BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CENTURYTEL OF MISSOURI, LLC d/b/a CENTURYLINK AND SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYLINK	)	
Complainant,	)	**File No. TC-2014-0263**
v.	)	
SPRINT COMMUNICATIONS COMPANY, LP	)	
Respondent.	)	

SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO DISMISS CENTURYLINK'S COMPLAINT FOR FAILURE TO STATE A CLAIM AND MEMORANDUM IN SUPPORT

INTRODUCTION

COMES NOW Respondent Sprint Communications Company L.P. ("Sprint"), pursuant to Commission Rule 4 CSR 240-2.070(7), and for its Motion to Dismiss for Failure to State a Claim for Which Relief May Be Granted, and states as follows:

1. The Commission should dismiss CenturyLink's Complaint for failure to state a claim on which relief may be granted. CenturyLink's claims are already pending in a case that CenturyLink filed in the federal district court for the Western District of Louisiana ("Louisiana Federal Court"). That Court took exclusive jurisdiction over the claims and referred the case to the Federal Communications Commission ("FCC"), which is now considering a threshold question of federal law: is all VoIP traffic jurisdictionally interstate, such that state access charges cannot apply? The first-filed rule, as well as principles of comity and judicial economy, require the Commission to dismiss the Complaint. The Commission should also dismiss the

Complaint because it does not have the statutory authority to award damages as CenturyLink demands.

BACKGROUND

A. CenturyLink's Louisiana Complaint

2. CenturyLink selected Louisiana Federal Court as the most appropriate forum in which to litigate its billing disputes with Sprint. CenturyLink's November 23, 2009 Complaint asserts four claims: Violation of Federal Access Tariffs (Count I), Violation of Section 251(g) of the Communications Act (Count II), Violation of Section 201 of the Communications Act (Count III), and Violation of State Access Tariffs (Count IV) ("State Access Tariff Claims"). Affidavit of Philip R. Schenkenberg ("Schenkenberg Aff.") Ex. 1 ("Louisiana Complaint"), ¶¶ 52-78. In Count IV, CenturyLink seeks to enforce state access tariffs filed in more than 25 states, one of which is Missouri. *Id.* ¶ 3 and Exhibit A.

3. CenturyLink's Louisiana Complaint alleges, among other things, that resolving its dispute with Sprint, including its State Access Tariff Claims, "does not require the interpretation of any statutes, regulations, or rates by ... any 'state commission' as that term is defined in 47 U.S.C. § 153(41)," that "[n]o single 'State commission' has jurisdiction over all state tariffs and the parties thereto," that "[t]he CenturyLink Plaintiffs' damage claims arise out of the same action by Sprint in refusing to pay the applicable charges under the Access Tariffs" and, "[a]s a result, judicial economy is served and the resources of the parties are conserved by having this collection action resolved in one forum." Louisiana Complaint, ¶¶ 37-39. As such, CenturyLink invoked the Court's supplemental jurisdiction to adjudicate the State Access Tariff Claims along with CenturyLink's federal law claims. Louisiana Complaint, ¶¶ 40-42. The Court accepted jurisdiction.

B. CenturyLink's Claims are Now Before the FCC

4. On January 13, 2010, Sprint moved to dismiss CenturyLink's Count II and requested that the Louisiana Federal Court refer the remaining claims to the FCC. Schenkenberg Aff. Ex. 2 (ECF No. 11). On January 25, 2011, the Louisiana Federal Court granted Sprint's motion. Schenkenberg Aff. Ex. 3 (ECF No. 36) p. 3. Subsequently, Sprint filed a Petition for Declaratory Ruling with the FCC as to all remaining counts, including the State Access Tariff Claims ("FCC Petition"). Schenkenberg Aff. Ex. 4. The FCC Petition remains pending.

5. On March 14, 2014, CenturyLink moved to lift the stay and announced its plan to voluntarily dismiss its State Access Tariff Claims and re-assert Count IV in multiple "state forums." Schenkenberg Aff. Ex. 5 (ECF No. 38) p. 1. Sprint opposed CenturyLink's motion because CenturyLink's attempted voluntary dismissal is procedurally improper under the federal rules, the FCC is currently considering the State Access Tariff Claims along with CenturyLink's other claims, and duplicative litigation would prejudice Sprint. Schenkenberg Aff. Ex. 6 (ECF No. 41). CenturyLink's motion is under advisement.

C. CenturyLink's Missouri Complaint

6. Despite the fact that CenturyLink's motion remains pending before the Louisiana Federal Court, CenturyLink filed this action (the "Missouri Complaint") on March 28, 2014. This is the first of CenturyLink's promised multiple state filings. CenturyLink acknowledges that the claims it asserts here are duplicative of those in its State Access Tariff Claims currently pending in Louisiana. Missouri Complaint, ¶ 21. Like in the Louisiana Complaint, CenturyLink seeks an order that Sprint must pay intrastate access charges for intrastate Voice over Internet Protocol ("VoIP") calls originated by cable companies, and that Sprint improperly withheld payment of charges for TDM calls in order to recoup amounts it had previously paid for VoIP calls. Missouri Complaint, ¶ 7.

D. History of VoIP before the Commission

7. The legal issues surrounding the treatment of VoIP traffic have been before the Commission for a number of years. In 2004, when VoIP calling plans were less ubiquitous than they are now, the Commission opened a docket to study VoIP. Case No. TW-2004-0324, Order Establishing Case, p. 3 (Feb. 3, 2004). The Commission held an open workshop on May 3, 2004, and various industry representatives provided comments and recommendations. *See* Case No. TW-2004-0324, May 3, 2004 Transcript. The Commission contemplated that this study would enable it to work better with the FCC on complicated legal and technical issues that would become more important over time. Case No. TW-2004-0324, Order Establishing Case, p. 2 (Feb. 3, 2004).

8. The Commission was called on to address the treatment of VoIP shortly thereafter in an arbitration between Southwestern Bell and a group of CLECs in File TO-2005-0336. In light of the FCC decisions to date, the Commission ordered that all VoIP traffic was subject to reciprocal compensation instead of access charges. *Sw. Bell Tel. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1079 (E.D. Mo. 2006). On appeal, the federal district court confirmed the Commission's conclusion:

> The Court concludes that the MPSC's decision subjecting IP-PSTN traffic to reciprocal compensation is consistent with the Act and the FCC's rules, and is not arbitrary or capricious. The decision is consistent with the FCC's orders because (1) federal law does not exempt IP-PSTN traffic from reciprocal compensation obligations, and (2) federal access charges are inapplicable to IP-PSTN traffic because such traffic is an "information service" or an "enhanced service" to which access charges do not apply.

Id.

9. Following this ruling, the Missouri Legislature enacted Section 392.550.2 RSMo, which provides that Interconnection VoIP traffic shall be subject to appropriate exchange "access

charges to the same extent that telecommunications services are subject to such charges." The Commission applied that statute in a subsequent arbitration, finding the fixed VoIP traffic at issue to be subject to access charges. *In re Sw. Bell Tel. Co.* No. IO-2011-0057, at 18 (Dec. 15, 2010). Though the Commission applied the statute for fixed Interconnected VoIP traffic, it also recognized that it lacks the authority to rule whether access charges apply for nomadic VoIP traffic. *Id.* at 17-18. Furthermore, the Commission stated it did not have the authority to hold that Section 392.550.2 RSMo is preempted by federal law. *Id.* at 10 (Commission has "no authority to declare the Missouri statute invalid..."). This preemption issue is at the heart of the dispute between Sprint and CenturyLink as the Louisiana Federal Court has already decided that it has jurisdiction to consider the state law tariff claims that are the subject of CenturyLink's Missouri Complaint and referred the issue to the FCC for determination.

ARGUMENT

10. The Commission should dismiss the Complaint because the Louisiana Federal Court has exclusive jurisdiction over CenturyLink's claims. The Louisiana Complaint was filed first by CenturyLink, and includes the exact claims CenturyLink now seeks to pursue here. The claims turn on issues of federal law, best addressed by a Federal Court and/or the FCC. Moreover, the Louisiana Federal Court is best-situated to afford complete relief among the parties as to all claims and defenses – both state and federal – arising from this controversy.

11. Moreover, the Commission lacks jurisdiction and authority to resolve a billing dispute and order payment. In this dispute Sprint is an interexchange carrier ("IXC") and CenturyLink is an ILEC suing for recovery of access charges. Prior to the enactment of Section 392.550.4(5) RSMo, this Commission did not have the authority to award monetary damages. Nothing in Section 392.550.4(5) RSMo has changed the Commission's authority as to Sprint when Sprint is acting as an IXC.

I. PRINCIPLES OF ABATEMENT AND COMITY COMPEL DISMISSAL OR STAY

12. The Commission should dismiss CenturyLink's Complaint for failure to state a claim because the Louisiana Federal Court has exclusive jurisdiction over CenturyLink's claims. CenturyLink not only wants two bites at the apple, it wants two bites in different places, at the same time. This violates established legal principles that require disputes to be decided where they are filed first, and not in multiple places at the same time.

A. The First-Filed Rule Directs the Commission to Dismiss the Complaint

13. "[I]t is settled in Missouri that where two actions involving the same subject matter between the same parties are brought in courts of concurrent jurisdiction, the court in which service of process is first obtained acquires exclusive jurisdiction and may dispose of the entire controversy without interference from the other." *State ex rel. Gen. Dynamics Corp. v. Luten*, 566 S.W.2d 452, 458 (Mo. 1978). Typically, this rule prevents a party sued in one place from turning around and starting a second suit elsewhere. Simply put, the rule is meant to protect the plaintiff's first choice of forum. "The law is well settled that the jurisdiction of a court first invoked cannot be defeated by a subsequent proceeding in a court having concurrent jurisdiction of the person or subject matter." *Id.* (internal quotations omitted). The principle "is given broad application in cases filed in the courts of [Missouri]." *Id.*

14. The first-filed rule applies here. CenturyLink first filed its lawsuit in the Louisiana Federal Court. Now, after the parties have adjudicated (and disposed of) the merits of one claim and are awaiting guidance from the FCC on the remaining three, it has changed its mind and wants to proceed before the Commission and dozens of other state commissions. And, unlike the typical situation, CenturyLink hopes to defeat its own first filed venue. The

Commission should apply the first-filed rule, dismiss this case, and allow CenturyLink's first-filed Louisiana suit to proceed.

B. The Doctrine of Abatement Directs the Commission to Dismiss the Missouri Complaint

1. A Second-Filed Suit Presenting the Same Issues Should Be Dismissed

15. CenturyLink admits that the claims it alleges here are already pending before the Louisiana Federal Court. Missouri Complaint, ¶ 21. CenturyLink's attempt to have the Commission adjudicate these claims is barred by the doctrine of abatement.

16. The doctrine of abatement, "also known as the 'pending action doctrine,'" directs "that where a claim involves the same subject matter and parties as a previously filed action so that the same facts and issues are presented, resolution should occur through the prior action and the second suit should be dismissed." *Planned Parenthood of Kan. v. Donnelly*, 298 S.W.3d 8, 12 (Mo. Ct. App. 2009) (en banc) (internal quotations omitted). "'The court in which the claim is first filed acquires exclusive jurisdiction over the matter.'" *Id.* (quoting *HTH Cos. v. Mo. Dep't of Labor & Indus. Relations*, 154 S.W.3d 358, 361 (Mo. Ct. App. 2004)). Pursuant to the doctrine of abatement, the Commission should dismiss CenturyLink's complaint.

17. CenturyLink asserts, without citation, that "[t]he presence of CenturyLink's intrastate claims in the law suit, pending their ultimate dismissal by CenturyLink, do not preclude CenturyLink from initiating this complaint in order to pursue its Missouri-specific claims in front of this Commission." Missouri Complaint, ¶ 21. But there is no exception to the first-filed rule or the abatement doctrine for causes of actions which the propounding party wishes to have dismissed from the first forum. Rather, the first forum retains "exclusive jurisdiction" over the matters pending before it. *HTH Cos.*, 154 S.W.2d at 361. CenturyLink's

as yet unsuccessful attempt to withdraw its claims from the Louisiana Federal Court does not trump the abatement doctrine.

2. The Federal Suit Should Trigger the Abatement Doctrine

18. CenturyLink may argue that the doctrine of abatement should not apply here, where parallel actions are pending in different states. It is true that the doctrine of abatement applies to courts having "concurrent jurisdiction" of the same cause of action; thus, "ordinarily," the doctrine, as a jurisdictional bar, will not automatically apply to actions pending in a different "sovereignty." *Gen. Dynamics*, 566 S.W.2d at 458 (quoting *Draper v. Louisville & N.R.R. Co.*, 156 S.W.2d 626 (Mo. 1941)). This general principle relates to the concept that "courts of one state have no authority to stay proceedings in the courts of another." *Id.* Thus, the Missouri procedural rule and statute, which have "been said to codify" the abatement doctrine, *Kelly v. Kelly*, 245 S.W.3d 308, 314 (Mo. Ct. App. 2008), include the phrase "in this state." *See* Mo. R. Civ. P. 55.27(9); § 509.290(1)(8) RSMo.

19. "In this state" has been cited by some courts as a reason for declining to dismiss on the basis of a state court action in another state. It is important to note, however, that these courts usually cite additional reasons for declining to dismiss.[1] Moreover, the Missouri Court of Appeals, sitting *en banc* in *Planned Parenthood*, did not perceive a "sovereignty" limitation on the doctrine of abatement as applied to a federal court case. Instead, as discussed above, the Missouri court affirmed the district court's dismissal of the state action in light of a previously filed, currently pending federal suit on the same issues. *Id.*

[1] *See, e.g., Chaney v. Cooper*, 954 S.W.2d 510, 517 (Mo. Ct. App. 1997) (noting that the "parties have not given us sufficient information either in the legal file or their briefs about the Kansas litigation to determine the nature of the litigation and whether it is pending," and thus the "record is insufficient for us to determine whether this litigation involves the same issues").

20. Here, the "in this state" restriction should not limit the application of the abatement doctrine. Like *Planned Parenthood*, CenturyLink first filed its case in federal court. That case has been pending since 2009 and numerous proceedings have occurred, most notably Sprint's motion to dismiss and the FCC's referral. Schenkenberg Aff. Exs. 2-3. As the *Planned Parenthood* court ruled, the Commission should "decline [CenturyLink's] belated invitation to needlessly insert [the Commission] into the previously filed and pending federal court litigation." *Planned Parenthood*, 298 S.W.3d at 14.

C. Principles of Comity Direct the Commission to Dismiss or Stay the Missouri Complaint

21. Even if the Commission does not formally apply the doctrine of abatement, it should nevertheless dismiss or stay these proceedings under principles of comity. "Under the principle of comity," just as with the doctrine of abatement, "when two state courts have jurisdiction to determine an issue between the same parties, the court whose jurisdiction attached first should proceed to render a final judgment." *Hale v. Hale*, 781 S.W.2d 815, 820 (Mo. Ct. App. 1989) (citing *Jewell v. Jewell*, 484 S.W.2d 668 (Mo. Ct. App. 1972). Thus, even if the doctrine of abatement is inapplicable to parallel suits in two different states, the rules of comity apply and should create the same result. *Jewell*, 484 S.W.2d at 674; *Welch v. Contreras*, 174 S.W.3d 53, 56 (Mo. Ct. App. 2005) ("where courts in two different states have coordinate jurisdiction, the one whose jurisdiction first attaches retains it and proceeds to final judgment regardless of any action taken by the other court").

22. In *Jewell*, the court held that because a suit was first filed in Missouri, that action should be given priority over a subsequently filed action in Arkansas. *Jewell*, 484 S.W.2d at 674. Here, CenturyLink first filed its claims in Louisiana Federal Court, before it filed this

second suit in Missouri. Principles of comity are clearly best-served by deferring to the Louisiana Federal Court.

II. THE LOUISIANA FEDERAL COURT IS BETTER SUITED TO HANDLE THIS CASE

23. CenturyLink's claims should be adjudicated in federal court because CenturyLink's ability to recover on its state law claims nevertheless requires analysis of federal law. The Louisiana Federal Court (with the assistance of the FCC) is also better situated to consider Sprint's defenses and counterclaims. Finally, judicial economy and efficiency will be best served by deferring to the Louisiana Federal Court.

A. CenturyLink's State Claims Involve Matters of Federal Law

1. Whether CenturyLink's Intrastate Access Tariffs Apply to VoIP Calls is an Open Question of Federal Law the Louisiana Court Must Decide

24. In a dispute between Sprint and the Iowa Utilities Board ("IUB") over compensation for VoIP traffic, the United States Supreme Court recently confirmed that whether intrastate access charges applied to VoIP calls delivered before the date of the FCC's *CAF Order* is an open question of federal law. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013).

25. In 2010, the IUB ruled that "intrastate access fees applied to VoIP calls." *Id.* at 589. The IUB rejected Sprint's argument that the question was governed by federal law. *Id.* Sprint then appealed to state court and federal court. *Id.* At the IUB's request, the federal district court abstained from considering that case in deference to the pending state court appeal. *Id.* at 590.

26. The Supreme Court reversed the district court in December 2013. The Supreme Court confirmed that the federal district unquestionably had "jurisdiction to decide whether federal law preempted the IUB's decision...." *Id.* at 590. This preemption question was an open issue because:

> The Federal Communications Commission has yet to provide its view on whether the Telecommunications Act categorically preempts intrastate access charges for VoIP calls. *See In re Connect America Fund*, 26 FCC Rcd. 17663, 18002, ¶ 934 (2011) (reserving the question whether all VoIP calls "must be subject exclusively to federal regulation").

Id. at 589 n.1.

27. Indeed, the Supreme Court held that the district court's exercise of jurisdiction was not simply permissive, it was mandatory: "Federal courts ... have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id.* at 590-91 (quoting *Cohens v. Virginia*, 19 U.S. 264 (1821)). "Jurisdiction existing, ... a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Id.* at 591 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). "Parallel state-court proceedings do not detract from that obligation." *Id.*

28. *Sprint v. Jacobs* demonstrates that the parties' dispute will be resolved, at least in part, as a matter of federal law, and that the Louisiana Federal Court will be bound to exercise jurisdiction and decide that issue, even if the Commission proceeds on this complaint. *Id.* at 590-91. As such, there is nothing to be gained by keeping this case alive.

2. Threshold Legal Issues on the State Access Tariff Claims Are Pending at the FCC

29. The federal question that the Supreme Court directed back to the federal district court in *Sprint v. Jacobs* is the same issue before the FCC on the Louisiana Federal Court's referral order: whether state access charges can apply to VoIP traffic that Sprint (and others) claim is jurisdictionally interstate. Indeed, Sprint's FCC Petition includes the following demands for relief:

> Sprint also seeks a declaration that because the VoIP originated traffic is jurisdictionally interstate, intrastate access tariffs cannot impose compensation obligations with respect to that traffic, even if those calls originate and terminate in the same state. Such a declaration is necessary to enforce the Commission's

> regulatory authority over this jurisdictionally interstate service, and is required by 47 U.S.C. § 251(g). This declaration will provide guidance with respect to CenturyLink's Count IV . . . . (FCC Petition, p. 3.)
>
> . . .
>
> The Commission should also declare that under no circumstances could intrastate access charges apply to VoIP-originated traffic that is jurisdictionally interstate. (FCC petition, p. 13.)

30. The FCC's process in answering that question is ongoing: the FCC solicited comments on Sprint's FCC Petition (Schenkenberg Aff. Ex. 7), and several industry participants submitted comments on all issues, including the issues relevant to the State Access Tariff Claims. For example, the Iowa Utilities Board filed comments opposing Sprint's requested declaration:

> The Board respectfully urges the Commission to decline to issue the declaratory rulings requested by Sprint, and instead to rule that, prior to December 29, 2011, interstate and intrastate access tariffs applied to VoIP-originated long distance calls.

Schenkenberg Aff. Ex. 8, pp. 3-4.

31. Other commenters were supportive. Verizon, for example, asked the FCC to "address Sprint's Petition by reaffirming that VoIP is exclusively interstate for jurisdictional purposes ...." Schenkenberg Aff. Ex. 9, p. 1; *see also id.* at 6 ("Affirmed by the Eighth Circuit, the *Vonage Order* confirms that all VoIP services are practically inseverable and therefore interstate for jurisdictional purposes.").

