning receipt of CAF support on meeting bandwidth requirements that only wireline service providers can satisfy not only is anti-competitive; it also discounts other factors – such as mobility – that consumers often find to be of equal or greater importance.[102] Furthermore, rather than "fixat[ing] on throughput," the Commission should "acknowledge that there is a fundamental trade-off between the speed of broadband services and the number of people to whom those services can be cost-effectively deployed."[103] One might reasonably conclude that it is better to provide broadband service to more people, at a slightly lower speed, than to provide broadband to fewer people at a higher speed.

Sprint agrees that whatever CAF broadband speed or other performance standards are in place at the time the CAF support is awarded are the ones against which compliance should be measured. Any "revised broadband definitions should apply only prospectively, to new distributions" of

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[101] *See* AT&T Comments, p. 107.

[102] *See, e.g.*, comments of Sprint, p. 40; US Cellular, p. 43; CTIA, p. 33.

[103] AT&T Comments, p. 88.

CAF or advanced mobility fund support,[104] because it would be unreasonable to require supported carriers to meet new, higher standards based on the broadband support level originally provided.

Third, the Commission should reject calls to give incumbent LECs – indeed, any carrier or class of carrier – a right of first refusal for receipt of new broadband universal service support. Advocates of this policy assert that providing CAF support to the incumbent to upgrade its existing network in a given geographic area will be less costly than funding construction of a new broadband network.[105] While this may be true in some circumstances, it is hardly the most likely scenario – Sprint would not expect that carriers with no network facilities in or around a given area would be willing to construct an entirely new broadband network based upon receipt of limited CAF support (which, at least initially, may be limited to capital but not operating expenses). It is far more likely that potential CAF bidders will, like an incumbent LEC, have existing facilities in or near the area being bid upon. In such cases, it may very well be that these other carriers (*e.g.*, wireless service providers, cable companies, competitive LECs) would be an even more efficient broadband provider than the incumbent LEC. It makes no sense to foreclose these other carriers from even bidding for CAF support by giving the incumbent LEC a right of first refusal.

Granting incumbent LECs a right of first refusal is antithetical to the principle of competitive and technological neutrality. Such a right would remove the discipline of a competitive bidding process, eliminate the incumbent LECs' incentive to provide service efficiently since their support would be based on their "costs," and effectively preclude consumers from obtaining supported broadband services from providers that have platforms and technologies different from

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[104] *Id.*, p. 96.

[105] *See, e.g.*, comments of AT&T, p. 89; CenturyLink, p. 38.

those used by the incumbent LEC.[106] None of these outcomes is in the public interest. As the Commission recognized long ago, "It is for the marketplace, not this Commission, to determine which competitors will be 'winners' and 'losers'":

> It is the responsibility of this Commission to ensure that all carriers receive an equal opportunity to compete in that marketplace.[107]

VII. CONCLUSION.

Sprint applauds the Commission's stated intention to adopt comprehensive reforms to the existing intercarrier compensation and universal service mechanisms in the very near future. In order to promote competition, benefit consumers, promote broadband to all Americans, implement ICC rules which reflect cost-causation, and help ensure the viability of the universal service program, the Commission must take the following steps:

- Eliminate all implicit subsidies from intercarrier compensation rates;
- Adopt default interconnection rules for the exchange of packetized voice traffic;
- Transition expeditiously to a bill-and-keep regime; and
- Adopt pro-competitive USF reforms expeditiously, including phase-out of existing high-cost subsidies. Any new universal service support mechanisms must be carefully targeted, competitively neutral, and explicit.

The Commission must resist calls to avoid or drag out (through excessive transition periods, unwarranted "access replacement" mechanisms, or simple inaction) difficult rule changes.

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[106] *See, e.g.,* comments of Sprint, p. 41; CTIA, p. 24.

[107] *MTS/WATS Market Structure,* 102 F.C.C.2d 849, 860 (¶ 22) (1985). *See also Advanced Services Order,* 13 FCC Rcd 24011, 24014 (¶ 2) (1998) ("The role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand."); *Fourth Advanced Services Order,* 16 FCC Rcd 15435, 15438 (¶ 7) (2001) ("[I]n adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another. Rather, Congress set up a framework from which competition could develop, one that attempted to place incumbents and competitors on generally equal footing.").