32. CenturyLink's ability to recover on its State Access Tariff Claims depends on the FCC's answer to the federal question currently pending before it. The Commission should thus reject CenturyLink's invitation to interfere with this process.

B. The Commission May Be Precluded from Considering this Important Issue

33. As *Sprint v. Jacobs* highlights, the key question is whether application of state access charges is preempted. As discussed above, the Commission has already noted that the question of whether Missouri law is preempted is beyond its jurisdiction. *Sw. Bell Tel. Co.*, No. IO-2011-0057, at 4. The Commission, unlike the Louisiana Federal Court, is simply not empowered to fully adjudicate all issues relating to CenturyLink's State Access Tariff Claims. That provides yet another reason for the Commission to decline to proceed in this duplicative litigation.

C. Judicial Economy is Served by Deferring to the Louisiana Federal Court Action

34. These claims arise out of the same transaction and occurrence as the other remaining claims pending before the Louisiana Federal Court (Louisiana Complaint, ¶ 42), and even CenturyLink agrees they should be heard together:

> The CenturyLink Plaintiffs' damage claims arise out of the same action by Sprint in refusing to pay the applicable charges under the Access Tariffs. As a result, judicial economy is served and the resources of the parties are conserved by having this collection action resolved in one forum.

Louisiana Complaint, ¶ 39 (emphasis added).

35. Each state action CenturyLink seeks to file will present the same threshold issue: are intrastate VoIP calls jurisdictionally interstate, so that state tariffs are preempted? It makes no sense for the same parties to litigate the same issue before the FCC, a federal court, and numerous state commissions. Sprint would have to duplicate efforts, and risk inconsistent results, creating a morass of state, federal, and administrative cases and appeals. Subjecting Sprint to multiple overlapping state disputes—including this proceeding—would cause significant prejudice to Sprint.

D. The Louisiana Federal Court Is Best Positioned to Fully Address Sprint's Defenses and Counterclaims

36. Sprint will plead defenses and counterclaims at the proper time in the Louisiana Federal Court proceeding. Sprint is confident that the Federal Court can consider all of those defenses and counterclaims. There is a question, however, whether the Commission could afford complete relief on all of Sprint's defenses and counterclaims. For example, CenturyLink alleges that Sprint "[withheld] payment on undisputed charges in order to claw-back payments it made without dispute for two years prior to raising a dispute over access charges on VoIP-originated traffic." Missouri Complaint, ¶ 7. Sprint would characterize this much differently. The amounts that have been withheld are related to Sprint's VoIP dispute. The vast majority of access charges incurred for the disputed period of time have been paid, and Sprint considers all undisputed charges to have been paid. Amounts were applied to CenturyLink's accounts in a way that increased the amount of the VoIP dispute being held by Sprint as opposed to the amount being held by CenturyLink.

Sprint is likely to assert the well established defense of "recoupment" with respect to the parties' accounts.

> "Recoupment rests upon the principle that it is just and equitable to settle in one action all claims growing out of the same contract or transaction." *Russell v. Empire Storage & Ice Co.*, 332 Mo. 707, 59 S.W.2d 1061, 1066 (1933) (citation omitted). "The object of the plea is to rebate or recoup in whole or part the claim sued on." *Id.* (citation omitted).

Boone Nat'l Sav. & Loan Ass'n, F.A. v. Crouch, 47 S.W.3d 371, 375 n.4 (Mo. 2001). Under this doctrine, any liability that Sprint has to CenturyLink for TDM-originated calls is reduced by CenturyLink's liability to Sprint for overbilling billing for VoIP-originated traffic under the same tariffs. However, it is not clear whether the Commission can hear and resolve a defense of recoupment, for two reasons. First, CenturyLink may argue that recoupment is an equitable

defense the Commission cannot consider. Second, the bills, payments, and recoupment necessarily involve both intrastate and interstate charges, and the Commission cannot adjudicate liability under interstate tariffs.

37. The Federal Court is not burdened by these limitations. It can consider all defenses, and can afford complete relief. This is yet another reason why the Commission should dismiss CenturyLink's Complaint.

III. THE COMMISSION LACKS AUTHORITY TO GRANT CENTURYLINK ITS REQUESTED RELIEF

38. The Commission does not have the authority to grant the relief sought by CenturyLink and, thus, the Complaint should be dismissed for failure to state a claim.

A. Standard of Review: the Jurisdictional Bounds of the Commission

39. The Commission is a creature of statute and its powers are limited to those conferred on it by statute. *See State ex rel. United Rys. Co. of St. Louis v. Pub. Serv. Comm'n. of Mo.*, 192 S.W. 958, 962 (Mo. 1917) ("the Public Service Commission, being a creature of the statute, can only exercise such powers as are expressly conferred on it; and the statute conferring such powers, to authorize action thereunder, should clearly define their limits"). *See also* § 386.040 RSMo (establishing the Commission and vesting "the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter").

40. Not only must the Commission have the authority to hear the facts of the controversy, it must also have the authority to grant the remedy requested. *See, e.g., Sexton v. Empire Dist. Elec. Co.*, No. EC-2008-0315, 2008 WL 2445656 (Mo. P.S.C. May 30, 2008) (ordering that, to proceed before the Commission, the petitioners must file a pleading demonstrating the Commission's authority to grant either of the two forms of remedy it seeks);

FP Grandboro, LLC v. Mo. Gas Energy, No. GC-2008-0228, 2008 WL 1787733 (Mo. P.S.C. Apr. 2, 2008) (same).

41. As the Complainant, it is CenturyLink's burden to identify *which* statute confers the Commission the authority to grant CenturyLink's requested relief. 4 C.S.R. § 240-2.070(4)(G). Absent statutory authority, the Complaint must be dismissed. *See, e.g., Shawnee Bend Dev. Co. v. Lake Region Water & Sewer Co.*, No. WC-2009-0116, 2009 WL 762536 (Mo. P.S.C. Mar. 18, 2009) (granting defendant's motion to dismiss because the Commission lacked statutory authority to proceed).

B. CenturyLink Improperly Asks the Commission to Issue a Monetary Award

42. CenturyLink asks the Commission to award money damages:

> **RELIEF REQUESTED**
>
> 29. CenturyLink seeks a determination by this Commission that Sprint has violated CenturyLink's intrastate exchange access tariff and Section 392.550.2. RSMo. by refusing to pay intrastate exchange access charges on interexchange VoIP traffic that was routed by Sprint to CenturyLink for termination, and that Sprint is liable to pay CenturyLink for such charges and associated late payment charges.
>
> 30. CenturyLink seeks a determination by this Commission that all charges Sprint refused to pay CenturyLink after August 2009 in an attempt by Sprint to retroactively claw-back exchange access payments made to CenturyLink prior to August 2009, were payments unlawfully withheld under CenturyLink's tariffs and applicable law and that Sprint is liable for such payments and associated late payment charges.

Missouri Complaint, ¶¶ 29-30 (emphasis added). These requests for monetary damages are beyond the authority of the Commission and must be requested from a court.

1. Neither Statute Cited by CenturyLink Gives the Commission the Authority to Issue a Monetary Award

43. CenturyLink purports to bring this action under two statutes: Sections 392.550.2 & 392.550.4.(5) RSMo.[2] Section 392.550.2 RSMo states that "[i]nterconnected [VoIP] service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges." Nothing in that statute provides the Commission with the authority to determine liability and order payment where an IXC is disputing access charge billings.

44. Likewise, nothing in Section 392.550.4(5) RSMo gives the Commission authority to issue monetary damages in a case like this:

> [N]otwithstanding any other provision of law to the contrary, the [Commission] shall have the following authority with respect to providers of interconnected [VoIP] service and their provision of such service:... (5) To hear and resolve complaints under sections 386.390 and 386.400 regarding the payment or nonpayment for exchange access services regardless of whether a user of exchange access service has been certificated or registered by the commission and regardless of whether the commission otherwise has authority over such user.

§ 392.550.4(5) RSMo (emphasis added).

45. This statute is explicitly limited to the Commission's authority over providers of interconnected VoIP service. Sprint is not a provider of interconnected VoIP service with respect to the calls at issue. All of the traffic at issue is terminating traffic. CenturyLink demands payment for VoIP calls originated by cable companies providing interconnected VoIP service to their customers, and delivered by Sprint in its capacity as an IXC for delivery to the terminating destination. Missouri Complaint, ¶ 4 (alleging that Sprint is an IXC); *id.* ¶¶ 12, 16 (explaining Sprint's provision of service to cable companies). In this context, Sprint is providing

[2] CenturyLink's Complaint also cites Section 386.40, 386.250, 386.320.1, 386.330, 386.390, 386.400, 392.200.1, and .2, 392.410.2, and 392.480 RSMo, as well as 4 C.S.R. § 240-2.070(4). Missouri Complaint, p. 1. None of these provisions, however, gives the Commission the authority to grant the relief sought by CenturyLink.

wholesale telecommunications services to complete calls for the cable companies and is not acting in the role of an interconnected VoIP provider.[3] Section 392.550.4(5) RSMo applies only if CenturyLink proceeds directly against the cable company interconnected VoIP providers. Since the Commission's complaint resolution authority under Section 392.550.4(5) RSMo is not directed at telecommunications carriers, the Complaint must be dismissed for failure to state claim.

2. It Is Well-Settled Law that the Commission Lacks the Inherent Authority to Issue Monetary Awards

46. Without a statutory grant of authority, the Commission lacks the inherent authority to decide contract disputes and issue monetary awards. *See, e.g., Am. Petroleum Exch. v. Pub. Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943) (the Commission "cannot determine damages or award pecuniary relief"); *Alma Commc'ns Co. v. Halo Wireless, Inc.*, No. TC-2011-0404, 2012 WL 1564777, at n.4 (Mo. P.S.C. Apr. 25, 2012) ("The Commission cannot enforce, construe, or annul contracts, nor can it enter a money judgment, order a refund or grant equitable relief.").

47. Instead, such relief must be requested from a court. *See Shawnee Bend Dev. Co.*, 2009 WL 762536 ("a remedy for breach of contract lies with the court, and not with the Commission"); *May Dep't. Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937) (while the Commission "has exclusive jurisdiction to establish rates to be charged from and after the time of their promulgation, it does not have authority to hear an action by a public utility customer for an accounting for past overcharges in excess of rates established by it

[3] *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exch. Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd. 3513, DA 07-709, ¶¶ 1, 3 (2007) (Sprint is a wholesale provider providing services to cable companies operating as VoIP service providers).

for the purpose of recovering such excess from the public utility. The commission is not a court and cannot enter a money judgment for one party against another"). The Missouri Supreme Court is in accord:

> when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of overcharge is made, only courts can require an accounting or render a judgment for the overcharge. The Public Service Commission cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment.

Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903, 905 (Mo. 1971) (emphasis added). *See also State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. Ct. App. E.D. 1980) ("[The Commission] may not perform the judicial function. It has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity."); *Farrant v. CenturyLink*, No. TC-2012-0394, 2013 WL 3477485, at *3 (Mo. P.S.C. June 19, 2013) (same).

48. Even more, CenturyLink is on record asserting that the Commission lacks the jurisdiction to grant its requested relief. In the Louisiana Federal Court case, CenturyLink filed a brief opposing the FCC referral in which CenturyLink explained to the Louisiana Federal Court that state commissions—including this one—cannot order payment:

> Moreover, the FCC has no jurisdiction to decide CenturyLink's claim for damages arising from Sprint's failure to make payments required by the State Access Tariffs. Many of the State commissions that previously approved the State Access Tariffs lack statutory authority to award damages to CenturyLink.[30]

[30] For example, "the [Indiana] Commission has no judicial power to render a money judgment." *State ex rel. Indianapolis Water Co. v. Niblack*, 240 Ind. 32, 34, 161 N.E.2d 377, 378 (1959). Similarly, in Missouri, "[t]he Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund." *Straube v. Bowling Green Gas Co.*, 227 S.W. 2d 666, 668 (Mo. 1950) (citations omitted).

Schenkenberg Aff. Exhibit 10, p. 14 (ECF No. 19) (emphasis added). The Commission should find—as CenturyLink agrees—that it lacks the authority to grant the relief sought by CenturyLink, and dismiss the Complaint.

CONCLUSION

49. The Commission has neither the authority nor a reason to proceed here, and it should dismiss CenturyLink's complaint for failure to state a claim. Under the first filed rule and the doctrine of abatement, the Commission must dismiss the action and defer to the Louisiana Federal Court as CenturyLink brought its claims to the Louisiana Federal Court, which has jurisdiction and can decide all of the issues necessary to fully adjudicate the parties' dispute. Moreover, the issues in the Complaint are a matter of federal law that the Supreme Court has found must be decided by the Federal Court that already has taken jurisdiction of the issue and referred them to the FCC. Failing to dismiss the Complaint risks a result where the parties and Commission becoming mired in a morass of conflicting regulatory and court decisions. CenturyLink must be held to pursue its claims in the jurisdiction it selected and first filed suit against Sprint—the Louisiana Federal Court. Finally, under established law, the Commission is without authority to grant pecuniary relief to CenturyLink, and Section 392.550.4(5) RSMo does not give the Commission authority to award damages against an IXC like Sprint for the delivery of wholesale telecommunications traffic.

50. WHEREFORE, the reasons stated herein, Sprint requests the Commission dismiss all the claims in CenturyLink's Complaint pursuant to Commission Rule 4 CSR 240-2.070(7) and for such other relief as it deems just and proper. If dismissal is not granted, and the Commission does not stay the case in deference to the Louisiana Federal Court, then Sprint requests the Commission establish a date for answering the Complaint.

Dated: May 1, 2014

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.

By: Ken Schifman by DCB

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COUNSEL FOR RESPONDENT SPRINT COMMUNICATIONS COMPANY L.P.

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

VERIFICATION

Kenneth A. Schifman, being first duly sworn, deposes and states that he is Senior Counsel and Director for Sprint Communications Company L.P., that he has read the Motion to Dismiss and has knowledge of the contents thereof, and that the information therein contained are true to the best of his knowledge, information and belief.

Kenneth A. Schifman

Subscribed and sworn to before me on this 1st day of May, 2014.

Notary Public

RHAMIE GLADE
Notary Public, State of Kansas
My Appointment Expires
9-12-16

My Commission Expires: 9-12-16

Seal:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May, 2014 a copy of the above and foregoing was served via US mail, facsimile or electronically mailed to the following:

Missouri Public Service Commission
Office General Counsel
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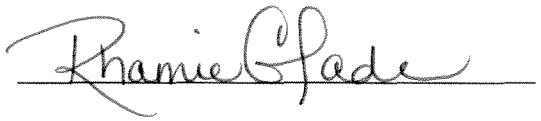

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

CENTURYTEL OF MISSOURI, LLC d/b/a CENTURYLINK AND SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYLINK, Complainant, v. SPRINT COMMUNICATIONS COMPANY, L.P., Respondent.	)	**File No. TC-2014-0263**

AFFIDAVIT OF PHILIP R. SCHENKENBERG IN SUPPORT OF SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO DISMISS CENTURYLINK'S COMPLAINT FOR FAILURE TO STATE A CLAIM

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

1. My name is Philip R. Schenkenberg. I am one of the attorneys representing Sprint Communications Co. L.P. ("Sprint") in this proceeding, as well as in the Louisiana Federal Court Action and before the FCC. I give this affidavit in support of Sprint's Motion to Dismiss CenturyLink's Complaint for Failure to State a Claim.

2. Attached hereto as **Exhibit 1** is a true and correct copy of CenturyLink's November 23, 2009 Complaint filed in the Louisiana Federal Court matter ("Louisiana Complaint"), as well as Exhibit A to the Louisiana Complaint. Exhibits B and C to the Louisiana Complaint are not attached.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Sprint's Motion to Dismiss CenturyLink's Count II and Motion to Refer Claims [to the FCC] Under Primary Jurisdiction, which was filed in the Louisiana Federal Court Action.

4. Attached hereto as **Exhibit 3** is a true and correct copy of the Louisiana Federal Court's order, granting Sprint's Motion to Dismiss CenturyLink's Count II and Motion to Refer Claims [to the FCC] Under Primary Jurisdiction.

5. Attached hereto as **Exhibit 4** is a true and correct copy of Sprint's Petition as downloaded from the FCC's website (the "FCC Petition"). The FCC Petition was filed on April 5, 2012. The exhibits are not attached. The FCC Petition remains pending.

6. Attached hereto as **Exhibit 5** is a true and correct copy of CenturyLink's *Ex Parte* Motion to Vacate Stay, which was filed in the Louisiana Federal Court Action.

7. Attached hereto as **Exhibit 6** is a true and correct copy of Sprint's memorandum in opposition to CenturyLink's *Ex Parte* Motion to Vacate Stay.

8. Attached hereto as **Exhibit 7** is a true and correct copy of the FCC's Public Notice, as downloaded from the FCC's website, soliciting comments on Sprint's FCC Petition.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the Iowa Utilities Board's comments on Sprint's FCC Petition, as downloaded from the FCC's website.

10. Attached hereto as **Exhibit 9** is a true and correct copy of Verizon's comments on Sprint's FCC Petition, as downloaded from the FCC's website.

11. Attached hereto as **Exhibit 10** is a true and correct copy of CenturyLink's brief in opposition to Sprint's Motion to Dismiss, which was filed in the Louisiana Federal Court Action.

AFFIANT SAYS NOTHING FURTHER.

Philip R. Schenkenberg

Subscribed and sworn to before me
this 24th day of April, 2014.