The long-term health of the telecommunications industry and the competitiveness of the telecommunications market require rationalization of the ICC and USF mechanisms. The Commission has the legal authority and the record support to take the long-overdue actions described above, and should do so expeditiously.

Respectfully submitted,

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Appendix D

THE COMMISSION HAS AMPLE "ANCILLARY" AUTHORITY TO ADOPT SPRINT'S PROPOSED RULES FOR IP-TO-IP INTERCONNECTION

Docket Nos. 01-92 and 09-51

Sprint has proposed the adoption of several targeted, high-level rules to govern the exchange of broadband (or packetized) voice traffic between two IP networks. The Commission clearly possesses the authority to adopt these rules if packetized voice services are deemed to be telecommunications services and thereby subject to Title II of the Act. But as Sprint demonstrates below, if packetized voice services are instead classified as information services, the Commission still possesses the authority to adopt these rule proposals under its Title I "ancillary" authority.

I. THE CENTRAL QUESTION THE COMMISSION SHOULD ADDRESS AT THE OUTSET: WHETHER IN AN ALL-IP WORLD, PACKETIZED VOICE USERS SHOULD BE ABLE TO MAKE VOICE CALLS TO ALL PACKETIZED VOICE USERS?

AT&T and Verizon have taken the position that no interconnection rules are needed once packetized voice traffic can be exchanged between two IP networks. In contrast, Sprint has recommended that the Commission adopt several high-level rules to help ensure that (a) there is ubiquitous IP interconnection among competing packetized voice providers, and (b) the terms of such interconnection will be reasonable and efficient.

Which approach the Commission pursues will depend largely on its vision for voice services in an all-IP world. Specifically,

1. Does the FCC want packetized voice users to have the same capability that circuit-switched POTS customers have long enjoyed – namely, the ability to make voice calls to any consumer or business?, or

2. Is the FCC willing to accept an environment in which packetized voice users will be able to call only a subset of all other packetized voice users?

Sprint has demonstrated that wireline carriers will retain their bottleneck, terminating access monopoly even when they terminate packetized voice calls over their IP networks.[1] Sprint has further demonstrated that large incumbent LECs, because of their sheer size, also possess significant market power over interconnection with their IP networks.[2] Sprint believes that the rules it has proposed would effectively limit the ability of LECs to exercise their monopoly and market power – and thereby help ensure there will be ubiquitous interconnection among IP networks for the exchange of packetized voice traffic and that the terms of such interconnection will be reasonable and efficient.

A very different result would occur if the Commission instead adopts the "market only" position that AT&T and Verizon favor. In such an environment, an IP network operator, especially one possessing significant market power, would be free to refuse to interconnect altogether with all other competing packetized voice providers. And in such a "no rules" world, a competitor would have no recourse following a rejection of its interconnection request (other than perhaps file a private antitrust case against the IP network operator refusing to interconnect).

Alternatively, an IP network operator possessing market power could agree to interconnect but only on unreasonable terms. Smaller packetized voice providers would then face a Hobson's choice:

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1 *See* Sprint Reply Comments at 11-14.

2 *See id.* at 14-16.

1. Reject the unreasonable terms, even though this would have the effect of precluding the smaller carrier's customers from calling the customers of the larger carrier; or
2. "Agree" to the terms the large operator demands (because a smaller operator needs interconnection more than the larger operator) but then face higher costs that render their voice service less price competitive than the packetized voice services offered the larger provider.[3]

Either way, meaningful and robust competition in the packetized voice market – and potentially in the larger broadband Internet access market – would be harmed.

Simply put, the "no rules" position espoused by AT&T and Verizon would give these two behemoths the ability to dictate unilaterally the future of the packetized voice market, and their exercise of this market power could have enormous negative impacts on the availability of ubiquitous voice coverage and the future of competition in the voice market.

II. THE FCC POSSESSES SUBJECT MATTER JURISDICTION TO ADOPT RULES GOVERNING THE EXCHANGE OF PACKETIZED VOICE TRAFFIC

Courts have established a two-part test for determining whether the FCC may adopt rules concerning information services such as packetized voice traffic: "(1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject, and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast* v. *FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

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[3] AT&T and Verizon might contend that smaller network operators have a third alternative – namely, send traffic to their customers "over the top" in which case new Rule 8.5 would preclude them from blocking the voice traffic. Sprint notes, however, that at least Verizon has indicated its intent to appeal these new Open Internet rules. But even assuming the rules are affirmed on appeal, there is no reason to give AT&T and Verizon the right to dictate the type of voice services that smaller network operators must offer their own customers – whether a best efforts "over the top" service, or a facilities-based specialized voice service.

Packetized voice traffic certainly qualifies as "interstate and foreign communications by wire or radio" within the scope of § 2(a) of the Act. Because Title I covers the subject of packetized voice traffic, the FCC unquestionably possesses subject matter jurisdiction to adopt rules governing the exchange of packetized voice traffic between two IP networks.[4] The rest of this legal analysis addresses whether Sprint's proposed packetized voice interconnection rules satisfy the second requirement for invoking ancillary authority.

III. THE RULES SPRINT PROPOSES ARE REASONABLY ANCILLARY TO THE FCC'S EFFECTIVE PERFORMANCE OF ITS STATUTORILY MANDATED RESPONSIBILITIES

Section 4(i) of the Act empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." Courts have held that in order to exercise its authority under this statute, any rules the FCC adopts must be "reasonably ancillary to [its] effective performance of its statutorily mandated responsibilities."[5] Specifically, new rules must be "incidental to, and contingent upon, *specifically delegated powers under the Act*."[6] The few interconnection and ICC rules that Sprint recommends the Commission adopt for packetized voice meet this standard.

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4 *See Open Internet Order*, 25 FCC Rcd 17905, 17967 ¶ 115 (2010)("Broadband Internet access services are clearly within the Commission's subject matter jurisdiction" under § 2(a) of the Act). *See also Comcast* v. *FCC*, 600 F.3d at 646-47 ("Comcast concedes that the Commission's action here satisfied the first requirement because the company's Internet service qualifies as 'interstate and foreign communications by wire' within the meaning of Title I of the Communications Act.").

5 *Comcast*, 600 F.3d at 646, *quoting American Library Ass'n* v. *FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

6 *Comcast*, 600 F.3d at 653 (italics in original), *quoting NARUC* v. *FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

The rules Sprint proposes fall into three general categories, and all of these rule proposals are incidental to, and would affirmatively promote, specifically delegated powers under §§ 251-52 – provisions that are the "heart" of the Act.[7]

A. Inter-Network Interconnection. Competition in voice services cannot exist unless network operators interconnect with each other. Congress recognized this point relative to circuit switched-based Plain Old Telephone Service ("POTS") in § 251(a)(1) of the Act, which imposes on "each" telecommunications carrier the "duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." By imposing this interconnection duty on every telecommunications carrier and by including a right to interconnect indirectly, Congress guaranteed that all POTS users will be able to call all other POTS users.

Packetized voice competes with, and eventually will replace, POTS service. Sprint therefore proposes several rules regarding the interconnection of IP networks to ensure that all packetized voice users, like POTS users, will also be able to call all other voice subscribers, regardless of the technology used by the terminating network operator. These interconnection requirements would preclude LECs in particular from exercising their terminating access monopoly by refusing to interconnect with competing packetized voice providers.

B. Intercarrier Compensation. Congress, recognizing that LECs possess a terminating access monopoly, imposed in § 251(b)(5) a duty on "each" LEC to establish "reciprocal" compensation arrangements for the exchange of telecommunications with other networks. Further recognizing that incumbent LECs in particular possess

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[7] *See Advanced Services Order,* 13 FCC Rcd 24011, 24014 ¶ 3 (1998). *See also id.* at 24023 ¶ 21 (FCC describes § 251 as the "core of the Act's market-opening provisions").

significant market power, Congress in § 252(d)(2) capped the amount of compensation that these incumbents can receive to their "additional costs" of call termination.

The per-minute, calling-party's-network-pays ("CPNP") regime that historically been used for the exchange of POTS traffic is not workable for the exchange of packetized voice traffic between two IP networks.[8] Accordingly, Sprint has proposed using a bill-and-keep reciprocal compensation arrangement for the exchange of all packetized voice traffic, an arrangement that the additional benefit of addressing more effectively the terminating monopoly problem with voice traffic.[9]

C. Dispute Resolution. Congress made two things clear in § 252: (a) no one party should be able to set unilaterally the terms of interconnection (*e.g.*, invoke the tariff process), and interconnection arrangements should instead be negotiated in good faith; and (b) a dispute resolution procedure is necessary when two parties cannot agree, with Congress determining that this procedure was necessary for disputes involving incumbent LECs only.