Notary Public
My Commission Expires: 1-31-15

SHERYL M. O'NEILL
Notary Public
Minnesota
My Commission Expires January 31, 2015

6198802.1

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Monroe Division

CENTURYTEL OF CHATHAM, LLC,)
a Louisiana limited liability company,)
)
CENTURYTEL OF NORTH LOUISIANA, LLC,)
a Louisiana limited liability company,)
)
CENTURYTEL OF EAST LOUISIANA, LLC,)
a Louisiana limited liability company,)
)
CENTURYTEL OF CENTRAL LOUISIANA,)
LLC, a Louisiana limited liability company,)
)
CENTURYTEL OF RINGGOLD, LLC,)
a Louisiana limited liability company,)
)
CENTURYTEL OF SOUTHEAST LOUISIANA,)
LLC, a Louisiana limited liability company,)
)
CENTURYTEL OF SOUTHWEST LOUISIANA,)
LLC, a Louisiana limited liability company,)
)
CENTURYTEL OF EVANGELINE, LLC,)
a Louisiana limited liability company,)
)
CENTURYTEL OF MISSOURI, LLC,)
a Louisiana limited liability company,)
)
MEBTEL, INC., a North Carolina corporation,)
)
CENTURYTEL OF IDAHO, INC.,)
a Delaware corporation ,)
)
GALLATIN RIVER COMMUNICATIONS,)
LLC, a Delaware limited liability company,)
)

CENTURYTEL OF NORTHWEST LOUISIANA, INC., a Louisiana corporation,

CENTURYTEL OF LAKE DALLAS, INC., a Texas corporation,

CENTURYTEL OF PORT ARANSAS, INC., a Texas corporation,

CENTURYTEL OF SAN MARCOS, INC., a Texas corporation,

SPECTRA COMMUNICATIONS GROUP, LLC, a Delaware limited liability company,

CENTURYTEL OF ARKANSAS, INC., an Arkansas corporation,

CENTURYTEL OF MOUNTAIN HOME, INC., an Arkansas corporation,

CENTURYTEL OF REDFIELD, INC., an Arkansas corporation,

CENTURYTEL OF NORTHWEST ARKANSAS, LLC, a Louisiana limited liability company,

CENTURYTEL OF CENTRAL ARKANSAS, LLC, a Louisiana limited liability company,

CENTURYTEL OF SOUTH ARKANSAS, INC., an Arkansas corporation,

CENTURYTEL OF NORTH MISSISSIPPI, INC., a Mississippi corporation,

GULF TELEPHONE COMPANY, an Alabama corporation,

CENTURYTEL OF ALABAMA, LLC, a Louisiana limited liability company,

CENTURYTEL OF ADAMSVILLE, INC., a Tennessee corporation,

CENTURYTEL OF CLAIBORNE, INC.,)
a Tennessee corporation,)
)
CENTURYTEL OF OOLTEWAH-)
COLLEGEDALE, INC., a Tennessee corporation,)
)
CENTURYTEL OF OHIO, INC.,)
an Ohio corporation,)
)
CENTURYTEL OF CENTRAL INDIANA, INC.,)
an Indiana corporation,)
)
CENTURYTEL OF ODON, INC.,)
an Indiana corporation,)
)
CENTURYTEL OF MICHIGAN, INC.,)
a Michigan corporation,)
)
CENTURYTEL OF UPPER MICHIGAN, INC.,)
a Michigan corporation,)
)
CENTURYTEL OF NORTHERN MICHIGAN,)
INC., a Michigan corporation,)
)
CENTURYTEL MIDWEST-MICHIGAN, INC.,)
a Michigan corporation,)
)
CENTURYTEL OF WISCONSIN, LLC,)
a Louisiana limited liability company,)
)
TELEPHONE USA OF WISCONSIN, LLC,)
a Delaware limited liability company,)
)
CENTURYTEL OF NORTHERN WISCONSIN,)
LLC, a Delaware limited liability company,)
)
CENTURYTEL OF NORTHWEST)
WISCONSIN, LLC, a Delaware)
limited liability company,)
)
CENTURYTEL OF CENTRAL WISCONSIN,)
LLC, a Delaware limited liability company,)
)

CENTURYTEL OF THE MIDWEST-KENDALL, LLC, a Delaware limited liability company,

CENTURYTEL OF THE MIDWEST-WISCONSIN, LLC, a Delaware limited liability company,

CENTURYTEL OF FAIRWATER-BRANDON-ALTO, LLC, a Delaware limited liability company,

CENTURYTEL OF LARSEN-READFIELD, LLC, a Delaware limited liability company,

CENTURYTEL OF FORESTVILLE, LLC, a Delaware limited liability company,

CENTURYTEL OF MONROE COUNTY, LLC, a Delaware limited liability company,

CENTURYTEL OF SOUTHERN WISCONSIN, LLC, a Delaware limited liability company,

CENTURYTEL OF MINNESOTA, INC., a Minnesota corporation,

CENTURYTEL OF CHESTER, INC., an Iowa corporation,

CENTURYTEL OF POSTVILLE, INC., an Iowa corporation,

CENTURYTEL OF COLORADO, INC., a Colorado corporation,

CENTURYTEL OF EAGLE, INC., a Colorado corporation,

CENTURYTEL OF THE SOUTHWEST, INC., a New Mexico corporation,

CENTURYTEL OF THE GEM STATE, INC., an Idaho corporation,

CENTURYTEL OF MONTANA, INC.,
an Oregon corporation,

CENTURYTEL OF WYOMING, INC.,
a Wyoming corporation,

CENTURYTEL OF OREGON, INC.,
an Oregon corporation,

CENTURYTEL OF EASTERN OREGON, INC.,
an Oregon corporation,

CENTURYTEL OF WASHINGTON, INC.,
a Washington corporation,

CENTURYTEL OF COWICHE, INC.,
a Washington corporation,

and

CENTURYTEL OF INTER-ISLAND, INC.,
a Washington corporation,

Plaintiffs,

v.

SPRINT COMMUNICATIONS COMPANY LP,
a Delaware limited partnership,

SERVE:

The Prentice-Hall Corporation System, Inc.
320 Somerulds Street
Baton Rouge, Louisiana 70802-6129

Defendant.

COMPLAINT

Plaintiffs CenturyTel of Chatham, LLC d/b/a CenturyLink and the other entities listed in the Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs and Access Tariffs attached as **Exhibit A**, each of which is a subsidiary of CenturyTel, Inc., a Louisiana corporation with its principal place of business in Monroe, Louisiana d/b/a CenturyLink (collectively, the

"CenturyLink Plaintiffs"), by counsel, respectfully state as follows for their Complaint against Defendant Sprint Communications Company LP ("Sprint").

NATURE OF ACTION

1. This collection action for money damages, costs, and attorneys' fees results from Sprint's refusal to pay more than $6.4 million in fees required by federal and state telecommunications tariffs for the use of the CenturyLink Plaintiffs' local telephone network facilities to complete long-distance calls.

2. Every time a customer of Sprint makes a long distance call to a local telephone customer using the wireline network of one of the CenturyLink Plaintiffs, the CenturyLink Plaintiff's local telephone network facilities must be used to complete, or "terminate," the call. This is true with respect to voice calls originated using Time Division Multiplexing ("TDM") technology or voice calls originated using Voice-over-Internet Protocol ("VoIP") technology and terminated to the Public Switched Telephone Network ("PSTN").

3. To the extent that such calls are between a calling party and a called party located in different states or different countries, Sprint is required to pay the CenturyLink Plaintiffs for this "terminating access" to the CenturyLink Plaintiffs' local exchange facilities pursuant to the CenturyLink Plaintiffs' interstate tariffs (the "Federal Access Tariffs") on file with the Federal Communications Commission ("FCC"). The applicable federal tariffs are listed in the Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs and Access Tariffs attached as **Exhibit A**.

4. To the extent that such calls are between a calling party and a called party located in the same state, Sprint is required to pay the CenturyLink Plaintiffs' local exchange facilities pursuant to the CenturyLink Plaintiffs' state tariffs (the "State Access Tariffs") on file with the applicable state regulatory commissions. The applicable state tariffs are listed in the Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs and Access Tariffs attached as **Exhibit A**.

5. The same Federal Access Tariffs and State Access Tariffs (collectively, the "Access Tariffs") apply to all voice calls terminating to the PSTN regardless of whether the method of transmission used to originate the call is TDM technology or VoIP technology.

6. The CenturyLink Plaintiffs seek recovery of the access charges that Sprint has unlawfully refused to pay, together with late charges and attorneys' fees in accordance with the Access Tariffs. The provisions of the Access Tariffs permitting the CenturyLink Plaintiffs to recover late charges and attorneys' fees are set forth in the Fed. R. Evid. 1006 Summary of Access Tariff Late Fee and Attorneys' Fee Provisions attached as **Exhibit B**.

7. For several years before August 2009, Sprint consistently paid the rates contained in the Access Tariffs for use of the CenturyLink Plaintiffs' local telephone network without protest and without distinction based on transmission technology or the originating traffic.

8. Beginning in August 2009, however, Sprint lodged a series of disputes and — for the very first time — refused to pay the rates contained in the Access Tariffs on VoIP-originated traffic terminated over the CenturyLink Plaintiffs' facilities. Sprint now claims that it is entitled to continue using the CenturyLink Plaintiffs' local telephone network facilities but is no longer obligated to pay the rates contained in the Access Tariffs on file with the FCC and applicable state regulatory commissions. Rather than pay the rates set forth in the Access Tariffs, Sprint is unilaterally substituting the much lower rate of $.0007 per minute for use of the CenturyLink Plaintiffs' local telephone network facilities.

9. Also beginning in August 2009, as invoices from the CenturyLink Plaintiffs have become due for payment, Sprint has withheld payment even with respect to services about which it has raised no dispute. Sprint has done so as a "self help" means of recovering — retroactive to

August 2007 — the difference between $.0007 per minute and the rates previously paid to the CenturyLink Plaintiffs pursuant to the Access Tariffs.

10. The CenturyLink Plaintiffs have made repeated requests to Sprint to pay consistent with the Access Tariffs for use of the CenturyLink Plaintiffs' facilities. Sprint has refused to pay the billed amounts but continues to use the CenturyLink Plaintiffs' local telephone network facilities.

11. The total amount of payments for Access Tariff rates that Sprint has refused to pay (the "Wrongfully Withheld Access Payments") was in excess of $6.4 million at the end of October 2009.

12. With each subsequent monthly invoice, the amount of the Wrongfully Withheld Access Payments continues to grow.

13. Sprint's wrongful refusal to pay the Access Tariff rates has left the CenturyLink Plaintiffs with no recourse but to bring this collection action for recovery of the Wrongfully Withheld Access Payments, along with a security deposit, late charges, pre-judgment interest, costs, and attorneys' fees.

PARTIES

The CenturyLink Plaintiffs

14. Each of the CenturyLink Plaintiffs is incorporated in and does business in the states identified in the Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs and Access Tariffs attached as **Exhibit A**.

15. Each of the CenturyLink Plaintiffs is a "telecommunications carrier" within the meaning of 47 U.S.C. § 153(44).

16. As a "telecommunications carrier," each of the CenturyLink Plaintiffs provides "telecommunications service" within the meaning of 47 U.S.C. § 153(46), including "telephone

exchange service" within the meaning of 47 U.S.C. § 153(47) and "exchange access service" within the meaning of 47 U.S.C. § 153(16).

17. In the State of Louisiana, for example, the following CenturyLink Plaintiffs provide "telecommunications service," "telephone exchange service," and "exchange access service" in various telephone exchanges located in the Western District of Louisiana. These telephone exchanges are set forth in the Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs' Telephone Exchanges in the Western District of Louisiana attached as **Exhibit C**.

18. Each of the CenturyLink Plaintiffs is an "incumbent local exchange carrier," a/k/a an "ILEC," within the meaning of 47 U.S.C. § 251(h)..

19. Each of the CenturyLink Plaintiffs has certain obligations under the Communications Act of 1934, as amended, and under the Access Tariffs. These include:

a. the obligations of every telecommunications carrier pursuant to 47 U.S.C. § 251(a)(1) to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;"

b. the obligations of every local exchange carrier pursuant to 47 U.S.C. § 251(b) to provide, *inter alia*, access to rights-of-way; and

c. the obligations of every ILEC pursuant to 47 U.S.C. § 251(c)(2) to allow "any requesting telecommunications carrier" to interconnect with its network.

20. Pursuant to 47 U.S.C. § 251(g), each of the CenturyLink Plaintiffs is entitled to compensation for access to and interconnection with its local exchange facilities from other telecommunications carriers, including Sprint.

Sprint

21. Sprint is a limited partnership organized under the laws of the State of Delaware with its principal place of business in Kansas.

22. Sprint is a "telecommunications carrier" within the meaning of 47 U.S.C. § 153(44).

23. Sprint provides "telecommunications service" within the meaning of 47 U.S.C. § 153(46).

24. As a "telecommunications carrier" providing "telecommunications service," Sprint is a "common carrier" within the meaning of 47 U.S.C. § 153(10).

25. Sprint provides retail "telecommunications service" to business and residential customers.

26. Sprint also provides wholesale "telecommunications service" on behalf of "cable operators," as that term is defined by 47 U.S.C. § 522(5), that seek to offer telephone voice service in competition with more traditional "telecommunications carriers." The wholesale telecommunications services that Sprint provides on behalf of various cable operators include the following:

a. connecting the cable operator's network to the telephone exchange service of telecommunications carriers;

b. negotiating and entering into ICAs with local exchange carriers for the use of such telephone exchanges;

c. paying intercarrier compensation on behalf of the cable operators for termination of their traffic, including exchange access and reciprocal compensation, pursuant to such ICAs;

d. providing long distance telephone and other "telephone toll service" within the meaning of 47 U.S.C. § 153(48); and

e. undertaking other tasks associated with rendering a cable operator capable of placing and receiving voice calls to and from the networks of local exchange carriers.

27. To provide the foregoing services, Sprint obtains access to and interconnects with the local exchange networks of the CenturyLink Plaintiffs, thereby obligating Sprint to pay access charges on interexchange calls.

The Access Charge Regime

28. Access charges are the fees that long distance carriers such as Sprint must pay local exchange carriers such as the CenturyLink Plaintiffs to compensate them for the use of local exchange facilities for originating and terminating long distance calls. The transmission of an interexchange call from the calling party to a long distance carrier is known as "originating access." The transmission of an interexchange call from a long distance carrier to the called party is known as "terminating access."

29. If the call originates in one state and terminates in another, the access charges that apply are set forth in the Federal Access Tariffs filed with and approved by the FCC. The rates and other terms contained in the CenturyLink Plaintiffs' Federal Access Tariffs are "deemed lawful" pursuant to 47 U.S.C. § 204(a)(3).

30. The rates and other terms contained in the CenturyLink Plaintiffs' Federal Access Tariffs:

a. are "just and reasonable" as a matter of federal law;

b. are lawful until modified by the FCC prospectively; and

c. cannot be refunded on a retroactive basis.

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130-132 (1990); *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222-23 (1998).

31. The provisions of the Federal Access Tariffs are binding on Sprint and govern the rates, terms, and conditions by which the CenturyLink Plaintiffs provide interstate terminating access services to Sprint.

32. If the call originates and terminates within the same state, the access charges that apply are set forth in the State Access Tariffs filed with the applicable state regulatory commission and thereafter effective under applicable state law.

33. The provisions of the State Access Tariffs are binding on Sprint and govern the rates, terms, and conditions by which the CenturyLink Plaintiffs provide intrastate terminating access services to Sprint.

34. The rates, terms, and conditions of the Access Tariffs do not distinguish between transmission protocols. The services provided by the CenturyLink Plaintiffs under the Access Tariffs are the same regardless of the transmission protocol. Regardless of whether the Sprint customer chooses to ***originate*** a call via VOIP or TDM, the call ***enters*** the CenturyLink Plaintiffs' network at the Sprint point of presence (POP) as TDM and uses the CenturyLink Plaintiffs' network in exactly the same manner. Depending upon the network configuration chosen by Sprint — *i.e.*, interconnection at the tandem or at the end office — the call may use one or more of the following network elements owned by the CenturyLink Plaintiffs for which they are entitled to compensation under the Access Tariffs:

a. tandem switch,

b. transport facilities,

c. end office switch, and/or

d. local loop.

35. The network elements, the functions that each element performs, and the manner in which it is used are not dependent on the originating transmission protocol. To the contrary, a VoIP-originated call and a TDM-originated call traverse the same path, in the same manner, and use the same network elements when the call is terminated through the CenturyLink Plaintiffs' network. At the point that a call enters the CenturyLink Plaintiffs' network, TDM-originated calls and VoIP-originated calls are indistinguishable to the CenturyLink Plaintiffs. Both calls appear the same to the CenturyLink Plaintiffs and use the same facilities in exactly the same manner.

36. Regardless of whether the call was transmitted using TDM or VoIP technology, at no time has the FCC determined that existing intercarrier compensation rules are not applicable to VoIP traffic terminating to the PSTN. Nor has the FCC established compensation rules for VoIP traffic that are different from those that apply to traffic using TDM technology terminating to the PSTN.

37. The relief sought by the CenturyLink Plaintiffs does not require the interpretation of any statutes, regulations, or rates by either the FCC or any "State commission" as that term is defined in 47 U.S.C. § 153(41).

38. No single "State commission" has jurisdiction over all state tariffs and the parties thereto.

39. The CenturyLink Plaintiffs' damage claims arise out of the same action by Sprint in refusing to pay the applicable charges under the Access Tariffs. As a result, judicial economy is served and the resources of the parties are conserved by having this collection action resolved in one forum.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

40. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1337 because the CenturyLink Plaintiffs' claims arise under Sections 201 and 251(g) of the Communications Act of 1934, 47 U.S.C. §§ 201 and 251(g). These statutory provisions include the mandatory interconnection requirements, and carrier obligations under the federal tariffs to which each of the CenturyLink Plaintiffs is subject by virtue of 47 U.S.C. § 251 (a)(1), (b), and (c)(2).

41. This Court also has subject matter jurisdiction over this case pursuant to 47 U.S.C. § 207, which authorizes "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" to "bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter ... in any district court of the United States of competent jurisdiction."

42. This Court also has supplemental jurisdiction over the CenturyLink Plaintiffs' claims for violation of the State Access Tariffs pursuant to 28 U.S.C.§ 1367(a).

Personal Jurisdiction

43. This Court has personal jurisdiction over Sprint because it conducts regular business in the State of Louisiana, and because a substantial part of its actions herein described occurred in and were directed toward various of the CenturyLink Plaintiffs in the State of Louisiana, causing injury and damage to the CenturyLink Plaintiffs in the State of Louisiana.

Venue

44. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) because a substantial part of the events and omissions giving rise to the action occurred and continue to

occur in this District and because Sprint conducts substantial and regular business within this District.

FACTS COMMON TO ALL COUNTS

The CenturyLink Plaintiffs' Billing of Sprint in Accordance With the Access Tariffs

45. Before billing Sprint for termination of calls, the CenturyLink Plaintiffs must first determine whether the call is:

a. intrastate long distance, and therefore subject to terminating intrastate access charges in accordance with the State Access Tariffs;

b. interstate long distance, and therefore subject to terminating interstate access charges in accordance with the Federal Access Tariffs; or

c. local, and therefore subject to no access charges,

46. To make the foregoing determination, the CenturyLink Plaintiffs follow the requirements of the Access Tariffs and examine the call detail information or PIUs provided by Sprint.

47. Each call detail sent to the CenturyLink Plaintiffs by Sprint constitutes a representation by Sprint that the call was originated by a caller using the telephone number set forth in Sprint's call detail or is properly jurisdictionalized as interstate under the PIU.

48. When Sprint provides call detail indicating that the call was originated on a number that was long distance to the called party, but in the same state, the CenturyLink Plaintiffs bill Sprint intrastate access charges in accordance with the State Access Tariffs.

49. When Sprint provides call detail indicating that the call was originated on a number that was long distance to the called party, but in another state or outside the United

States, the CenturyLink Plaintiffs bill Sprint interstate access charges in accordance with the Federal Access Tariffs.

50. For calls that originated on a number that was local to a called party, the CenturyLink Plaintiffs bill Sprint reciprocal compensation charges as appropriate for local calls or as required pursuant to interconnection agreements.

51. As a matter of law, Sprint is required to pay the applicable rates contained in the Access Tariffs.

COUNT I

Violation of Federal Access Tariffs

52. The CenturyLink Plaintiffs hereby incorporate by reference the foregoing paragraphs 1 through 51.

53. The CenturyLink Plaintiffs provided interstate access services to the Sprint and Sprint has demanded and made use of the CenturyLink Plaintiffs' interstate access services in accordance with the Federal Access Tariffs.

54. The rates, terms, and conditions applicable to interstate access services are contained in the Federal Access Tariffs filed with the FCC.

55. The rates, terms, and conditions contained in the Federal Access Tariffs are deemed lawful pursuant to Section 204(a)(3) of the Communications Act, 47 U.S.C. § 204(a)(3).

56. As a matter of federal law, pursuant to 47 U.S.C. § 203(c), each of the CenturyLink Plaintiffs is required to charge, and Sprint is required to pay, the charges contained in the Federal Access Tariffs.

57. The "filed rate doctrine" requires carriers and their customers to abide by the rates in tariffs filed with the FCC.

58. Sprint received invoices from the CenturyLink Plaintiffs for payment for services provided pursuant to the Federal Access Tariffs.

59. Sprint has refused to pay the invoices it has received from the CenturyLink Plaintiffs for interstate access services.

60. Sprint has breached its duty to pay for interstate access services provided by the CenturyLink Plaintiffs.

COUNT II

Violation of Section 251(g) of Communications Act

61. The CenturyLink Plaintiffs hereby incorporate by reference the foregoing paragraphs 1 through 60.

62. Pursuant to 47 U.S.C. § 251(g), each of the CenturyLink Plaintiffs is required to provide exchange access service to Sprint pursuant to any obligations that applied before enactment of the Telecommunications Act of 1996 unless and until "explicitly superseded" by regulations prescribed by the FCC.

63. Pursuant to 47 U.S.C. § 251(g), Sprint is required to pay compensation for exchange access service pursuant to any obligations that applied before enactment of the Telecommunications Act of 1996 unless and until "explicitly superseded" by regulations prescribed by the FCC.

64. Sprint's obligation to pay the CenturyLink Plaintiffs the rates for exchange access services set forth in the Access Tariffs is an obligation of Sprint that applied before enactment of the Telecommunications Act of 1996.

65. No regulation prescribed by the FCC after the enactment of the Telecommunications Act of 1996 has "explicitly superseded" the application of the Access Tariffs to the traffic delivered by Sprint to the CenturyLink Plaintiffs' telephone network.