Sprint has proposed several rules applicable to packetized voice providers that are similar in purpose and function to those Congress adopted relative to telecommunications carriers. Among other things, it has proposed that the FCC require IP network operators providing retail broadband services to negotiate in good faith after receiving a *bona fide* request for packetized voice interconnection. Sprint further proposes that the FCC

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[8] National Broadband Plan at 142 ("The current ICC system is not sustainable in an all-broadband Internet Protocol (IP) world where payments for the exchange of IP traffic are not based on per-minute charges, but instead typically are based on charges for the amount of bandwidth consumed per month.").

[9] *See* Sprint Comments at 21 and Appendix B.

establish procedures to resolve disputes over the terms of interconnection when two parties are unable to resolve them in their negotiations.

Sprint notes that even before the 1996 Act, the FCC required LECs to negotiate in good faith with wireless carriers concerning interconnection, further preempting States over this interconnection and good faith negotiation requirements.[10] Sprint further notes that the Supreme Court, in a comparable setting (the early days of cable TV), affirmed the FCC's exercise of its ancillary authority to establish procedures for "requests for special relief and of 'complaints or disputes.'"[11]

Courts have further held that in its exercise of ancillary authority, the Commission may also refer to other provisions in the Act, including statements of policy, because such statements can "help delineate the contours of statutory authority."[12] Moreover, the Supreme Court has held that the FCC may impose on firms previously unregulated requirements that "affirmatively . . . further statutory policies":

> [W]e agree with the Commission that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends to requiring CATV affirmatively to further statutory policies."[13]

The rules Sprint proposes would further several different statutory policies, including:

- In the Preamble to the 1996 Act, Congress stated that its purpose was to "open[] all telecommunications markets to competition."[14]

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10 *See Cellular/LEC Interconnection Order*, 2 FCC Rcd 2910, 2912 ¶ 17, 2912-13 ¶¶ 21-22, 2916 ¶¶ 54-56 (1987), *aff'd*, 4 FCC Rcd 2369 (1989).

11 *See United States* v. *Southwestern Cable*, 392 U.S. 157, 178-80 (1968).

12 *Comcast*, 600 F.3d at 654.

13 *United States* v. *Midwest Video*, 406 U.S. 649, 644 (1972).

14 Preamble to the 1996 Act, Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 56 (1996).

The FCC has held that "pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services."[15] The rules Sprint has proposed would preserve and promote competition in the provision of packetized voice services.

- Section 1 of the Act states that the FCC was established to make available "to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." The rules Sprint proposes would promote all of these statutory objectives.
- Section 201(b) provides that "[a]ll charges, practices, classification, and regulations for or in connection with such [common carrier] service, shall be just and reasonable." The rules Sprint proposes for packetized voice providers would help ensure that their charges and practices relative to packetized voice interconnection are just and reasonable.
- Section 230(b) provides that it is "the policy of the United States (1) to promote the continued development of the Internet." Packetized voice is a core Internet application, and Sprint's proposed rules would accelerate the availability of packetized voice services to all Americans, which will incent more people to subscribe to broadband Internet access services.
- Section 254(b)(2) directs the FCC to design a universal service program that, among other things, makes "[a]ccess to advanced telecommunications services" available "in all regions of the Nation." Sprint's proposed rules would help the Commission achieve this objective.
- Congress enacted § 256 to "ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks." In § 256(b)(1), Congress directed the FCC to "establish procedures for . . . oversight of coordinated network planning . . . for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service." The rules Sprint proposals would help the FCC achieve these objectives.

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[15] *Advanced Services Order*, 13 FCC Rcd 24011, 24018 ¶ 11 (1998). In fact, before the FCC classified DSL services as an information service, the FCC had held that "incumbent LECs are subject to the interconnection obligations of sections 251(a) and 251(c)(2) with respect to . . . [their] packet-switched networks." *Ibid.*

- Section 706 of the 1996 Act provides that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[16] The rules Sprint proposed for packetized voice, one type of advanced service capability,[17] would help the FCC achieve these objectives.

In summary, the exercise of ancillary authority that Sprint recommends in its proposed rules clearly is incident to, and would affirmatively promote, specifically delegated powers under §§ 251-52 of the Act and would further affirmatively promote other statutory statements of policy as well.

IV. Section 706 Could Provide an Independent Source of Regulatory Authority Over Broadband – If the FCC Squarely Addresses the D.C. Circuit's Concerns

One year ago, the D.C. Circuit vacated the FCC's 2008 *Comcast Network Management Practices Order*.[18] While the Court noted that § 706 could "at least arguably be read to delegate authority to the Commission,"[19] it nonetheless vacated the *Order* because it read certain statements in an order issued a decade earlier as holding that § 706 does "not constitute an independent grant of authority":

> Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies "may not . . . depart from a prior policy *sub silentio*," the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.[20]

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16 47 U.S.C. § 1302(a).

17 *See id.* at § 1302(d)(1).

18 *See Comcast* v. *FCC*, 600 F.3d 642 (D.C. Cir. 2010), *vacating Comcast Network Management Practices Order*, 23 FCC Rcd 13028 (2008).

19 *Comcast*, 600 F.3d at 658. *See also Ad Hoc Telecom Users Committee* v. *FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009)("The general and generous phrasing of § 706 means that the FCC possesses significant, *albeit* not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.").

20 *Comcast*, 600 F.3d at 658-59 (supporting citations omitted).

The question the Commission was asked to address in its *Advanced Services Order,* 12 FCC Rcd 24011 (1998) was narrow. Section 10 of the Act prescribes the standards the FCC must apply in responding to a petition for forbearance from other provisions in the Act, but this statute does not permit the FCC to forbear from §§ 251(c) and 271 "until it determines that those requirements have been fully implemented" (§ 160(d)). The RBOCs sought to be relieved of their §§ 251(c) and 271 obligations relative to their advanced services (without their full compliance with those statutes) and claimed that § 706 "constitutes an independent grant of forbearance authority" that trumps the limitations on forbearance contained in § 10.[21]

The Commission rejected this RBOC argument by applying the settled canon of statutory construction that a "specific provision . . . controls one[] of more general application."[22] Thus, in this *Order*, the Commission addressed the specific question posed to it: does the substantive authority in § 706 include the authority to ignore explicit limitations Congress imposed in the § 10 forbearance statute, when the two provisions were enacted at the same time? The Commission did not address (because it was not asked to) the question whether § 706 gives the FCC substantive authority to adopt implementing rules when the rules do not conflict with other provisions in the Act.

Two FCC statements in the *Advanced Services Order* concerned the D.C. Circuit. The Court first stated with regard to that *Order*, quoting from paragraph 77: "the Commission ruled that section 706 'does not constitute an independent grant of

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[21] *Advanced Services Order*, 13 FCC Rcd at 24044 ¶ 68.

[22] *Bloate* v. *United States*, 130 S. Ct. 1345, 1354 (2010).

authority.'"[23] But as the context of that sentence makes apparent, the Commission was referring specifically to its forbearance authority under that statute, as evidenced by the very next sentence:

> Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services. Under section 10(d), we may not use that authority to forbear from applying the requirements of sections 251(c) and 271 prior to their full implementation.[24]

When the General Counsel's Office pointed out this limitation, the Court responded by quoting paragraph 69 of the 1998 *Order*: "But the order itself says otherwise" – "[S]ection 706 does not constitute an independent grant of forbearance authority *or of authority to employing other regulating methods*."[25] To the extent the italicized clause can be read to refer to § 706 authority other than forbearance authority broader than that contained in the forbearance statute (the only issue then before the FCC), this clause is at most unfortunate *dicta*.

Sprint agrees with the Commission that its *Advanced Services Order* is "consistent with our present understanding that Section 706(a) authorizes" it to "take actions . . . that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision."[26] Sprint further believes that in its recent *Open*

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23 *Comcast*, 600 F.3d at 658.

24 *Advanced Services Order*, 13 FCC Rcd at 24047-48 ¶ 77. *See also id.* at 24043 ¶ 68 ("Petitioners contend that section 706(a) constitutes an independent grant of forbearance authority that encompasses the ability to forbear from sections 251(c) and 271."); *id.* at ¶ 24044 ¶ 69 (§ 706(a) does "not constitute an independent grant of forbearance authority"); *id.* at 24045 ¶ 70 ("independent grant of forbearance authority"); *id.* at ¶ 71 (same); 24046 ¶ 75 (same); *id.* at 24027 n. 151 (same).

25 *Comcast*, 600 F.3d at 659.

26 *Open Internet Order*, 25 FCC Rcd at 17969 ¶ 119.