66. No regulation prescribed by the FCC after the enactment of the Telecommunications Act of 1996 has "explicitly superseded" the obligation of Sprint to pay the CenturyLink Plaintiffs for exchange access services pursuant to the Access Tariffs.

67. By refusing to pay the Wrongfully Withheld Access Payments, Sprint has violated 47 U.S.C. § 251(g).

COUNT III

Violation of Section 201 of the Communications Act

68. The CenturyLink Plaintiffs hereby incorporate by reference the foregoing paragraphs 1 through 67.

69. Section 201(b) of the Communications Act, 47 U.S.C. § 201, imposes upon common carriers the duty that their practices in connection with communication services be "just and reasonable," and provides that all unjust and unreasonable practices are unlawful.

70. Sprint has unilaterally readjusted the rates for the VoIP traffic to an arbitrary level of $.0007 which it purports to be "willing" to pay. Sprint, in fact, is not paying anything in many cases.

71. By refusing to pay the CenturyLink Plaintiffs the proper rate under the Federal Access Tariffs, Sprint has and is engaged in unreasonable, unjust, and unlawful self-help

COUNT IV

Violation of State Access Tariffs

72. The Century Link Plaintiffs hereby incorporate by reference the foregoing paragraphs 1 through 71.

73. The CenturyLink Plaintiffs have provided Sprint with intrastate switched access service pursuant to the State Access Tariffs.

74. The State Access Tariffs have been filed with the applicable "State commissions" and are deemed to be "just and reasonable."

75. The rates, terms, and conditions of the State Access Tariffs are binding upon Sprint.

76. Sprint has received invoices from the CenturyLink Plaintiffs billing the rates for intrastate access services as set forth in the State Access Tariffs.

77. Sprint has refused to pay the invoices Sprint received from CenturyLink for intrastate access services.

78. Sprint has breached its duty to fully pay the tariffed rates for intrastate access services provided by the CenturyLink Plaintiffs.

INJURY AND DAMAGE

79. The CenturyLink Plaintiffs hereby incorporate by reference the following paragraphs 1 through 78.

80. The CenturyLink Plaintiffs have been damaged and continue to be damaged by Sprint's refusal to pay the Wrongfully Withheld Access Payments.

81. The CenturyLink Plaintiffs are also entitled to late fees, prejudgment interest, costs, and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, the CenturyLink Plaintiffs respectfully request that this Court:

A. Adjudge and decree that Sprint is liable to pay the CenturyLink Plaintiffs for intrastate and interstate access charges on interexchange traffic;

B. Award the CenturyLink Plaintiffs all damages proximately caused by the failure of Sprint to pay for federal and state access fees, including late charges in an amount to be determined at trial;

C. Award the CenturyLink Plaintiffs pre-judgment interest, costs, attorneys' fees pursuant to 47 U.S.C. § 206, and such other relief as the Court deems just and proper; and

D. Require Sprint to provide the CenturyLink Plaintiffs with a security deposit and/or make payment into Court, pursuant to Fed. R. Civ. P. 67, of the sum of at least Six Million Four Hundred Thousand and 00/100 Dollars ($6,400,000.00) or such other amount as is reasonably necessary to secure Sprint's payment obligations under the Access Tariffs pending trial.

DEMAND FOR JURY TRIAL

The CenturyLink Plaintiffs demand trial by jury of all issues for which they are entitled to have a jury decide.

Dated: November 23, 2009

Respectfully submitted,

THE CENTURYLINK PLAINTIFFS

By: /s/ Edward H. Bergin

Edward H. Bergin (La. Bar NO. 02992)
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Fed. R. Evid. 1006 Summary of the CenturyLink Plaintiffs

CenturyLink Plaintiff ILEC ("Incumbent Local Exchange Carrier")	Doing Business In	Where Organized/ Incorporated	Applicable Federal Tariff	Applicable State Tariff
1 CenturyTel of Chatham, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
2 CenturyTel of North Louisiana, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
3 CenturyTel of East Louisiana, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
4 CenturyTel of Central Louisiana, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel of Evangeline, LLC d/b/a CenturyTel Tariff L.P.S.C. No. 3
5 CenturyTel of Ringgold, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
6 CenturyTel of Southeast Louisiana, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
7 CenturyTel of Southwest Louisiana, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
8 CenturyTel of Evangeline, LLC	LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
9 CenturyTel of Missouri, LLC	MO	LA	CTOC FCC #3 CTOC FCC #2	▪ CenturyTel of Missouri, LLC PSC MO No. 2, Facilities for Intrastate Access Tariffs
10 Mebtel, Inc.	NC	NC	Madison River FCC #1	▪ Concurs with BellSouth Telecommunications Inc. Industry Access Service Tariff
11 CTL of Idaho, Inc.	ID	DE	CTOC FCC #7	▪ IPUC-12
12 Gallatin River Communications, LLC	IL	DE	Madison River FCC #1	▪ Gallatin River Communications, LLC, I.C.C. No. 2
13 CenturyTel of Northwest Louisiana, Inc.	AR, TX, LA	LA	CTOC FCC #7	▪ CenturyTel Tariff of Evangeline, LLC Tariff L.P.S.C. No. 3
14 CenturyTel of Lake Dallas, Inc.	TX	TX	CTOC FCC #7	▪ CenturyTel of Lake Dallas Exchange Tariff
15 CenturyTel of Port Aransas, Inc.	TX	TX	CTOC FCC #7	▪ CenturyTel of Port Aransas Exchange Tariff
16 CenturyTel of San Marcos, Inc.	TX	TX	TUECA FCC #2	▪ CenturyTel of San Marcos, Inc. Access Service Tariff
17 Spectra Communications Group, LLC	MO	DE	CTOC FCC #1	▪ Spectra Communications Group, LLC PSC MO. NO. 2
18 CenturyTel of Arkansas, Inc.	AR	AR	CTOC FCC #7	▪ CenturyTel of Arkansas Exchange Tariff; ▪ CenturyTel of Mountain Home Access Tariff

CenturyLink Plaintiff ILEC ("Incumbent Local Exchange Carrier")	Doing Business In	Where Organized/ Incorporated	Applicable Federal Tariff	Applicable State Tariff
19 CenturyTel of Mountain Home, Inc.	AR	AR	CTOC FCC #7	▪ CenturyTel of Mountain Home Exchange Tariff; ▪ CenturyTel of Mountain Home Access Tariff
20 CenturyTel of Redfield, Inc.	AR	AR	CTOC FCC #7	▪ CenturyTel of Redfield Exchange Tariff; ▪ CenturyTel of Mountain Home Access Tariff
21 CenturyTel of Northwest Arkansas, LLC	AR, OK, MO	LA	CTOC FCC #7	▪ **AR:** CenturyTel of Northwest Arkansas General Exchange Tariff; ▪ **MO:** Spectra Communications Group, LLC PSC MO No. 2 Facilities for Intrastate Access Tariff; ▪ **OK:** CenturyTel of Northwest Arkansas, LLC, Oklahoma General Exchange Tariff
22 CenturyTel of Central Arkansas, LLC	AR	LA	CTOC FCC #7	▪ CenturyTel of Central Arkansas Exchange Tariff
23 CenturyTel of South Arkansas, Inc.	AR	AR	CTOC FCC #7	▪ CenturyTel of South Arkansas Exchange Tariff; ▪ CenturyTel of Mountain Home Access Tariff
24 CenturyTel of North Mississippi, Inc.	MS	MS	CTOC FCC #7	▪ CenturyTel of North Mississippi, Inc. Access Services Tariff
25 Gulf Telephone Company	AL	AL	Madison River FCC #1	▪ General Subscriber Services Tariff
26 CenturyTel of Alabama, LLC	AL	LA	CTOC FCC #3 CTOC FCC #2	▪ CenturyTel of Southern Alabama Facilities for Intrastate Access Tariff; ▪ CenturyTel of Northern Alabama Access Services Tariff
27 CenturyTel of Adamsville, Inc.	MS, TN	TN	CTOC FCC #7	▪ CenturyTel of Adamsville TRA No. 1
28 CenturyTel of Claiborne, Inc.	TN	TN	CTOC FCC #7	▪ CenturyTel of Claiborne TRA Tariff 1
29 CenturyTel of Ooltewah-Collegedale, Inc.	TN	TN	CTOC FCC #7	▪ CenturyTel of Ooltewah-Collegedale TRA Tariff 1
30 CenturyTel of Ohio, Inc.	OH	OH	CTOC FCC #1	▪ CenturyTel of Ohio, Inc. Access Service Tariff P.U.C.O. No. 2
31 CenturyTel of Central Indiana, Inc.	IN	IN	CTOC FCC #7	▪ CenturyTel of Central Indiana Tariff I.U.R.C. No. 1
32 CenturyTel of Odon, Inc.	IN	IN	CTOC FCC #7	▪ CenturyTel of Odon Tariff I.U.R.C. No. 2

CenturyLink Plaintiff ILEC ("Incumbent Local Exchange Carrier")	Doing Business In	Where Organized/ Incorporated	Applicable Federal Tariff	Applicable State Tariff
33 CenturyTel of Michigan, Inc.	MI	MI	CTOC FCC #1	▪ Michigan Exchange Carriers Association, Inc. M.P.S.C. No. 25; ▪ CenturyTel of Michigan, Inc. d/b/a CenturyTel, Price List
34 CenturyTel of Upper Michigan, Inc.	MI	MI	CTOC FCC #7	▪ Michigan Exchange Carriers Association, Inc. M.P.S.C. No. 25; ▪ CenturyTel of Michigan, Inc. d/b/a CenturyTel, Price List
35 CenturyTel of Northern Michigan, Inc.	MI	MI	CTOC FCC #7	▪ Michigan Exchange Carriers Association, Inc. M.P.S.C. No. 25; ▪ CenturyTel of Michigan, Inc. d/b/a CenturyTel, Price List
36 CenturyTel Midwest-Michigan, Inc.	MI	MI	CTOC FCC #1	▪ Michigan Exchange Carriers Association, Inc. M.P.S.C. No. 25; ▪ CenturyTel of Michigan, Inc. d/b/a CenturyTel, Price List
37 CenturyTel of Wisconsin, LLC	WI	LA	CTOC FCC #1	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
38 Telephone USA of Wisconsin, LLC	WI	WI	CTOC FCC #1	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
39 CenturyTel of Northern Wisconsin, LLC	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
40 CenturyTel of Northwest Wisconsin, LLC	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
41 CenturyTel of Central Wisconsin, LLC	WI	DE	CTOC FCC #1	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
42 CenturyTel of the Midwest-Kendall, LLC	WI	DE	TUECA FCC #2	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
43 CenturyTel of the Midwest-Wisconsin, LLC	WI	DE	TUECA FCC #2 NECA FCC #5	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
44 CenturyTel of Fairwater-Brandon-Alto, LLC	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1

CenturyLink Plaintiff ILEC ("Incumbent Local Exchange Carrier")	Doing Business In	Where Organized/ Incorporated	Applicable Federal Tariff	Applicable State Tariff
45 CenturyTel of Larsen-Readfield, LLC	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
46 CenturyTel of Forestville, LLC,	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
47 CenturyTel of Monroe County, LLC	WI	DE	TUECA FCC #2	▪ CenturyTel of Monroe County, Inc. Intrastate Access Tariff No. 1
48 CenturyTel of Southern Wisconsin, LLC	WI	DE	CTOC FCC #7	▪ CenturyTel of the Midwest-Wisconsin, LLC Access Tariff No. 1
49 CenturyTel of Minnesota, Inc.	MN	MN	TUECA FCC #2	▪ CenturyTel of Minnesota, Inc. Intrastate Access Tariff No. 1
50 CenturyTel of Chester, Inc.	IA, MN	IA	NECA FCC #5	▪ CenturyTel of Chester Exchange Tariff
51 CenturyTel of Postville, Inc.	IA	IA	NECA FCC #5	▪ CenturyTel of Postville Exchange Tariff
52 CenturyTel of Colorado, Inc.	CO	CO	CTOC FCC #7	▪ CenturyTel COLO PUC No. 15
53 CenturyTel of Eagle, Inc.	CO, UT	CO	TUECA FCC #2	▪ CenturyTel COLO PUC No. 15
54 CenturyTel of the Southwest, Inc.	NM	NM	CTOC FCC #7	▪ CenturyTel of the Southwest, Inc. d/b/a CenturyTel, f/k/a Universal Telephone Company of the Southwest, Inc. Access Service Tariff SCC No. 3
55 CenturyTel of the Gem State, Inc.	ID, NV	ID	TUECA FCC #2	▪ **NV:** CenturyTel of the Gem State, Inc. PSCN No. 2; ▪ **ID:** IPUC No. 12
56 CenturyTel of Montana, Inc.	MT	OR	TUECA FCC #2	▪ CenturyTel of Montana, Inc. PSC MT AC 5
57 CenturyTel of Wyoming, Inc.	WY	WY	TUECA FCC #2	▪ CenturyTel of Wyoming, Inc., Wyoming P.S.C. No. 2
58 CenturyTel of Oregon, Inc.	OR	OR	TUECA FCC #2	▪ CenturyTel of Oregon, Inc. Oregon PUC AC4
59 CenturyTel of Eastern Oregon, Inc.	OR, CA	OR	TUECA FCC #2	▪ **OR:** CenturyTel of Oregon, Inc. Oregon PUC AC4; ▪ **CA:** CenturyTel of Eastern Oregon, Inc. Schedule Cal. P.U.C. No. A
60 CenturyTel of Washington, Inc.	WA	WA	TUECA FCC #2	▪ CenturyTel of Washington, Inc. WN U-4 Access Service
61 CenturyTel of Cowiche, Inc.	WA	WA	TUECA FCC #2	▪ CenturyTel of Washington, Inc. WN U-4 Access Service

CenturyLink Plaintiff ILEC ("Incumbent Local Exchange Carrier")	Doing Business In	Where Organized/ Incorporated	Applicable Federal Tariff	Applicable State Tariff
62 CenturyTel of Inter-Island, Inc.	WA	WA	TUECA FCC #2	▪ CenturyTel of Washington, Inc. WN U-4 Access Service

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Monroe Division

CenturyTel of Chatham, L.L.C., et al. Plaintiff, v. Sprint Communications Co., L.P., Defendant	)	Civil Action No. 3:09-CV-01951 RGJ/MLH Chief Judge Robert G. James Magistrate Judge Mark L. Hornsby **MOTION TO DISMISS COUNT II AND TO REFER REMAINING COUNTS TO THE FCC**

MOTION TO DISMISS COUNT II, AND
MOTION TO REFER CLAIMS UNDER PRIMARY JURISDICTION

Sprint Communications Co. L.P. ("Sprint"), through undersigned counsel, moves this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Count II of Plaintiffs' Complaint on the ground that the Complaint fails to state a claim against Sprint upon which relief can be granted.

Sprint further moves this Court to invoke the doctrine of primary jurisdiction so that the Federal Communications Commission ("FCC") may properly consider the technical and policy issues raised by Plaintiffs in their Complaint, which are within the agency's jurisdiction and particular field of expertise, and which are currently under consideration by the FCC. In support of its motion, Sprint has attached the following memorandum of authorities.

Respectfully submitted,

Dated: January 13, 2010

s/Gordon D. Polozola
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, a copy of the above and foregoing pleading was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

s/Gordon D. Polozola

EXHIBIT 3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CENTURYTEL OF CHATHAM, LLC, ET AL.	**CIVIL ACTION NO. 09-1951**
VERSUS	**JUDGE ROBERT G. JAMES**
SPRINT COMMUNICATIONS COMPANY LP	**MAG. JUDGE MARK HORNSBY**

RULING

Pending before the Court is a Motion to Dismiss Count II and Refer the Other Counts to the Federal Communications Commission ("Motion to Dismiss") [Doc. No. 11] filed by Defendant Sprint Communications Company LP ("Sprint"). The motion was referred to Magistrate Judge Mark Hornsby for report and recommendation. On December 15, 2010, the Magistrate Judge issued a Report and Recommendation [Doc. No. 28] recommending that the motion be granted, that Count II of Plaintiffs' Complaint be dismissed for failure to state a claim on which relief may be granted, and that the case be stayed while the remaining counts in Plaintiffs' Complaint are referred to the Federal Communications Commission ("FCC"). On December 29, 2010, Plaintiffs filed an Objection to the Report and Recommendation expanding their arguments and requesting oral argument. [Doc. No. 29]. On January 11, 2011, Sprint filed a Response. [Doc. No. 34].

After a *de novo* review of the record, the Court ADOPTS the Report and Recommendation of the Magistrate Judge. The Court issues this Ruling to address arguments that were not addressed in the Report and Recommendation.

II. Count II

In the Report and Recommendation, the Magistrate Judge found that there was nothing in 47

U.S.C. § 251(g) "that clearly and unmistakably creates a right for a local exchange carrier to sue under the statute regarding [the] right to receipt of compensation for services." [Doc. No. 28, p. 6].

Plaintiffs argue that "[b]ecause Section 251(g) entitles [Plaintiffs] to 'receipt of compensation' for the services it provides Sprint, dismissal of Count II would be inconsistent with the rationale if not the express holding of *Global Crossing* that a carrier's refusal to pay compensation is unjust and unreasonable in violation of 47 U.S.C. § 201(b)." [Doc. No. 29, p. 6] (citing *Global Crossing v. Metrophones*, 550 U.S. 45 (2007)). In *Global Crossing*, the FCC issued an order equating a carrier's violation of a compensation rule with "unjust and unreasonable" conduct in violation of 47 U.S.C. § 201(b). 550 U.S. at 54. In this case, the FCC has not issued an order that establishes a statutory violation. Therefore, *Global Crossing* is inapplicable to this case. *See North Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1158-60 (9th Cir. 2010); *Va. Elec. & Power v. Comcast*, No. 1:09-cv-1149, 2010 WL 916953, at *6 (E.D. Va. March 8, 2010).

II. Primary Jurisdiction

In the Report and Recommendation, the Magistrate Judge also found that "the best exercise of the court's discretion in these circumstances would be to stay this case, refer the remaining counts of the complaint to the FCC, and close this civil action for administrative purposes." [Doc. No. 28, p. 10].

Plaintiffs argue that the FCC does not have jurisdiction or specialized expertise to interpret Plaintiffs' State Access Tariffs and that many of the state commissions that previously approved the State Access Tariffs lack statutory authority to award damages to Plaintiffs. [Doc. No. 29, p. 2 (citing *State ex rel. Indianapolis Water Co. v. Niblack*, 161 N.E.2d 377, 378 (Ind. 1959); *Straube v.*

Bowling Green Gas Co., 227 S.W.2d 666, 668 (Mo. 1950))]. Plaintiffs also argue that referral to the FCC would serve no purpose other than delay because the FCC does not entertain collection actions nor act as a collection agent for carriers with respect to unpaid tariffed charges. [Doc. No. 29, p. 4 (citing *Global Crossing*, 550 U.S. at 68 n.1; *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457, at ¶ 23 n.93 (Order April 21, 2004))]. Any action by the FCC, therefore, would apply prospectively only.

However, the State Access Tariffs involve only one count in Plaintiffs' Complaint. By referring this matter to the FCC, the Court intends for the FCC to **interpret** those counts involving Federal Access Tariffs. Thereafter, any party may seek a judgment based on the FCC's ruling in this Court, including a claim based on unjust enrichment for past invoices due.

Finally, Plaintiffs argue that the primary jurisdiction doctrine is inapplicable because the invoices are all based on Plaintiffs' tariffed rates which are valid until set aside. However, the main issue in this case is whether Plaintiffs' tariffed rates are even applicable to VoIP originated calls, not whether those tariffed rates are valid.

The Court finds that the best exercise of its discretion is to stay this case and refer the remaining counts of Plaintiffs' Complaint to the FCC.

III. CONCLUSION

For the foregoing reasons and the reasons stated in the Report and Recommendation of the Magistrate Judge, Sprint's Motion to Dismiss [Doc. No. 11] is GRANTED, Count II of Plaintiffs' Complaint is DISMISSED WITH PREJUDICE, this case is STAYED, and the remaining counts in Plaintiffs' Complaint are referred to the FCC. After one year from the date of this Ruling, if any party is not satisfied that the FCC has made substantial progress toward deciding the matter, the party

may file a motion to vacate the stay with this Court.