Internet Order, the Commission made a powerful case that § 706 does, in fact, grant it substantive authority to adopt implementing rules regarding the broadband industry.[27]

Nevertheless, to eliminate any possible uncertainty and so as to ensure the FCC's ability to rely on § 706 in the future, Sprint recommends that the Commission explicitly declare that (a) it did not in its *Advanced Services Order* hold that § 706 does not constitute an independent grant of substantive authority over broadband networks and services, and (b) to the extent that any part of that *Order* might be read as taking that position, those statements are explicitly overruled.

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[27] *See Open Internet Order*, 25 FCC Rcd 17905, 17968-72 ¶¶ 117-23 (2010).

Appendix E

RESPONSE TO THE JOINT BOARD – STATE MEMBERS' LEGAL ANALYSIS
CC Docket No 01-92

Sprint demonstrated in its comments that Congress has delegated to the Commission the legal authority to reform intercarrier compensation ("ICC") for all traffic – including intrastate access charges (*see* Comments, Appendix A). The State Members of the Joint Board ("State Members") do not challenge in their later filed comments any of Sprint's legal analysis. They nonetheless contend that the FCC "lacks legal authority to mandate rate changes to intrastate telecommunications rates" (p. vii). The analysis below demonstrates that the State Members are mistaken in their interpretation of federal law.

A. The Structure of the 1996 Act. The State Members, citing § 2(b) of the Act, contend at the outset that the "structure of the 1996 Act preserved existing State authority over the rates charged for intrastate access:

> There was no *quid pro quo* in the Act by which the States gave up their existing authority to set the rates for intrastate services, including access (p. 143).

But as Sprint has earlier demonstrated (*see* p. A.3), the Supreme Court has already squarely rejected this State argument based on § 2(b). That Court further noted that the 1996 Act "fundamentally restructure[d] local telephone markets" and that Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States" (*see* p. A.3).

B. The State Members Appear to Agree that Intrastate Access Traffic Falls Within the Scope of the Reciprocal Compensation Statute. The State Members acknowledge that Section 251(b)(5) "obligates" LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications" (p. 143). Sprint assumes the State Members would

agree that intrastate access service falls within the statutory term, "telecommunications" (*see* p. A.4). Thus, as the FCC has already recognized, but for § 251(g) intrastate access services would be subject to reciprocal compensation under § 251(b)(5) (*see* p. A.5).

C. The FCC's § 251(g) Authority. Sprint agrees with the State Members that the § 251(g) exception to the reciprocal compensation statute was "intended to maintain the pre TA-96 *status quo* regarding . . . existing intercarrier compensation rates" (p. 143), relative to LEC access services that existed in 1996. The State Members do not challenge the fact that Congress in § 251(g) explicitly gave to the FCC – and not to the FCC for interstate access and the States for intrastate access – the authority to determine when this access charge exception should end (*see* Sprint Appendix A, pp. A.6-A.7). The State Members nonetheless contend that this FCC § 251(g) authority "has expired" because the FCC has "failed to exercise it for fifteen years," with the result that "the Commission has allowed that authority to lapse" (p. 144).

Congress did state unequivocally that the period of the § 251(g) access charge exception was to be "interim" only,[1] and the FCC has similarly recognized this exception was to be "temporary" only (*see NPRM* ¶ 514). Obviously, the passage of 15 years is neither "interim" nor "temporary." Sprint cannot, however, agree that as a result of the FCC's "failure to act" over the past 15 years, this § 251(g) authority somehow shifts to the States, so each State can then determine whether and when continued use of above-cost intrastate access charges must end.

Congress enacted the 1996 Act, including § 251, to provide for "a pro-competitive, de-regulatory ***national policy framework*** to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[2]

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1 *See* H.R. CONF. REP. NO. 104-458, at 123 (Jan. 31, 1996).

2 *Id.* at 1 and 113 (emphasis added).

Giving each State the authority to determine whether and when the access charge exception to reciprocal compensation should end would not result in the "national policy framework" that Congress wanted to establish.

D. The § 252 State Arbitration Process. The State Members contend that bill-and-keep involves a rate prescription of zero and that as a result, an FCC order requiring use of bill-and-keep would be "contrary" to the arbitration process set forth in § 252, where Congress established a procedure whereby "State commissions, not the FCC, [are] to arbitrate the rate" (p. 144). Sprint respectfully disagrees with this position for several reasons.

First, the Supreme Court has affirmed the FCC's authority to adopt national rules implementing §§ 251-252, including rules that States must follow in their § 252 arbitrations.[3] That Court has also specifically affirmed FCC rules requiring use of a "forward-looking" cost methodology in setting reciprocal compensation rates.[4] Thus, even if bill-and-keep is deemed to be a rate prescription of zero (and it is not, as discussed below), the FCC could still determine, as the Wireline Bureau has already found,[5] that LECs no longer incur any "additional costs" in call termination and that as a result, all LEC rates for reciprocal compensation must be set at zero. After all, federal courts have held that if a LEC incurs no additional costs in call termination, "then there is nothing to pay" under the Act.[6]

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[3] *See AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999).

[4] *See Verizon* v. *FCC*, 535 U.S. 467 (2002).

[5] *See* Sprint Comments, Appendix B at B.6, n.41, *citing Virginia Arbitration Cost Order*, 18 FCC Rcd 17722, 17877 ¶ 391, 17903-04 ¶ 463-65, 17911-13 ¶¶ 484-89 (2003); *Virginia Arbitration Cost Compliance Order*, 19 FCC Rcd 1259, 1269 ¶ 30 (2004).

[6] *Ace Telephone* v. *Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2005).

Moreover, as Sprint has earlier explained, bill-and-keep is not a rate, but is rather a methodology for the mutual recovery of termination costs that is different from the calling-party's-network-pays ("CPNP") methodology:

> With bill-and-keep, the terminating carrier, instead of recovering its "additional costs" from its competitors, recovers any such costs from its own end users (and where appropriate, universal service). Congress made clear in its bill-and-keep savings clause that bill-and-keep is an arrangement that also "afford[s] the mutual recovery of costs through the offsetting of reciprocal obligations" (Comments, Appendix B, pp. B.6-B.7).

"If, as the Supreme Court has held, the Commission is empowered to adopt rules requiring use of a CPNP reciprocal compensation methodology, it necessarily follows that the Commission also possesses the authority to require use of a different methodology, such as bill-and-keep" (*id.*, p. B.7).

Finally, it bears noting that the arbitration authority Congress has delegated to State commissions is limited to disputes between "an incumbent local exchange carrier" and another "telecommunications carrier or carriers." 47 U.S.C. § 252(a)(1). Thus, State commissions do not possess the authority to arbitrate a dispute between two telecommunications carriers if neither of them is an incumbent LEC. Nor can State commissions arbitrate disputes between two information service providers or between an information service provider and a telecommunications carrier. Thus, for example, if VoIP is deemed to be an information service, State commissions would not possess the delegated authority to arbitrate interconnection disputes involving VoIP providers.

E. <u>The State Members Misconstrue § 251(d)(3)</u>. The State Members contend that the FCC's modification or elimination of intrastate access charges would "violate subsection 251(d)(3)" (p. 144). This statute is a savings clause that preserves State authority to "establish access and interconnection obligations of local exchange carriers," but only to the extent that

such obligations are "consistent with the requirements of this section" 251 and do "not substantially prevent implementation of the requirements of this section and the purposes of this" Act. According to the State Members, "None of [these § 251(d)(3)] exceptions apply to intrastate access rates, and the Commission therefore cannot preempt those rates" (p. 144). Sprint must respectfully disagree.

As discussed above, Congress in § 251(g) has given the FCC exclusive authority to determine when the access charge exemption should be removed so such traffic is instead subject to reciprocal compensation. Thus, the FCC unquestionably possesses the statutory authority to eliminate access charges, including intrastate access charges. Indeed, the FCC has already exercised this § 251(g) authority in explicitly prohibiting LECs from imposing access charges on intraMTA mobile-to-land traffic.[7]

The question under the § 251(d)(3) savings clause is rather whether, once the FCC exercises its explicit § 251(g) authority, a State commission could then enter an order directing LECs in the State to re-file their access charges – that is, effectively nullify the action that the FCC has determined serves the public interest. Such a State commission decision would not fall within the limited authority Congress gave to the States, because such a State order would "substantially prevent implementation of the requirements" of § 251 "and the purposes of" the Act.[8]

As noted above, Congress has directed the FCC to establish a "national policy framework to accelerate rapidly private sector deployment of advanced telecommunications and information

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[7] *See Local Competition Order*, 11 FCC Rcd 15499, 16016 (¶ 1043) (1996). The FCC has not established an explicit rule requiring the payment of access charges on interMTA traffic.