Plaintiffs' request for oral argument as construed as a Motion for Hearing [Doc. No. 29] is DENIED.

MONROE, LOUISIANA, this 24 day of January, 2011.

ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

EXHIBIT 4

WC 12-105

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

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

PETITION FOR DECLARATORY RULING

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Counsel for Sprint Communications Company L.P.

April 5, 2012

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

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

PETITION FOR DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

In 2009, the incumbent local exchange companies formerly known as "CenturyTel," and now doing business as "CenturyLink" (referred to herein as "CenturyLink") filed a complaint against Sprint Communications Company L.P. ("Sprint") in Federal Court for the Western District of Louisiana seeking to enforce their state and federal access tariffs with respect to Voice-over Internet Protocol ("VoIP") originated calls. The VoIP originated calls were delivered to Sprint in its capacity as a wholesale provider and then delivered to CenturyLink via Feature Group D facilities for termination by CenturyLink company serving the called party. [1]

CenturyLink's complaint in the Louisiana action contained four counts, each of which was predicated on Sprint's alleged failure to pay tariffed switched access charges. Count I charged Sprint with violation of federal access tariffs by failing to pay tariffed rates for VoIP originated interstate long distance traffic.[2] Count II alleged that Sprint's failure to pay charges contained in state and federal access tariffs constituted a violation of 47 U.S.C. § 251(g).[3] Count

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1 A copy of CenturyLink's Complaint is attached as Exhibit A.
2 Exhibit A, Complaint ¶¶ 52-60.
3 Exhibit A, Complaint ¶¶ 62-67.

III alleged that Sprint's decision to compensate VoIP originated long distance traffic at a rate of $0.0007 per minute, rather than at the rates in switched access tariffs, was an unreasonable and unjust practice in violation of 47 U.S.C. § 201(b).[4] Finally, Count IV claimed that Sprint violated more than 30 separate state tariffs on file with 25 separate state public utilities commissions by failing to pay tariffed rates for VoIP originated intrastate long distance traffic.[5] Following a Magistrate Judge's Report and Recommendation, on January 25, 2011, Federal District Court Judge Robert James issued an order dismissing Count II for failure to state a claim upon which relief could be granted, and referring the remaining counts – Counts I, III and IV – to the Commission.[6] The Court found "the main issue in this case is whether Plaintiffs' tariffed rates are even applicable to VoIP originated calls" and decided "to stay this case and refer the remaining counts of Plaintiffs' Complaint to the FCC."[7]

Following i) discussions among the parties and Commission Staff regarding the proper procedure through which to effectuate the referral, and ii) settlement discussions, Sprint files this Petition. Sprint acknowledges that Commission staff believes the *Referral Order* only calls for the resolution of the issue within CenturyLink's Count I. Sprint reads the *Referral Order* to refer all "remaining counts" to the Commission. It therefore includes all remaining counts within this Petition, in order to comply with the *Referral Order*, and to prevent CenturyLink from arguing to the Court that Sprint has failed to raise all of the referred issues.[8] The Commission, of course,

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4 Exhibit B, Complaint ¶¶ 69-71.

5 Exhibit B, Complaint ¶¶ 72-78.

6 *CenturyTel of Chatham, LLC v. Sprint Communications Company L.P.*, No. 09-1951 (W.D. La.) at 3 ("*Referral Order*"). The *Referral Order* is attached as Exhibit B. Sprint files this Petition pursuant to 47 C.F.R. § 1.2 and pursuant to the *Referral Order*.

7 *Referral Order* at 3.

8 While the *Referral Order* at 3-4 does not give the Commission a deadline for ruling, a party not satisfied that the Commission has made substantial progress towards deciding the referred issues may file a motion to vacate the stay.

has the discretion to decline decide one or more of the issues referred to it by the court. Through this Petition Sprint seeks a declaration that for periods prior to December 29, 2011, the effective date of the forward-looking rules adopted by the Commission in its recent *CAF Order*,[9] access tariffs filed with the Commission, including CenturyLink's tariffs, did not impose compensation obligations on VoIP originated calls delivered over the public switched telephone network. In accordance with Part 69 of the Commission's Rules, a telecommunications carrier cannot tariff a non-telecommunications service absent a ruling by the Commission allowing it to do so. Such a finding would comply with Section 251(g)'s prohibition on the imposition of access charges on calls not subject to access prior to the Telecommunications Act of 1996.[10] This declaration will provide guidance with respect to CenturyLink's Count I, one of the "remaining counts" referred to Commission.

Sprint also seeks a declaration that because the VoIP originated traffic is jurisdictionally interstate, intrastate access tariffs cannot impose compensation obligations with respect to that traffic, even if those calls originate and terminate in the same state. Such a declaration is necessary to enforce the Commission's regulatory authority over this jurisdictionally interstate service, and is required by 47 U.S.C. § 251(g). This declaration will provide guidance with respect to CenturyLink's Count IV, another of the "remaining counts" referred to Commission.

Finally, Sprint seeks a declaration that it could not violate 47 U.S.C. § 201(b) when it compensated CenturyLink at $0.0007 per minute, rather than at rates in switched access tariffs, alleged in CenturyLink's Count III. Such a result is compelled by the Commission's decision in *All-American Tel. Co. v. AT&T Corp.*, File No. EB-10-MD-003, 26 FCC Rcd. 723, (2011) ("*All-*

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[9] *In the Matter of Connect America Fund*, WC Docket No. 10-90 et al., 26 FCC Rcd. 17663, Report & Order and Further Notice of Proposed Rulemaking (2011) ("*CAF Order*").
[10] 47 U.S.C. § 251(g).

American") that customers do not violate Section 201(b) by failing to pay for services. This declaration will provide guidance with respect to CenturyLink's Count III, the final of the "remaining counts" referred to Commission.

II. BACKGROUND

The CenturyLink companies are incumbent local exchange carriers ("ILECs") operating in a number of states. Sprint is a telecommunications carrier that operates both as an interexchange carrier ("IXC") and a competitive LEC. In its capacity as a competitive LEC, Sprint offers, in conjunction with cable operators, VoIP and other Internet Protocol ("IP")-enabled services to end user customers in competition with incumbent LECs like CenturyLink.[11] When VoIP calls are made, a cable telephony modem connected to the customer's telephone originates the voice call in IP. The IP-originated call is then sent over the cable company's facilities to the Sprint network. The Sprint network converts the call to Time Division Multiplex ("TDM") protocol before it is delivered to the carrier that completes the call, which in this case is CenturyLink. CenturyLink terminates the calls it receives to its customers in TDM.

Sprint's VoIP originated traffic is like other VoIP originated traffic that has been the subject of disputes presented to the Commission and various courts. It is not like traditional TDM-TDM traffic, nor is like so-called "IP in the Middle" traffic,[12] both of which involve no net protocol change.

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[11] *See In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exch. Carriers May Obtain Interconnection Under Section 251 of the Commc'ns. Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers*, 22 FCC Rcd. 3513, ¶ 2 (2007) ("*Time Warner Order*"); *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 747 (8th Cir. 2009) (describing Sprint's provision of competitive VoIP services in conjunction with cable companies).

[12] *See infra* pp. 7-8.

CenturyLink's Tariff F.C.C. No. 7 is one of the tariffs at issue and a typical interstate access tariff. It defines "Switched Access Service" as a service "available to customers for their use in furnishing their services to end users."[13] A customer is defined as one that "subscribes to service under this tariff, including both Interexchange Carriers (ICs) and End Users."[14] And, End User means "any customer of an interstate or foreign telecommunications service that is not a carrier."[15] Thus, for access charges to apply, Sprint must be acting as an Interexchange Carrier as it serves an End User customer of interstate telecommunications service.

I. DISCUSSION

A. The Commission's New Rules Adopted In The *CAF Order* Do Not Resolve The Questions Presented In This Petition.

On November 18, 2011, the Commission released its *CAF Order*, in which it fundamentally reformed the intercarrier compensation regime. One significant reform made by the Commission established a "prospective intercarrier compensation framework for VoIP traffic."[16] "Ultimately," all VoIP-PSTN traffic "will be subject to a bill-and-keep framework." However, the Commission established a "transition to that end point" under which (1) "all VoIP-PSTN traffic [is brought] within the section 251(b) framework"; (2) "[d]efault intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates,"; (3) "[d]efault intercarrier compensation rates for non-toll VoIP-PSTN traffic are the otherwise applicable reciprocal compensation rates"; and (4) "[c]arriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation."[17]

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13 Exhibit C, CenturyLink Tariff No. 7, § 6.1, Original Page 6-1 (emphasis added).
14 Exhibit C, CenturyLink Tariff No. 7, § 2.6, Original Page 2-50.
15 Exhibit C, CenturyLink Tariff No. 7, § 2.6, Original Page 2-53.
16 *CAF Order*, ¶ 933.
17 *CAF Order*, ¶¶ 933, 958.

In adopting these reforms the Commission explicitly stated "our action clarifying the prospective intercarrier compensation treatment of VoIP-PSTN traffic does not resolve the numerous existing industry disputes" regarding compensation for prior periods.[18] As a result, regardless of the treatment of VoIP originated calls delivered by Sprint to CenturyLink on and after December 29, 2011 (an issue beyond the scope of this Petition), the Commission must still resolve the treatment of that traffic for prior periods.

B. The Commission Should Declare That Until December 29, 2011, CenturyLink's Federal Access Tariffs Did Not Impose Access Charges With Respect To VoIP- Originated Calls (CenturyLink's COUNT I)

1. Part 69 applies to telecommunications services.

The federal access tariffs at issue in CenturyLink's Count I were, according to CenturyLink, filed pursuant to 47 C.F.R. Part 69, which regulates the provision of interstate access services by telephone companies. Section 69.1 "establishes rules for access charges for interstate or foreign access services provided by telephone companies" and provides that "charges for such access service shall be computed, assessed, and collected and revenues from such charges shall be distributed as provided in this part."[19] Rule 69.2(b) defines "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."[20] Rule 69.5(b) provides that a filing carrier's charges shall be assessed "upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[21]

The term "telecommunications" is defined by federal law as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in

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18 *CAF Order*, ¶ 935.
19 47 C.F.R. § 69.1(a) and (b) (2011).
20 47 C.F.R. § 69.2(b) (2011) (emphasis added).
21 47 C.F.R. § 69.5(b) (2011) (emphasis added).

the form or content of the information as sent and received."[22] Because VoIP-PSTN traffic clearly involves a "change in form," it simply cannot be a telecommunication service subject to Title II of the Act and the tariff obligations under 47 U.S.C. § 203.

2. VoIP-originated traffic undergoes a change in form

As noted above, the traffic that is the subject of this Petition is originated in IP, converted to TDM, and then delivered in and terminated in TDM. As such, this traffic unquestionably undergoes a net change in form.

VoIP-originated traffic is fundamentally different than "IP in the middle traffic" which the Commission has previously found to be subject to the access charge regime.[23] The *IP in the Middle* case addressed traffic that began and ended in TDM protocol on the public switched telephone network. When the calls entered AT&T's network – in the middle – they were converted into IP and transported over AT&T's Internet backbone before being converted back to the original format when entering the PSTN for termination at the called party's location. The Commission concluded this service did not involve a net change in form, and so qualifies as a telecommunications service, and was therefore subject to access charges.[24] The Commission noted that that "AT&T does not offer these customers a 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information ...'."[25]

The Commission limited its decision to IP in the middle traffic, and did so in a way that highlights the differences between IP in the middle traffic and the VoIP originated traffic at issue in Sprint's Petition:

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22 47 U.S.C. § 153(50) (emphasis added).

23 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Servs. Are Exempt From Access Charges*, WC Docket No. 02-361, 19 FCC Rcd. 7457 (2004) ("*IP in the Middle Order*").

24 *Id.* ¶¶ 12-15.

25 *Id.* ¶ 12.

> We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, *i.e.*, an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.[26]

The Commission went on: "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services."[27]

3. The former access charge rules do not apply to VoIP-originated traffic.

There are two fundamental reasons why access charges do not, and cannot, apply to VoIP-originated traffic under existing Commission Rules. First, as discussed above, and in accordance with 47 C.F.R. Part 69, access charges do not apply to non-telecommunications services. VoIP-PSTN traffic undergoes a change in form and is not a telecommunications service.

Second, because there was no pre-1996 intercarrier compensation obligation that applied to VoIP originated traffic, such charges were not preserved by Section 251(g)'s carve-out for the legacy access charge regime. In 1996 Congress adopted Section 251(g), which mandated that federal and state access charges could apply only to traffic subject to the then-existing access charge regime. 47 U.S.C. § 251(g) (on and after February 8, 2006, each local exchange carrier shall provide access services as it did on that date, unless superseded by Commission rule or

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[26] *Id.* ¶ 1. *See also id.* ¶ 10 ("This order represents our analysis of one specific type of service under existing law based on the record compiled in this proceeding. It in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or when it resolves the *Intercarrier Compensation* proceeding.").

[27] *Id.* ¶ 4 (emphasis added).

order). Except as specifically provided in Section 251(g), Section 251(b)(5) reciprocal compensation applies to all telecommunications. As the D.C. Circuit stated in *Worldcom v. FCC*:

> On its face, § 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superseded by Commission action implementing the Act.[28]

At no time has the Commission or CenturyLink identified a pre-1996 per-minute access charge compensation obligation imposed on net protocol exchange traffic exchanged between a LEC and an IXC.[29] In the absence of a per-minute access charge compensation obligation, there is no compensation obligation to be "preserved" by Section 251(g), and access charges cannot apply. Compensation, if any, would be governed by Section 251(b)(5).

Courts that have examined this issue have determined, as a matter of law, that interstate and intrastate access charges do not and cannot apply to VoIP originated traffic. In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, a federal court in Missouri rejected the argument that VoIP-originated traffic is subject to access charges because – based on existing law – "federal access charges are inapplicable to IP-PSTN traffic because such traffic is an 'information service' or an 'enhanced service' to which access charges do not apply."[30] The court continued:

> Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable.[31]

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28 *Worldcom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

29 *See CAF Order*, ¶ 956 n.1952.

30 *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1079 (E.D. Mo. 2006).

31 *Id.* at 1080.

In February 2010, a federal court in the District of Columbia held access charges do not, and cannot, apply to VoIP originated traffic like that in this case.[32] That court interpreted Section 251(g) to limit the application of access charges only to traffic for which there was a pre-1996 Act access payment obligation.[33] VoIP originated calls do not fall within this category because there was no pre-Act obligation relating to intercarrier compensation for VoIP-PSTN traffic."[34] The Court also held "that CommPartners' transmission and net conversion of the calls is properly labeled an information service."[35] Access charges did not apply to this non-telecommunications service, and judgment was entered against the plaintiff seeking to collect them.[36]

In March of 2010, a federal district court in New York issued a post-trial memorandum rejecting the application of access tariffs to VoIP originated calls, despite the fact that the calls were delivered to the plaintiff in TDM format.[37] That court held: "the filed [state and federal] tariff rates cannot be applied to the facts of this dispute."[38]

Consistent with these decisions and the underlying law, the Commission should grant Sprint's Petition.

4. CenturyLink's access tariffs compel the same result.

a. The Commission has confirmed that the terms of an access tariff must be strictly met for access charges to apply.

CenturyLink has argued that it is entitled to bill and collect access charges simply because the calls were delivered in TDM and completed by Centurylink. Yet the Commission

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32 *PAETEC Commc'ns, Inc. v. CommPartners LLC*, No. 08-0397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010).

33 *Id.* at *3.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Manhattan Telecomms. Corp. v. Global Naps, Inc.*, No. 08 CIV. 3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010).

38 *Id.* at *3.

has made abundantly clear that for access charges to apply, the strict terms of a tariff must apply. For example, the Commission recently explained that: "Consistent with [47 U.S.C. § 203], a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff."[39] There the Commission found YMax did not provide service as described in its tariff for several reasons, including that the recipients of the calls did not meet the definition of "End User" based on the service they were receiving.[40] This was true even though the calls were received in TDM and completed by *YMax*.

b. CenturyLink's Tariff Require Analysis of a call on and end-to-end basis.

Under CenturyLink's FCC Tariff No. 7, and its other tariffs, access service is defined with reference to the service being purchased by the individual making the call. Under CenturyLink's tariff, Switched Access Service is available to Sprint as it furnishes service to a customer of an interstate telecommunications service.[41] Under the business model employed by VoIP based cable providers, the "customer" is the person or entity making the call in IP format. Because CenturyLink's tariff – like other federal tariffs – point back to the nature of the service received by he who makes the call, the Commission should confirm that the access tariff does not apply to VoIP originated information service calls.

5. Sprint's status as a telecommunications carrier does not make access charges applicable to VoIP-originated calls.

CenturyLink has argued that VoIP- originated traffic Sprint receives from cable companies is "telecommunications" because the Commission determined in the *Time Warner Order* that Sprint is providing "telecommunications" when it acts as a wholesale provider with

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39 *AT&T Corp. v. YMax Commc'ns Corp.*, File No. EB-10-MD-005, 26 FCC Rcd. 5742, Memorandum Opinion & Order, ¶ 12 ("*YMax Order*").

40 *Id.* ¶¶ 15-20.

41 *Supra* pp. 6-7.

respect to this traffic. This argument ignores the context of the order and the order itself. There, the Wireline Competition Bureau ("WCB") determined Sprint met the definition of a "telecommunications carrier" with respect to the combined suite of services offered to its cable company customers, and was thus entitled to interconnection from incumbent LECs under the 1996 Act. In so doing, the WCB stated explicitly:

> [T]he statutory classification of a third-party provider's VoIP services as an information service or a telecommunications service is irrelevant to the issue [being decided in this Order].[42]

The WCB went on to declare that this Order did not purport to decide or "prejudge the [FCC's] determination of what compensation is appropriate" for the termination of VoIP originated traffic, or to prejudge "any other issues pending in the Intercarrier Compensation docket."[43] Thus, the fact that Sprint provides "telecommunications" to cable companies on a wholesale basis has no impact on how VoIP originated traffic is treated for intercarrier compensation purposes.

In fact, this issue was squarely addressed and resolved in *Southwestern Bell Tel.*[44] That court affirmed a Missouri Commission decision, and held that while VoIP-originated traffic is an "information service" not subject to access charges, it does involve "telecommunications."[45] The court recognized "when a CLEC acts as a VoIP provider it uses 'telecommunications' to transmit IP-PSTN traffic to the network of the carrier that provides service to the called party."[46] The court noted that information services are, by definition, "provided '*via telecommunications.*' 47

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42 *Time Warner Order*, ¶ 15.
43 *Id.* ¶ 17 (emphasis added).
44 461 F. Supp. 2d 1055.
45 *Id.* at 1079.
46 *Id.*

U.S.C. § 153(20)."[47] In no way did this undermine the court's holding that the call itself, on an end-to-end basis, was an information service exempt from access charges as a matter of federal law.[48]

Moreover, the Commission has already decided implicitly that an IXC's status as a telecommunications carrier is not definitive with respect to the application of access charges. If the IXC's status as a telecommunications carrier was determinative, the Commission's *IP in the Middle Order* would have been decided on the single undisputed fact that AT&T was operating as a telecommunications carrier. Instead, the Commission's decision focused on the nature of the transmission on an end-to-end basis, and whether AT&T was providing a service that provided the enhanced capabilities to the end user.[49] Consistent with this, the Commission should grant Sprint's Petition.

C. The Commission Should Declare That State Access Tariffs Do Not Apply To VoIP-Originated Calls That Meet The Definition Of An Information Service (CenturyLink's COUNT IV).

The Commission should also declare that under no circumstances could intrastate access charges apply to VoIP-originated traffic that is jurisdictionally interstate. The FCC has determined that one type of VoIP originated traffic is jurisdictionally interstate, and made the following statements:

> Indeed, the practical inseverability of other types of IP-enabled services having basic characteristics similar to

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47 *Id.* at 1081 n.19 (emphasis in original).

48 *Id.* at 1082. *See also Report to Congress*, ¶ 41 ("When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications", it does not provide telecommunications; it is using telecommunications.'"). Nothing in the *CAF Order* takes away from this analysis. To the contrary, the Commission found it had authority to impose the forward looking rules under Section 251(b)(5) regardless of whether the underlying service on an end-to-end basis is an information service. *CAF Order*, ¶ 954.

49 *IP in the Middle Order*, ¶ 12.

> DigitalVoice would likewise preclude state regulation to the same extent as described herein.... Accordingly, to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.[50]

In that same order, the Commission noted that it had determined cable *modem* service to be jurisdictionally interstate:

> The Commission similarly determined that cable modem service is an interstate service because the points among which cable modem communications travel are often in different states and countries. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59.[51]

Because VoIP originated traffic and cable modem service are jurisdictionally interstate services, the CenturyLink Plaintiffs' intrastate access charges do not apply, and cannot apply to the VoIP originated traffic delivered by Sprint to CenturyLink.[52]

Finally, the discussion above with respect to the application of Section 251(g) applies equally to both interstate and intrastate traffic. Section 251(g) prohibits LECs from imposing per-minute access charges on traffic that was not subject to per-minute access charges before 1996. Nothing in the text of Section 251(g) limits its application to interstate traffic.[53] As such, in order to properly implement Congress's directive in Section 251(g), the Commission should declare that intrastate access tariffs do not impose compensation obligations on VoIP originated traffic.

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50 *Vonage Order*, ¶ 32.

51 *Id.* ¶ 22 n.80.

52 Again, nothing in the *CAF Order* takes away from this analysis. This was simply another issue not reached by the Commission. *CAF Order*, ¶ 959.

53 *CAF Order*, ¶¶ 765-66 ("We also reject arguments that sections 251(g) and 251(d)(3) somehow limit the scope of the 'telecommunications' covered by section 251(b)(5). Whatever protections these provisions provide to state access regulations, it is clear that those protections are not absolute.").

D. The Commission Should Declare That Sprint Cannot Have Violated Section 201(b) By Compensating VoIP-Originated Traffic At $0.0007 Per Minute (CenturyLink's COUNT III).

CenturyLink's Count III alleges that Sprint engaged in unjust and unreasonable conduct in violation of 47 U.S.C. § 201(b) by compensating CenturyLink the amount of $0.0007 per minute, instead of access rates, for VoIP originated traffic. CenturyLink's Count III is fundamentally at odds with the Commission decision in *All-American* that: "[A]n allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c)."[54] The Commission's rationale was as follows:

> During the past twenty years, the Commission has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c) – even if the carrier's customer is another carrier. These holdings stem from the fact that the Act generally governs a carrier's obligations to its customers, and not vice versa. Thus, although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission under section 208 (or in court under section 206) for breach of the Act itself. This long-standing Commission precedent that "collection actions" fail to state a claim for violation of the Act has been acknowledged and followed by courts.[55]

That same rationale applies to CenturyLink's Count III. As such, the commission should declare that, under *All-American*, a carrier-customer's payment of amount less than what was billed cannot constitute a violation of Section 201(b).

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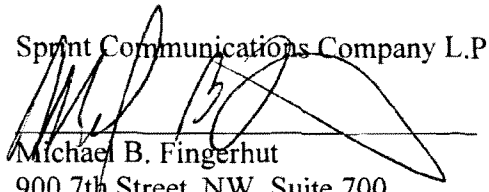
[54] *All-American*, ¶ 2.
[55] *All-American*, ¶ 10.

IV. CONCLUSION

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

Respectfully submitted

Sprint Communications Company L.P.



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April 5, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Monroe Division

CENTURYTEL OF CHATHAM, LLC d/b/a CenturyLink, *et al.*, **Plaintiffs,** **v.** **SPRINT COMMUNICATIONS CO. LP,** **Defendant.**	**Case No. 3:09-cv-01951 RGJ/MLH** **Chief Judge Robert G. James** **Magistrate Judge Mark L. Hornsby**

EX PARTE MOTION TO VACATE STAY

The CenturyLink Plaintiffs (collectively, "CenturyLink"),[1] by counsel, move the Court to vacate the stay entered on January 25, 2011 for the limited purpose of allowing CenturyLink to file a Notice of Dismissal Without Prejudice, pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, to dismiss without prejudice those claims that asserted violations of state access tariffs as set forth in Count IV of the Complaint so that CenturyLink can pursue these claims in the appropriate state forums. The grounds for vacating the stay are more fully set forth in CenturyLink's Memorandum in Support of Motion to Vacate Stay, filed contemporaneously with this motion. At this time, CenturyLink is content to have the stay remain in place with respect to the claims asserted in Counts I and III of the Complaint. CenturyLink is also not seeking to have this Court withdraw its referral of those claims to the Federal Communications Commission ("FCC").

[1] The complete list of CenturyLink Plaintiffs is set forth in Exhibit "A" to the Complaint (Rec. Doc. 1).

Dated: March 14, 2014

Respectfully submitted,

THE CENTURYLINK PLAINTIFFS

By: *s/ Mark A. Mintz*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing *EX PARTE* MOTION TO VACATE STAY has been forwarded this day to all counsel of record by the Court's CM/ECF system.

New Orleans, Louisiana, this 14th day of March, 2014.

/s/ Mark A. Mintz
Mark A. Mintz

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA
Monroe Division

CENTURYTEL OF CHATHAM, LLC d/b/a CENTURYLINK, *ET AL.*,

Plaintiffs,

V.

SPRINT COMMUNICATIONS CO., L.P.,

Defendant.

CASE NO. 3:09-CV-01951

CHIEF JUDGE ROBERT G. JAMES

MAGISTRATE JUDGE MARK L. HORNSBY

SPRINT COMMUNICATIONS CO. L.P.'S MEMORANDUM IN OPPOSITION TO CENTURYLINK'S *EX PARTE* MOTION TO VACATE STAY

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Sprint Communications Co. L.P. ("Sprint"), by counsel, respectfully submits this memorandum in opposition to the CenturyLink Plaintiffs' ("CenturyLink") *Ex Parte* Motion to Vacate Stay.

I. BACKGROUND

CenturyLink filed its Complaint on November 11, 2009. ECF No. 1 ("Compl."). In its Complaint, CenturyLink asserts four claims: Violation of Federal Access Tariffs (Count I), Violation of Section 251(g) of the Communications Act (Count II), Violation of Section 201 of the Communications Act (Count III), and Violation of State Access Tariffs (Count IV). Compl. ¶¶ 52-78. CenturyLink asserts that its federal claims fall under the Court's federal question jurisdiction and that the state tariff claims fall within the Court's supplemental jurisdiction. Compl. ¶¶ 40-42. No party, nor the Court, challenged CenturyLink's assertion of supplemental jurisdiction over the state law claims.

On January 13, 2010, Sprint moved to dismiss Count II pursuant to Federal Rule of Civil Procedure 12(b)(6) and requested that the Court refer the remaining claims to the Federal Communications Commission ("FCC"). ECF No. 11. On January 25, 2011, the Court issued an order dismissing Count II, staying the case, and referring the remaining counts to the FCC. ECF No. 36, p. 3. Subsequently, Sprint filed a Petition for Declaratory Ruling with the FCC as to Counts I, III, and IV ("FCC Petition"), which remains pending. Affidavit of Philip R. Schenkenberg ("Schenkenberg Aff.") Ex. A. Now, CenturyLink moves to lift the stay, with the stated goal of voluntarily dismissing its

Count IV claims and re-asserting a fragmented Count IV in multiple "state forums" while Counts I and II remain pending with the FCC.[1] ECF No. 39, p. 1.

In furtherance of its goal, on March 28, 2014, CenturyLink filed a complaint against Sprint containing a fragmented version of Count IV in Missouri, seeking to collect intrastate charges. Schenkenberg Aff. Ex. E. In that complaint, CenturyLink discusses this litigation and states that "[t]he presence of CenturyLink's intrastate claims in the law suit, pending their ultimate dismissal by CenturyLink, do not preclude CenturyLink from initiating this complaint in order to pursue its Missouri-specific claims in front of this Commission." Schenkenberg Aff. Ex. E ¶ 21.

II. ARGUMENT

CenturyLink's motion should be denied for three reasons: (1) CenturyLink's purported voluntary dismissal is improper under Rule 41, (2) the FCC has been asked to provide guidance on the Count IV claims and should be allowed to do so, and (3) Sprint would be substantially prejudiced if CenturyLink were to split its claims and force Sprint to defend multiple overlapping state actions.

A. CenturyLink's Proposed Voluntary Dismissal is Procedurally Deficient

1. Rule 41 Does Not Authorize a Plaintiff to Voluntarily Dismiss Some, But Not All, Claims Against a Defendant

CenturyLink purports to move the Court to vacate the stay so that CenturyLink can file a Notice of Dismissal Pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of

[1] ECF No. 1-1, attached to CenturyLink Complaint, identifies 25 separate states in which the CenturyLink Plaintiffs do business and maintain state tariffs. CenturyLink has not disclosed how many separate state actions it contemplates filing if it allowed to split its Count IV claims from its Count I and III claims.

Civil Procedure of one, but not all, of the claims it asserts against Sprint. ECF No. 38, p. 1. Such a request is procedurally deficient and should be denied.

The Rule states: "the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i) (emphasis added). In violation of the Rule, CenturyLink seeks to voluntarily dismiss only its Count IV claims, not the entire action. ECF 38-1, p., 1. The Fifth Circuit has held that the words, "an action," mean that a plaintiff may voluntarily dismiss only an entire action, not just certain claims against a particular defendant. *See Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 662-63 (5th Cir. 1979) (holding that a plaintiff cannot voluntarily dismiss one but not all claims against a particular defendant because "when Rule 41(a) refers to Dismissal of an 'action', there is no reason to suppose that the term is intended to Include the separate claims which make up an action"); *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 720 (5th Cir. 2010) ("Rule 41(a) dismissal only applies to the dismissal of an entire action—not particular claims"). *See also* 9 Charles Alan Wright et al., FED. PRAC. & PROC. § 2362, at 413 (3d. ed. 2013) ("Similarly, it has been held that when multiple claims are filed against a single defendant, Rule 41(a) is applicable only to the voluntary dismissal of all the claims in an action."). Accordingly, the Court should decline to lift the stay and, even if it does, it should refuse to accept CenturyLink's improper notice of voluntary dismissal of Count IV.

2. To Dismiss One or More Claims, But Not All, against Sprint, CenturyLink Must Comply with Rule 15

Courts in the Fifth Circuit hold that, when a plaintiff like CenturyLink purports to "voluntarily dismiss" one or more, but not all, claims against a certain defendant, that plaintiff's activities are governed by Rule 15, not Rule 41. *See*, *Moore v. Maplehurst Bakeries, Inc.*, No. CIV. A. 99-0454, 1999 WL 695824, at *1 (E.D. La. Sept. 7, 1999) ("The Court treats plaintiff's attempt to dismiss a single claim of a multi-claim complaint as an amendment of the pleadings under Rule 15"); *Orthoflex, Inc. v. Thermotek, Inc.*, Nos. 3:11-CV-0870-D, 3:10-CV-2618-D, 2011 WL 4398279, at *1 (N.D. Tex. Sept. 21, 2011) (refusing to apply Rule 41 to a request to dismiss "only one of four claims" and instead applying Rule 15). *See also*, 9 FED. PRAC. & PROC. § 2362, at 413 (Advising that "[a] plaintiff who wishes to drop some claims but not others should do so by amending his complaint pursuant to Rule 15."). Accordingly, there is a proper time for Rule 41 and a proper time for Rule 15: the rules are not interchangeable. *See Copeland v. Merrill Lynch & Co.*, No. Civ. A. No. 92-570, 1993 WL 139487, at *1 (E.D. La. Apr. 28, 1993) (refusing to apply Rule 15 and instead applying Rule 41 when plaintiffs sought to amend their Complaint and dismiss all claims against a defendant). In this case, if CenturyLink wishes to eliminate its Count IV claims, it must proceed under Rule 15.

Under Rule 15, a party can amend a pleading "once as a matter of course" in two situations:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Fed. R. Civ. P. 15(a)(1).

CenturyLink served Sprint with its Complaint on December 4, 2009. ECF No. 5. Sprint served a responsive 12(b) motion on January 13, 2010. ECF No. 11. Twenty-one days have passed since the service of the Complaint and Sprint's 12(b) motion. Therefore, under the Rules, CenturyLink cannot, "as a matter of course," amend its Complaint. Fed. R. Civ. P. 15(a).

Instead, CenturyLink can amend its Complaint "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Sprint does not consent to CenturyLink's amendment of its Complaint and, because Sprint will be substantially prejudiced by CenturyLink's proposed amendment, the Court should deny any motion that CenturyLink may file seeking to amend its Complaint and dismiss Count IV, allowing it to bring multiple actions against Sprint in multiple state forums.[2] This argument is further addressed, *infra*, Section II(C).

B. The FCC Has Already Been Asked to Address Threshold Legal Issues on the Count IV Claims

On January 15, 2011, this Court ordered that "the best exercise of its discretion is to stay this case and refer the remaining counts of Plaintiffs' Complaint [counts I, III, and

[2] Sprint does not know whether CenturyLink will seek to proceed under Rule 15 if the Court disallows its purported voluntary dismissal under Rule 41. If CenturyLink does file such a motion, or amend its Motion to Vacate, Sprint reserves the right to file a formal response. In an abundance of caution, Sprint includes herein its argument as to why an amendment splitting Count IV claims off would be inappropriate.

IV] to the FCC." ECF No. 36, p. 3. The Court should deny CenturyLink's Motion because there is no reason to treat Count IV differently from Counts I and III.

CenturyLink's ability to recover on Count IV will depend on the answer to a question of federal law that has been presented to the FCC: does federal law preempt the application of intrastate tariffs to the VoIP traffic in dispute? As such, the reason for the stay – to allow the FCC to address federal telecommunications issues – exists as to Count IV just as to does as to Counts I and III. In fact, the U.S. Supreme Court recently confirmed that this is an open question of federal law. Since the question has been formally directed to the FCC, and briefed by industry commenters, the Court should maintain the stay and allow the FCC to act.

1. Legal Issues Regarding CenturyLink's State Law Claims Are Pending Before the FCC

Sprint filed its FCC Petition April 5, 2012. Schenkenberg Aff. Ex. A. In its FCC Petition, Sprint specifically asked the FCC to provide guidance on Count IV:

> Sprint also seeks a declaration that because the VoIP originated traffic is jurisdictionally interstate, intrastate access tariffs cannot impose compensation obligations with respect to that traffic, even if those calls originate and terminate in the same state. Such a declaration is necessary to enforce the Commission's regulatory authority over this jurisdictionally interstate service, and is required by 47 U.S.C. § 251(g). This declaration will provide guidance with respect to CenturyLink's Count IV . . . . (FCC Petition, p. 3.)
>
> ...
>
> The Commission should also declare that under no circumstances could intrastate access charges apply to VoIP-originated traffic that is jurisdictionally interstate. (FCC petition, p. 13.)
>
> ...

> Section 251 (g) prohibits LECs from imposing per-minute access charges on traffic that was not subject to per-minute access charges before 1996. Nothing in the text of Section 251(g) limits its application to interstate traffic. As such, in order to properly implement Congress's directive in Section 251(g), the Commission should declare that intrastate access tariffs do not impose compensation obligations on VoIP originated traffic. (FCC Petition, p. 14 (footnote omitted).)

The FCC solicited comments on Sprint's FCC Petition (Schenkenberg Aff. Ex. B), and several industry participants submitted comments on all issues, including the issues relevant to Count IV. For example, the Iowa Utilities Board filed comments strongly opposing Sprint's requested declaration:

> The Board respectfully urges the Commission to decline to issue the declaratory rulings requested by Sprint, and instead to rule that, prior to December 29, 2011, interstate and intrastate access tariffs applied to VoIP-originated long distance calls.

Schenkenberg Aff. Ex. C, pp. 3-4.

Other commenters were supportive. Verizon, for example, asked the FCC to "address Sprint's Petition by reaffirming that VoIP is exclusively interstate for jurisdictional purposes ...." Schenkenberg Aff. Ex. D, p. 1; *see also id.* at 6 ("Affirmed by the Eighth Circuit, the *Vonage Order* confirms that all VoIP services are practically inseverable and therefore interstate for jurisdictional purposes."). The questions posed by Sprint, and addressed by commenters, give the FCC a vehicle to provide guidance on CenturyLink's Count IV claims.

As such, the issues relevant to Count IV are, just like the issues relevant to Counts I and III, awaiting decision by the FCC. There is no sense in lifting the stay so that those issues can be split off and addressed by multiple state bodies.

2. The Supreme Court Has Recognized that Whether VoIP Traffic Is Exclusively Federal Is an Open Issue of Federal Law

CenturyLink has previously attempted to assert that its Count IV claims do not raise issues of federal law. *See* CenturyLink's Opposition To Sprint's Motion To Dismiss (ECF Doc. 19) p. 14 ("Moreover, the FCC has no jurisdiction to decide CenturyLink's claim for damages arising from Sprint's failure to make payments required by the State Access Tariffs."). If it were true that the FCC could say nothing to impact the state claims, that might support a decision to litigate those claims differently than Counts I and III. However, the U.S. Supreme Court, in a parallel dispute, recognized that there is a threshold federal question to issues like Count IV and directed a lower court to exercise its jurisdiction rather than defer to a state decision-maker. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584 (2013).

Sprint v. Jacobs arose out of a case in which a state public utilities commission decided that intrastate access charges applied to VoIP traffic. *Id.* at 589. Sprint appealed that decision to state court, and also sought declaratory relief in federal district court. *Id.* After the federal court abstained (in deference to the pending state court proceeding), the matter proceed to the Eighth Circuit and then the Supreme Court. *Id.* at 590. In a unanimous decision, the Supreme Court reversed, holding that the district court should have exercised its jurisdiction and resolved the issue of federal law raised by Sprint. *Id.* at 592.

It is significant that the federal question the Supreme Court directed back to the district court is the same issue the FCC has been asked to decide relative to

CenturyLink's Count IV claims: whether state access charges can apply to VoIP traffic that Sprint (and others) claim is jurisdictionally interstate. *Id.* at 589. In fact, the FCC recognized that this issue has not yet been decided:

> The Federal Communications Commission has yet to provide its view on whether the Telecommunications Act categorically preempts intrastate access charges for VoIP calls. *See In re Connect America Fund*, 26 FCC Rcd. 17663, 18002, ¶ 934 (2011) (reserving the question whether all VoIP calls "must be subject exclusively to federal regulation").

Id. at 589 n.1. The Supreme Court's analysis shows that Sprint has properly raised this preemption issue in a federal forum, and that it would be inappropriate to pull that issue back from the FCC so CenturyLink can press its claims in state forums.

C. Dismissal of Count IV Will Cause Substantial Prejudice to Sprint

Not only is Count IV properly before the FCC, but subjecting Sprint to multiple overlapping state disputes – as CenturyLink proposes to do – would cause significant prejudice to Sprint. Accordingly, the Court should refuse to grant CenturyLink leave to amend its Complaint (if it seeks to do so). When a party – like CenturyLink – no longer can amend its complaint "as a matter of course" and when the opposing party – like Sprint – does not consent to the amendment, the party must obtain leave from the Court. Fed. R. Civ. P. 15(a)(2). While "Rule 15 'evinces a bias in favor of granting leave to amend,' it is not automatic." *Matter of Southmark Corp.*, 88 F.3d 311, 314 (5th Cir. 1996) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981)). Instead, the Court must consider certain factors, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of

allowance of the amendment, (and) futility of amendment." *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981) (quoting *Foman v. Davis*, 371 U.S. 178, 1782 (1962)).