[8] In addition, the State authority preserved in § 251(d)(3) is limited to obligations imposed on "local exchange carriers" only. This statute does not permit PUCs to impose obligations on non-LECs (*e.g.*, require wireless carriers to pay LEC access charges when the FCC has determined there is no such obligation in federal law).

technologies and services." Any State action that attempts to undo steps the FCC has taken to develop a national policy framework obviously would substantially prevent implementation of both § 251 and the purposes of the Act -- and thus fall outside of the § 251(d)(3) savings clause.[9]

F. The State Members Misconstrue § 332. The State Members finally contend that "Subdivision 332(c)(3) gives the Commission authority only over 'rates charged' by commercial mobile service providers" (p. 145). In fact, this statute does not give the FCC any authority over wireless carriers. Rather, in § 332(c)(3) Congress took away all State authority over the "rates charged by" wireless carriers:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service.[10]

FCC authority over wireless carriers rather stems from (a) § 2(a) of the Act, which gives the FCC exclusive authority over all interstate and international services, and (b) the decision by Congress in the 1993 Budget Act to exempt wireless services from the limitations that § 2(b) historically imposed on FCC authority over intrastate services.[11] As Sprint has earlier explained,

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[9] *See, e.g., BellSouth DSL Order*, 20 FCC Rcd 6830 ¶ 1 (2005)(FCC preempts PUC orders and rejects PUCs' § 251(d)(3) defense because their orders requiring an ILEC to provide DSL service to CLECs are "inconsistent with and substantially prevent the implementation of the Act and the Commission's federal unbundling rules and policies."); *Verizon* v. *Strand*, 367 F.3d 577, 587 (6th Cir. 2004)(Court vacates a PUC order authorizing a LEC file a State tariff that sets unilaterally the terms the terms of § 251(b)(5) traffic. In so ruling, the court rejected the PUC's § 251(d)(3) defense because its tariff order was "inconsistent with the negotiation and arbitration procedures of the Act."); *Illinois Bell* v. *Box*, 548 F.3d 607, 611 (7th Cir. 2008)(Court rejects PUC's § 251(d)(3) defense because the obligations it imposed under State law (provide certain UNEs that the FCC had determined need not be provided) are "inconsistent with the requirements of section 251 and do prevent their implementation.").

[10] 47 U.S.C. § 332(c)(3)(A). This federal preemption over the rates charged by wireless carriers includes "any state regulation of CMRS interconnection rates." *CMRS Interconnection Obligations*, 9 FCC Rcd 5408, 5458-59 ¶ 143 (1994).

[11] Since 1993, § 2(b) has provided: "*Except as provided in . . . section 332 of this title* . . . , nothing in this chapter shall be constructed to apply or to give the Commission jurisdiction with respect to . . . intrastate services." 47 U.S.C. § 152(b)(italics added).

in the 1993 Act "Congress expanded FCC authority over wireless to include not only interstate wireless traffic but also intrastate wireless traffic":

> As a result, the FCC and the States now share regulatory authority over intrastate wireless, while the FCC continues to possess exclusive authority over interstate wireless services (Comments, Appendix A, p. A.8).

Congress gave the FCC plenary authority over wireless services so it "could establish a Federal regulatory framework to govern the offering of all commercial mobile services" (*id.* p. A.8, n.29).

In addition, § 332(c)(1)(B) gives the FCC explicit authority to "order a common carrier" (which includes LECs) to interconnect with wireless carriers "pursuant to the provisions of section 201." Section 201(a) authorizes the Commission to establish not only interconnection with LECs, but also the "charges applicable" to such interconnection. As one federal appellate court has held with regard to § 332(c)(1)(B):

> Absent agreement, wireless providers may petition the FCC for an order requiring interconnection with another carrier; the carrier must then establish just and reasonable charges.[12]

Consequently, the Commission has explicit statutory authority to establish the "charges" LECs impose on wireless carriers for call termination. And since 1993, when Congress expanded FCC authority to include intrastate wireless services, this FCC authority includes the jurisdiction to determine the rates that LECs may charge for terminating intrastate calls that originate on wireless networks.

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12 *Union Telephone* v. *Qwest*, 495 F.3d 1187, 1194 (10th Cir. 2007).