1. Sprint will be substantially prejudiced by being forced to defend overlapping fragmented litigation

In determining whether to grant leave to amend pleadings, a court must consider prejudice to the non-requesting party. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971) (affirming decision to deny leave to amend pleadings when requested amendment would have imposed "substantial" prejudice on non-moving party). CenturyLink states that, if allowed to file a notice of dismissal, it will pursue Count IV "in the appropriate state forums." ECF No. 38, p. 1; ECF No. 39, p 1 (emphasis added). It is this kind of prejudice that the Fifth Circuit recognized when it held that Rule 41 does not authorize a plaintiff to voluntarily dismiss some, but not all, claims against a particular defendant. *Exxon Corp.*, 599 F.2d at 662 (denying request to voluntarily dismiss claim because dismissal would force the defendant to "face the possibility of defending overlapping claims in two forums").

Indeed, federal courts often deny requests for leave to amend a complaint when the amendment would result in overlapping litigation of the same issue, finding that to do otherwise would impose undue prejudice on the other party. *See Buckley Towers Condo., Inc. v. Buchwald*, 533 F.2d 934, 939 (5th Cir. 1976) (denying motion to amend complaint to add or join plaintiffs "in light of the commencement of a second action alleging substantially the same claims"); *Hancock Oil Co. v. Universal Oil Prods. Co.*, 120 F.2d 959, 962 (9th Cir. 1941) (affirming decision to deny request to amend complaint to bring

a claim already at issue in a pending action); *Arthur v. Stern*, No. H-07-3742, 2008 WL 2620116, at *7 (S.D. Tex. June 26, 2008) ("Even under the more lenient 'freely given' standard of Rule 15, courts have held that leave to amend to assert a claim already at issue in a lawsuit in another court should not be granted if the same parties are involved, the same substantive claim is raised, and the same relief is sought."); *Hanover Ins. Co. v. Emmaus Mun. Auth.*, 38 F.R.D. 470, 473 (E.D. Pa. 1965) (denying motion to amend complaint to add a claim which had already been partially decided in another action and the remainder of the claim had been raised in a pending action); *United States v. Am. Optical Co.*, 7 F.R.D. 158, 159 (S.D.N.Y. 1945) (denying motion to amend answer to add cross-claim against co-defendant identical to a claim already being litigated between the parties in another federal court); *Flintkote Co. v. Diener*, 185 F. Supp. 509, 510 (D.P.R. 1960) (denying motion to amend complaint because plaintiff had filed a separate action alleging the same claims in state court); *Cuco v. Fed. Med. Ctr.-Lexington*, No. 05-CV-232-KSF, 2006 WL 1635668 at *46 (E.D. Ky. June 9, 2006) ("A plaintiff should not be allowed to amend her complaint to assert claims that are already pending in a parallel court proceeding"); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1983) (finding evidence of bad faith and affirming decision to deny request for leave to amend complaint when proposed amendment would have inserted claims that were already asserted in a pending litigation).

CenturyLink's overlapping claims should stay in this Court, where the Court has already accepted supplemental jurisdiction of Count IV and referred the issues to the FCC. CenturyLink itself alleges that the issues presented in Count IV arise out of the

same transaction and occurrence as the other remaining Counts in this matter: "[t]his Court also has supplemental jurisdiction over the CenturyLink Plaintiffs' claims for violation of the State Access Tariffs pursuant to 28 U.S.C. § 1367(a)." Compl. ¶ 42. Indeed, the Court accepted jurisdiction of this case or controversy when it adjudicated Count IV and referred remaining claims to the FCC. Not only does CenturyLink recognize that the counts are overlapping, but it also has alleged that the counts should be heard together:

> The CenturyLink Plaintiffs' damage claims arise out of the same action by Sprint in refusing to pay the applicable charges under the Access Tariffs. As a result, judicial economy is served and the resources of the parties are conserved by having this collection action resolved in one forum.

Compl. ¶ 39 (emphasis added).

Now, CenturyLink has promised that its proposed amendment will result in multiple overlapping claims against Sprint in multiple state forums, contrary to its earlier representation that one federal action would best serve judicial economy conserve the parties' resources. *See* ECF No. 39, p. 1. In fact, after filing the present motion, but before receiving a response from Sprint or a determination from the Court, CenturyLink filed a complaint against Sprint before the Missouri Service Commission. Schenkenberg Aff. Ex. E. This Missouri action is likely the tip of the iceberg and presents a portion of CenturyLink's Claim IV in fragmented form. Schenkenberg Aff. Ex. E. The Court should deny CenturyLink's attempt to split claims as highly prejudicial to Sprint and contrary to judicial economy. *See, e.g., Charpentier v. Blue Streak Offshore, Inc.*, No. Civ. A. 96-323, 1996 WL 383126, at *2 (E.D. La. July 3, 1996) (denying motion to sever

because "both the interests of justice and judicial economy are best served by having one trier of fact hear all the issues involved in this case"); *Hanover Ins. Co.*, 38 F.R.D. at 473 (denying motion to amend a complaint in part because "the law favors a ruling which is designed to put an end to litigation").

2. CenturyLink chose to assert its Count IV Claims in this Court

When deciding whether to allow a motion to amend, the Fifth circuit also considers "whether the facts underlying the amended complaint were known to the party when the original complaint was filed." *Matter of Southmark Corp.*, 88 F.3d at 316. As addressed above, certainly CenturyLink knew the facts of Count IV when it pleaded the count in its Complaint. In addition, CenturyLink, the plaintiff in this action, *chose* to bring Count IV before this Court, invoking this Court's supplemental jurisdiction over the matter. *See* Compl. ¶ 42. Sprint has incurred expense in defending against Count IV, won its request to send Count IV to the FCC for review, and has petitioned the FCC to act. At this point, the Court should hold that CenturyLink would cause undue prejudice to Sprint by amending its Complaint to dismiss its Count IV claims, only to bring those claims again in fragmented, overlapping actions in multiple state forums.

3. Sprint is entitled to assert counterclaims

Because the Court stayed the case at the same time it granted Sprint's motion to dismiss CenturyLink's Count II, Sprint has not yet pled its defenses and counterclaims. When asserted, Sprint's defenses and counterclaims will raise some of the same issues that are currently before the Court on CenturyLink's Counts I and IV. Judicial economy, therefore, supports considering these defenses and disposing of these counterclaims in the

same action, rather than in fragmented litigation in multiple state forums that cannot address counts I and IV together.

What is more, it is not clear that all of Sprint's anticipated defenses and counterclaims, could be raised in state forums, especially state administrative forums. Accordingly, this is not a case in which dismissal of state claims will send all state issues to a state forum. Instead, if Count IV is dismissed, Sprint and CenturyLink will litigate the same issues in two places in duplicative litigation that is to no one's benefit.

Finally, the Fifth Circuit's decision in *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, LTD* provides a further basis for denying CenturyLink's proposal to dismiss its state claims. 79 F.3d 480 (5th Cir. 1996). There, the court granted a motion to substitute a new party in for the Plaintiffs. *Id.* at 482-83. Before that was done, however, the defendant had pled compulsory counterclaims against the original plaintiffs. *Id.* The Court of Appeals construed the amendment to be dismissal of an action against the original plaintiffs, invoked Fed. R. Civ. P. 41(a)(2), and reversed the district court. *Id.* at 483. As it pointed out, Rule 41(a)(2) prohibits the dismissal of an action after counterclaims have been pled unless the counterclaims can remain pending for independent adjudication. Fed. R. Civ. P. 41(a)(2). In the absence of such a rule, the defendant will have been prejudiced by dismissal of its counterclaims, which might be barred by the statute of limitations. *Id.* at 484-85. While the facts of *Underwriters* are not quite on point,[3] the lesson is: any dismissal at this juncture must take into

[3] For example, as pointed out above, CenturyLink does not wish to dismiss an action, and so Rule 41 does not technically apply.

consideration the impact on Sprint, including the impact on Sprint's ability to litigate its compulsory counterclaims.

III. CONCLUSION

For the reasons stated herein, Sprint respectfully requests that the Court deny CenturyLink's *ex parte* motion and order that its attempt to voluntarily dismiss its Count IV claims is ineffective.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel by operation of the court's electronic filing system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to those who are non-CM/ECF participants.

Baton Rouge, Louisiana this 4th day of April, 2014.

s/Glenn M. Farnet
Glenn M. Farnet

EXHIBIT 7

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
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DA 12-681
Released: April 30, 2012

WIRELINE COMPETITION BUREAU SEEKS COMMENT ON SPRINT PETITION FOR DECLARATORY RULING ON VOIP ORIGINATED TRAFFIC

WC Docket No. 12-105

COMMENTS: June 14, 2012
REPLY COMMENTS: July 16, 2012

On April 5, 2012, Sprint Communications Company (Sprint) filed a petition for declaratory ruling raising a number of issues concerning the applicability of tariffed access rates to Voice over Internet Protocol (VoIP)-originated calls.[1] Specifically, Sprint asks the Commission to declare that: (1) for periods prior to December 29, 2011, "access tariffs filed with the Commission, including CenturyLink's tariffs, did not impose compensation obligations on VoIP originated calls delivered over the public switched telephone network";[2] (2) "because the VoIP originated traffic is jurisdictionally interstate, intrastate access tariffs cannot impose compensation obligations with respect to that traffic, even if those calls originate and terminate in the same state";[3] and (3) Sprint could not violate section 201(b) of the Communications Act[4] when it compensated CenturyLink at $0.0007 per minute, rather than at rates in CenturyLink's switched access tariffs.[5] The petition was filed to effectuate a referral from the United States District Court for the Western District of Louisiana, where CenturyLink filed a complaint against Sprint to enforce state and federal access tariffs with respect to VoIP-originated calls.[6]

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All pleadings are to reference WC Docket No. 12-105. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).[7] Two courtesy copies must be delivered to Belinda Nixon, Federal Communications Commission, Wireline Competition Bureau, Pricing Policy Division, 445 12th Street, SW, Room 5-A221, Washington, DC 20554, or via e-mail at belinda.nixon@fcc.gov.

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

[2] *Id.* at 3, 6-13.

[3] *Id.* at 3, 13-14.

[4] 47 U.S.C. § 201(b).

[5] Petition at 3, 15.

[6] *Id.* at 1-2; *see also CenturyTel of Chatham, LLC v. Sprint Communications Company L.P.*, No. 09-1951 (W.D. La.) at 3.

[7] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

This Public Notice establishes certain procedural requirements relating to consideration of the Sprint Petition. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[8] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

[8] 47 C.F.R. §§ 1.1200 *et seq.*

For further information regarding this proceeding, contact Belinda Nixon, Pricing Policy Division, Wireline Competition Bureau, (202) 418-1520, or via e-mail at belinda.nixon@fcc.gov.

-FCC-

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

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

COMMENTS OF THE IOWA UTILITIES BOARD

On April 30, 2012, the Federal Communications Commission (Commission) released a notice seeking comment regarding the "Petition for Declaratory Ruling" filed with the Commission on April 5, 2012, by Sprint Communications Company (Sprint). Sprint asks the Commission to rule on several issues regarding the application of switched access rates in both interstate and intrastate access tariffs for Voice over Internet Protocol (VoIP) originated long distance calls. Sprint acknowledges that the Commission addressed the prospective payment obligations for such VoIP calls in the Commission's order issued in *In the Matter of Connect America Fund*, WC Docket No. 10-90 et al., on November 18, 2011, (USF/ICC Transformation Order), which became effective on December 29, 2011. Sprint now asks the Commission to resolve the status of VoIP calls for periods prior to December 29, 2011.

Generally, the Iowa Utilities Board (IUB or Board) objects to Sprint's Petition and disputes all arguments included therein, but has particular interest in Sprint's request that the Commission declare that "because VoIP originated traffic is jurisdictionally interstate, intrastate access tariffs cannot impose compensation obligations with respect to that traffic, even if those calls originate and terminate in the same state" (Sprint Petition, p. 3) and that "under no circumstances could intrastate access charges apply to VoIP–originated traffic that is jurisdictionally interstate." (Sprint Petition, p. 13.)

Such a declaration would be contrary to the IUB's decision in *In re: Sprint Communications Company L.P. v. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom*, Iowa Utilities Board Docket No. FCU-2010-0001, issued February 4, 2011, a case in which the Board required Sprint to pay intrastate access charges billed by a service provider pursuant to its Board-approved tariff for connecting intrastate telephone calls that were made in Iowa by Sprint's customers using VoIP technology. Sprint had stopped paying the tariffed charges based on its unilateral opinion that the VoIP calls were not subject to access charges. The Board determined its jurisdiction to interpret and enforce the terms of the disputed intrastate switched access tariff as applied to the non-nomadic VoIP long distance calls in question had not been preempted under either the "information services exception" or the "impossibility exception." The Board also rejected Sprint's argument that "net protocol conversion" is the sole determinative factor of whether VoIP should be classified as an information service. Copies of the IUB's "Order" and subsequent "Order Denying Application

for Reconsideration and Motion for Stay," issued on March 25, 2011, are attached to these comments.

Sprint appealed the Board's decision to both state and federal court. *See Sprint Communications Company, L.P. v. Iowa Utilities Board*, Polk County District Court No. CVCV008638 and *Sprint Communications Company, L.P. v. Berntsen, et. al*, Eighth Circuit Court of Appeals, Case No. 11-2984. Presently, the Board is defending its decision as advancing important state interests in enforcing state law and Board regulations governing intrastate telecommunications services, particularly the interest in enforcing tariffs filed with the Board that apply to long distance calls made within Iowa.

In the USF/ICC Transformation Order, the Commission explicitly declined to address intercarrier compensation payment obligations for VoIP-PSTN traffic for periods before the effective date of the order. To grant the rulings requested by Sprint, i.e., that VoIP is (and was) an information service not subject to intrastate access tariffs, could potentially disrupt decisions made by multiple state regulatory commissions. Moreover, the requested declaratory rulings would be logically inconsistent with the Commission's treatment of prospective payment obligations for VoIP originated long distance calls. It would make no sense for the Commission to rule that such calls made before December 29, 2011, were not subject to any access tariffs at all, i.e., VoIP was an information service, but going forward VoIP toll calls are now subject to both interstate and intrastate access tariffs. The Board respectfully urges the Commission to decline to issue the declaratory rulings requested by Sprint, and instead to rule that, prior to

December 29, 2011, interstate and intrastate access tariffs applied to VoIP-originated long distance calls.

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Respectfully submitted,

_____/s/_____
Michael Balch, Acting
Telecommunications Mgr.

EXHIBIT 9

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF VERIZON

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Before the
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INTRODUCTION

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

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

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

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

DISCUSSION

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

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

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

[5] *Id.* ¶ 959 n.1967.

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

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

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

[9] *Id.* ¶ 933.

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

[11] Petition at 6.

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

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

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

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

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

[13] *See Vonage Order*, ¶¶ 15-37.

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

[15] *See id.* ¶¶ 29-32.

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

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

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

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

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

[18] *Vonage Order* ¶ 14.

[19] *Id.* ¶ 25.

[20] *Id.*

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

[22] *See id.* ¶ 24.

[23] *Id.* ¶ 25 n.93.

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

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

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[24] *Id.* ¶ 32.

[25] *Id.*

[26] *Id.* ¶¶ 25 n.93, 32.

[27] *See id.* ¶ 32 n.113.

[28] *Id.*

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

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

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

B. VoIP is an information service.

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

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[30] *Vonage Order* ¶ 23.

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

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

[33] *Id.* ¶ 959 n.1969.

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

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

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

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

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

[35] 47 U.S.C. § 153(24).

[36] *Vonage Order* ¶¶ 7, 25 n.93.

[37] 47 U.S.C. § 153(24).

[38] *Vonage Order* ¶¶ 8, 25 n.93.

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

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

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

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

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

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

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

[43] *Id.* at 992.

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

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

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

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

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

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

[48] 47 U.S.C. § 153(24).

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

[50] 47 C.F.R. § 64.702(a).

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

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

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

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

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

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

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

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

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

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

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

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

[58] *All American Order*, ¶ 10.

CONCLUSION

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

Respectfully submitted,

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June 14, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Monroe Division

CENTURYTEL OF CHATHAM, LLC d/b/a CenturyLink, *et al.*,	)	
Plaintiffs,	)	**Case No. 3:09-cv-01951 RGJ/MLH**
v.	)	**Chief Judge Robert G. James**
	)	**Magistrate Judge Mark L. Hornsby**
SPRINT COMMUNICATIONS CO. LP,	)	
Defendants.	)	

CENTURYLINK'S OPPOSITION
TO SPRINT'S MOTION TO DISMISS

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February 3, 2010

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TABLE OF AUTHORITIES

STATUTES, RULES & REGULATIONS

OTHER AUTHORITIES

"CenturyLink,"[1] by counsel, respectfully states as follows in opposition to the Motion to Dismiss Count II, and Motion to Refer Claims Under Primary Jurisdiction (Doc. 11) (the "Motion to Dismiss") filed by Defendant Sprint Communications Co., L.P. ("Sprint").

I. STATEMENT OF THE CASE

As a result of the break-up of AT&T in the early 1980s, in an effort to introduce competition for long distance service, the telephone industry was divided into two segments.[2] Each segment serves a geographic calling area known as an "exchange area." Local exchange carriers, or "LECs," provide local telephone service ***within*** exchange areas. Interexchange carriers, or "IXCs," provide long distance telephone service ***between*** exchange areas. Completing a long distance call thus requires the services of multiple carriers:

- Every long distance call begins — or "originates" — on facilities owned and operated by the LEC serving the exchange ***from which*** an interexchange or long distance call is placed. This LEC is known as the ***originating carrier***.
- Every call ends — or "terminates" — on facilities owned and operated by the LEC serving the exchange ***to which*** an interexchange call or long distance is placed. This LEC is known as the ***terminating carrier***.
- The transmission of a long distance call from the originating LEC's exchange to the terminating LEC's exchange is handled by an IXC. The IXC transmits the call from the originating LEC to the terminating LEC. The terminating LEC then delivers the call to the party being called.

In this case, each plaintiff is an LEC[3] that serves as a terminating carrier for traffic delivered by an IXC, the defendant Sprint. (Compl. ¶¶ 20, 27).

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[1] The term "CenturyLink" is used to refer collectively to the CenturyLink Plaintiffs listed in Exhibit A to the Complaint (Doc. 1-1). Except as otherwise indicated, all defined terms used in the Complaint have the same meaning herein. Unpublished decisions and other authorities are cited by exhibit number ("Ex. #") to the accompanying Appendix (cited herein as "App.").

[2] *See United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. United States v. Maryland*, 460 U.S. 1001 (1983) (mem.).

[3] *See* Compl. ¶¶ 15-18.

Typically, the caller pays the long distance IXC a fee for the long distance call. The IXC pays the originating and/or terminating LEC(s) for use of the local exchange network(s) without which the long distance call could not be completed. The charges due to the originating and terminating LECs are known as "access charges."

Federal law requires LECs to file with the Federal Communications Commission (the "FCC"), and obtain FCC approval of, tariffs containing their access charges for ***interstate*** interexchange phone calls. *See* 47 U.S.C. § 203(a). State law similarly requires LECs to file with the applicable public service commission (the "State commission"[4]), and obtain State commission approval of, tariffs containing their access charges for ***intrastate*** interexchange calls.[5] Once approved, these tariffs are subject to the "filed rate doctrine." The filed rate doctrine prohibits the LECs from charging or accepting any rate other than the rates set forth in the tariffs that have been approved by the FCC or applicable State commission.[6]

In this case, Sprint does not dispute that CenturyLink's "Federal Access Tariffs" for terminating ***interstate*** traffic have been approved by the FCC. (Compl. ¶¶ 3, 29-30). Nor does Sprint dispute that each of CenturyLink's "State Access Tariffs" for terminating ***intrastate*** traffic has been approved by the applicable State commission. (Compl. ¶¶ 4, 32-33).[7] Sprint

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[4] *See* 47 U.S.C. § 153(41).

[5] *See, e.g.*, Louisiana Public Service Commission Regulations for Competition in the Local Telecommunications Market ("La. PSC Regs.") § 401(A) and (C). (App. Ex. 1).

[6] *See* 47 U.S.C. § 203(c) ("no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect"). *See, e.g.*, La. PSC Regs. § 401(C)(1)(h) ("Telecommunications services providers shall charge only the rates contained or allowed in their tariffs."). (App. Ex. 1).

[7] CenturyLink's Federal and State Access Tariffs are referred to collectively as the "Access Tariffs." *See* Compl. ¶ 5.

nevertheless seeks to avoid paying CenturyLink's tariffed rates for ***termination*** whenever the calls ***originate*** using a new technology known as "Voice over Internet Protocol" or "VoIP."[8]

Sprint's arguments about VoIP technology are a classic example of a "red herring." Regardless of how a call ***originates***, when Sprint delivers the call to CenturyLink's LEC facilities for ***termination***, the call has been converted to the traditional format for telephone calls[9] used by the public switched telephone network ("PSTN"). CenturyLink's Complaint seeks compensation from Sprint at the same tariffed rates — approved by federal and state regulators — that CenturyLink charges other carriers for providing the exact same termination services that CenturyLink provides to Sprint. Regardless of how the call ***originates*** and is ***transmitted***, the termination services ordered by Sprint and provided by CenturyLink are the same. Under CenturyLink's Access Tariffs, the rates for ***terminating*** a call are also the same regardless of the format in which the call originated or was transmitted.[10] As a result, there is no need for this Court to become embroiled in a debate about whether other types of services that other carriers provide using VoIP technology should be subject to traditional tariffs. In this case, the termination services that Sprint receives in fact are covered by CenturyLink's Access Tariffs. Each of these Access Tariffs has been approved by a federal or state regulator. As long as Sprint uses CenturyLink's facilities to provide service to its customers, Sprint remains liable for payment of CenturyLink's tariffed rates while the Access Tariffs remain in effect.

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[8] The VoIP calls at issue originate with cable companies for which the IXC, Sprint, provides wholesale services. Sprint obtains interconnection with LECs and is responsible for paying intercarrier compensation.

[9] This traditional format is known as Time Division Multiplex or "TDM." *See* Def. Mem. at 2-3 (Sprint's "network converts the call to Time Division Multiplex ('TDM') protocol ***before it is delivered to the carrier completing the call.***") (emphasis added). Following this conversion by Sprint, "[a]t the point that a call enters [CenturyLink's] network, TDM-originated calls and VoIP-originated calls are indistinguishable to [CenturyLink]." (Compl. ¶ 35).

[10] *See* Compl. ¶ 34 ("[t]he rates, terms, and conditions of [CenturyLink's] Access Tariffs do not distinguish between transmission protocols.").

II. SUMMARY OF ARGUMENT

For several years before August 2009, Sprint paid CenturyLink in accordance with the same Access Tariffs that Sprint now seeks to renounce. As required by the Access Tariffs, Sprint made such payments regardless of whether a particular call originated in VoIP format. What happened five months ago to create the "disagreement" and the "fundamental dispute" to which Sprint's Motion to Dismiss refers?[11] The answer is: nothing. The event dates back to ***2001***, when the FCC issued the Notice of Proposed Rulemaking cited by Sprint.[12]

To find a ***credible*** explanation for Sprint's change of heart, therefore, this Court must look beyond the four corners of Sprint's Motion to Dismiss. The week before moving to dismiss CenturyLink's Complaint in this Court, Sprint filed a complaint in Iowa against a local telephone company that sent Sprint a notice of disconnection because Sprint had stopped paying its bills. In its January 6, 2010 Iowa filing, Sprint admitted why it now disputes payment obligations that it had previously honored: "To ensure competitive viability, Sprint has been forced to revisit its own position on the status of VoIP with regard to access." (App. Ex. 2).

Sprint's concerns about its "competitive viability" do not justify the means by which Sprint seeks to reduce its cost of doing business — shortchanging other carriers and refusing to pay their lawful charges. CenturyLink's Access Tariffs allow ***any*** "telecommunications carrier" — including but not limited to Sprint — to receive the same service at the same tariffed rates. The Access Tariffs do not allow a single carrier — in this case, Sprint — to unilaterally reduce

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[11] *See* Def. Mem. at 3, 10, 12.

[12] *See* Def. Mem. at 17 ("Beginning in 2001, the FCC set out to reform the intercarrier compensation regime. *See In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 9610 (2001)"). The foregoing FCC docket is cited hereafter as the "2001 NOPR."

CenturyLink's tariffed rates as filed and approved.[13] Nor do the Access Tariffs permit Sprint to engage in "self help" by withholding payment as a means of recovering, retroactive to August 2007, the difference between the tariffed rates and the fraction thereof that Sprint is now willing to pay.

In the Western District of Louisiana, the median time to trial is twelve ***months***.[14] In contrast, it has been nearly ***nine years*** since the FCC issued the 2001 NOPR cited by Sprint as the justification for its refusal to pay. It makes no difference, however, when — if ever — the "complicated regulatory questions" and "complicated and technical issues" to which Sprint's Motion to Dismiss refers[15] are finally resolved by the FCC, the U.S. District Court for the District of Columbia, or the U.S. Court of Appeals for the D.C. Circuit (if not the Supreme Court of the United States). CenturyLink's Complaint asks ***this Court*** to answer only two simple questions:

1. Has Sprint failed to pay the rates set forth in the Access Tariffs approved by the FCC and State commissions?
2. If so, how much does Sprint owe CenturyLink?

The answer to these two questions does not require the "specialized expertise" of the FCC. To understand why, this Court need only look at what Sprint itself has said in other proceedings before the FCC and various State commissions. In these other proceedings, Sprint's objective was not to avoid paying its bills. Rather, Sprint sought to obtain the same termination

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[13] At the rate chosen by Sprint ($.0007 per minute), if a call lasted 24 hours per day for 365 straight days, by the end of the year the total charge would be only $367.92.

[14] *See* Judicial Business of the United States Courts, *2008 Annual Report of the Director* (James C. Duff), Table C-5: U.S. District Courts — Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2008 (www.uscourts.gov/judbus2008/appendices/C05Sep08.pdf).

[15] *See* Def. Mem. at 3, 7.

services for which Sprint now refuses to pay CenturyLink. In those proceedings, Sprint claimed the right to interconnect with LECs regardless of whether the calls originated in VoIP format. In those proceedings, Sprint asserted that the "regulatory questions" and "technical issues" that it has thrown before this Court were not so "complicated" after all. These other proceedings include the FCC's "*Time Warner Declaratory Ruling*"[16] and similar proceedings in Illinois, Pennsylvania, and New York, among other states. In its *Time Warner Declaratory Ruling*, the FCC agreed with Sprint's contention in that proceeding that the LEC's termination of VoIP-originated traffic ***is*** properly classified as a "telecommunications service" within the meaning of 47 U.S.C. § 251. State commissions in Illinois (App. Ex. 3), Pennsylvania (App. Ex. 4), and New York (App. Ex. 5) have also agreed that Sprint is entitled to receive — and obligated to pay for — interexchange access for the exact same type of VoIP-originated traffic at issue here.

As Sprint argued (successfully) in these other proceedings, how a call ***originates*** is irrelevant. The fact that some of this traffic ***originates*** with cable companies using VoIP technology[17] has no bearing on its classification as "telecommunications service" when delivered by Sprint. ***Origination*** of this traffic is ***not*** what makes Sprint liable for payment under CenturyLink's Access Tariffs. Sprint's obligation to pay CenturyLink does not arise until the call — following ***transmission*** by Sprint — is ultimately delivered to an LEC such as CenturyLink for routing to the LEC's customers, *i.e.*, ***termination***.

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[16] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, 22 F.C.C.R. 3513 (2007).

The FCC proceeding known as *Petition of Time Warner Cable* — the existence of which is not even acknowledged in Sprint's Motion to Dismiss — is not to be confused with the Ninth Circuit case that Sprint ***does*** cite, *Clark v. Time Warner Cable*, 523 F.3d 1110 (9th Cir. 2008).

[17] *See* Def. Mem. at 2 ("In addition to its long distance operations, Sprint, in conjunction with cable operators, offers VoIP and other IP-enabled services to end user customers in competition with incumbent LECs like CenturyLink.") (citations omitted).

Sprint concedes that — regardless of how the call ***originates*** — by the time it has been ***transmitted*** by Sprint and delivered to CenturyLink for ***termination***, it has been converted to the same TDM format as any other voice call. *See* Compl. ¶¶ 34-35; Def. Mem. at 2-3. Even if CenturyLink had some way of telling in which format the call originated or was transmitted, "the Access Tariffs do not distinguish between transmission protocols." (Compl. ¶ 34). "The rates and other terms contained in" CenturyLink's Federal Access Tariffs — as "filed with and approved by the FCC" — "are 'deemed lawful' pursuant to 47 U.S.C. § 204(a)(3)." (Compl. ¶ 29).

Until CenturyLink's Access Tariffs are "***explicitly superseded*** by regulations prescribed by the [FCC],"[18] the plain language of 47 U.S.C. § 251(g) has two consequences. First, it obligates CenturyLink to provide Sprint with terminating access. Second, it entitles CenturyLink to "receipt of compensation" for doing so. Sprint would have this Court read CenturyLink's entitlement to receive compensation out of the statute altogether. According to Sprint, it has "no affirmative obligation" to pay for the service that Section 251(g) obligates CenturyLink to provide. *See* Def. Mem. at 5 *et seq.* Sprint has not, however, disclaimed its entitlement to obtain this service under Section 251(g), which obligates CenturyLink to "provide exchange access, information access, and exchange services for such access to interexchange carriers." 47 U.S.C. § 251(g).[19]

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[18] 47 U.S.C. § 251(g) (emphasis added).

[19] CenturyLink is obligated to do so "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (***including receipt of compensation***) that apply to [CenturyLink] on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the FCC." 47 U.S.C. § 251(g). (emphasis added).

Under the filed rate doctrine cited by Sprint, the Federal Access Tariffs upon which CenturyLink's Complaint is based are the equivalent of a "regulation, order, or policy of the FCC" within the meaning of 47 U.S.C. § 251(g) *Cf. Global Crossing Telecomms., Inc. v. Metrophones Telecomms. Inc.*, 550 U.S. 45 (2007) (carrier's

(footnote continued on next page)

If CenturyLink refused to provide Sprint with interexchange access as required by Section 251(g), Sprint would be entitled to relief in this Court for, *inter alia*, violation of CenturyLink's Federal Access Tariffs.[20] And if the *quid pro quo* under Section 251(g) for CenturyLink's statutory obligation to provide Sprint with interexchange access is the statutory right to "receipt of compensation," it goes without saying that the entity from which CenturyLink is entitled to receive such compensation is none other than Sprint. In the various proceedings in which Sprint has sought to ***receive*** interexchange service, Sprint has not had the audacity to contend that it has no obligation to pay the LECs in question for that service.

To the contrary, Sprint's Comments to the FCC in response to the *Petition of Time Warner Cable* — a case in which Sprint sought to receive interexchange access for the termination of VoIP-originated traffic — offered to pay the LEC's standard "inter-carrier compensation, including exchange access and reciprocal compensation." Sprint made similar offers to the State commissions in Illinois (App. Ex. 3), Pennsylvania (App. Ex. 4), and New York (App. Ex. 5). Consistent with the FCC's *Time Warner Declaratory Ruling*, each of these State commissions found that Section 251(g) entitled Sprint to interexchange access for termination of VoIP-originated traffic. In each case, this entitlement was held to be contingent upon Sprint's obligation to in fact make such payments.[21] If Section 251(g) somehow entitled Sprint to make use of CenturyLink's local exchange facilities without making payment, as Sprint now contends, the statute would be of dubious constitutionality under the Takings Clause.

(footnote continuation)

refusal to pay compensation actionable under 47 U.S.C. § 207 even though refusal did not violate the express terms of either the statute or any tariff filed with the FCC).

[20] As the Supreme Court observed in *Global Crossing*, it is well settled that claims for violations of FCC tariffs are actionable under Section 207. *See* 550 U.S. at 54.

[21] *See* App. Ex. 3 (Illinois), App. Ex. 4 (Pennsylvania), and App. Ex. 5 (New York).

Perhaps recognizing this infirmity in its argument, Sprint backtracks somewhat from its claim to be entitled to something for nothing. Sprint thus claims to be entitled to something for ***almost*** nothing ($.0007 per minute, to be exact). One of the many problems with Sprint's unilateral substitution of this new rate is that it is ***not*** reflected in any explicitly superseding "regulation, order, or policy of the FCC" as required by 47 U.S.C. § 251(g). In this case, the only ***actual*** "regulation, order, or policy of the FCC" that sets forth the rate at which CenturyLink is entitled to "receipt of compensation" from Sprint can be found in the Federal Access Tariffs on file with the FCC.

In an effort to justify its sudden refusal to pay this rate, Sprint cites — in addition to the 2001 NOPR — a series of statements by the FCC, beginning six years ago, suggesting that it was considering the prospective adoption of new intercarrier compensation rules for VoIP traffic.[22] Under the statute, however, the provisions of CenturyLink's Federal Access Tariffs govern "***until*** such restrictions are explicitly superseded by regulations prescribed by the [FCC] after February 8, 1996." 47 U.S.C. § 251(g) (emphasis added). Suffice it to say that, when it comes to new intercarrier compensation rules for VoIP-originated traffic, the FCC has not said or done anything — "explicitly" or otherwise. Sprint's Motion to Dismiss repeatedly attempts to read regulatory tea leaves as to what the FCC might eventually say or do. Even if Sprint could accurately predict the future of FCC regulation, CenturyLink's statutory entitlement to "receipt of compensation" for providing Sprint with terminating access is governed by CenturyLink's

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[22] *See* Def. Mem. at 16-18, citing *In the Matter of IP-Enabled Servs.*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 F.C.C.R. 4863 (2004); *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 F.C.C.R. 22404 (2004); *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Docket No. 05-283, *Public Notice*, 20 F.C.C.R. 16167 (2005); *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers*, WC Docket No. 08-152, *Public Notice*, 23 F.C.C.R. 11190 (2008).

Access Tariffs until this access regime and/or the tariffs themselves "are explicitly superseded by regulations prescribed by the FCC." 47 U.S.C. § 251(g). [23] This has not happened. If and when the FCC ever explicitly supersedes CenturyLink's Access Tariffs, any modifications would apply only on a ***prospective*** basis and would not result in any refunds after the fact. [24]

This Court can deny Sprint's Motion to Dismiss without finding that Sprint's requested referral to the FCC would put CenturyLink's damage claim on indefinite hold. Other district courts, however, have not failed to notice that "the FCC appears in no hurry to resolve those broader questions." *Manhattan Telecomms. Corp. v. Global NAPS, Inc.*, No. 08 Civ. 3829 (JSR), 2009 WL 423990 at *1 (S.D.N.Y. Feb. 13, 2009). (App. Ex. 7). Here, as in *Manhattan Telecomms.*, "the payment issue ... is sufficiently narrow and self-contained as to be capable of prompt resolution in this Court." *Id.*

If CenturyLink's Complaint ***really*** presents the "issue of tariff interpretation" that Sprint now claims (*see, e.g.*, Def. Mem. at 12), why has Sprint never raised this "issue" before with the bodies that approved the Access Tariffs in the first place? In the proceeding in Iowa that Sprint commenced on January 6, 2010, Sprint as a gesture of "good faith" paid the LEC much of the amount in dispute while adjudication of the claims proceeds. In the Virginia case cited in

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[23] If the FCC does eventually "explicitly supersede" CenturyLink's Access Tariffs, however, it will be doing so over the objections of Sprint — at least as Sprint communicated its position six years ago. Sprint's May 28, 2004 Comments to the FCC (App. Ex. 6) ***agreed*** with the FCC's statement that the rules for compensation for termination of calls on the Public Switched Telephone Network or "PSTN" — a term which includes CenturyLink's local exchange facilities — should be the same regardless of the underlying technology:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

In the Matter of IP-Enabled Services, WC Docket 04-36, *Notice of Proposed Rulemaking*, 19 F.C.C.R. 4863 ¶¶ 33, 61 (March 10, 2004), cited in Def. Mem. at 17.

[24] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-32 (1990); *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222-23 (1998).

Sprint's Motion to Dismiss, the referral to the FCC was limited in duration to six months, and Sprint was ordered to pay the tariffed rate for services already received.[25] In this case, judging by the 2001 date of the FCC Notice of Proposed Rulemaking upon which Sprint seeks to rely, the referral sought by Sprint could easily last six years rather than six months. And rather than make the "good faith" payment for services rendered that it voluntarily made in Iowa, Sprint has unilaterally withheld payment for a period retroactive to August 2007. Sprint's actions speak much louder than its many words about how "complicated" this case supposedly is. Sprint's protestations to the contrary notwithstanding, CenturyLink's Complaint presents issues that are well within "the "conventional experience of judges" — who are routinely called upon to decide cases in which the defendant simply does not want to pay its bills.

III. PROCEDURAL STANDARD

A. Rule 12(b)(6) Requires the Court to Accept As True CenturyLink's Factual Allegations About Sprint's Failure to Pay Access Charges.

Dismissal pursuant to Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowery v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir. 1997); *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009); *S.E.C. v. Hollier*, No. 09-CV-0928, 2010 WL 126470, at *3 (W.D. La. Jan. 8, 2010) (App. Ex. 8).

Rule 12(b)(6) requires this Court to accept the truth of the well-pleaded factual allegations of CenturyLink's Complaint and to draw all reasonable inferences in favor of

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[25] In *Advamtel, LLC v. Sprint Communications Co. L.P.*, 125 F. Supp.2d 800, 803 (E.D. Va. 2001), the court ordered Sprint to "pay plaintiffs for these services at the tariff rate and seek a refund later, if warranted by the FCC's resolution of the already-referred issue concerning the reasonableness of the tariff." The *Advamtel* court also found that it would be reasonable to expect the FCC to address the reasonableness of the tariffs and other referred issues within six months. *See* 125 F. Supp.2d at 807 ("If, at the end of the six month period, the FCC has not ruled on the referred questions, a trial addressing all remaining questions, including those referred to the FCC, will proceed in this Court").

CenturyLink. *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1950 (2009); *Lormand*, 565 F.3d at 232. *See also RSUI Indem. Co. v. Louisiana Rural Parish Ins. Co-op.*, No. 09-0793, 2009 WL 2606092, at *2 (W.D. La. Aug. 24, 2009). (App. Ex. 9). To survive Sprint's Rule 12(b)(6) motion, CenturyLink's Complaint "'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief — including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Thus, CenturyLink must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Guidry v. American Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007). A claim meets the plausibility test when it has "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, --- U.S. at ----, 129 S. Ct. at 1949 (internal citations omitted).

In this case, the factual allegations of CenturyLink's Complaint are sufficient to establish, as a matter of law, that Sprint has violated 47 U.S.C. § 251(g) by failing to pay CenturyLink's tariffed rates and that the doctrine of primary jurisdiction does not apply.

B. Referral Under the Doctrine of Primary Jurisdiction Is Proper Only Where An Administrative Agency Must Resolve Preliminary Issues.

Sprint concedes that the Court "has original jurisdiction over the claim before it." *Northwinds Abatement v. Employers Ins.*, 69 F.3d 1304, 1311 (5th Cir. 1995).[26] Sprint nevertheless seeks a ***discretionary*** dismissal[27] or "stay"[28] based on the doctrine of primary

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[26] *See* Def. Mem. at 10 ("the Court has federal question jurisdiction over Counts I, II, and III, and supplemental jurisdiction over Count IV.").

[27] *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.").

jurisdiction. Under controlling Fifth Circuit precedent, the doctrine of primary jurisdiction can be invoked only if two prerequisites are satisfied. First, CenturyLink's Complaint must "require[] the resolution of predicate issues or the making of preliminary findings." *Northwinds*, 69 F.3d at 1311. Second, judicial deference is warranted only if "the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body." *Id.*

In this case, any "predicate issues" that an administrative body must resolve have already been resolved. Similarly, any "preliminary findings" that an administrative body must make have already been made. The FCC has already approved CenturyLink's Federal Access Tariffs for ***interstate*** traffic. (Compl. ¶¶ 29-30). Similarly, CenturyLink's State Access Tariffs for ***intrastate*** traffic have been approved by each applicable State Commission. (Compl. ¶¶ 32-33). These facts establish why — as a matter of law — the doctrine of primary jurisdiction simply does not apply. These same facts also establish that Sprint's refusal to pay CenturyLink's tariffed rates violates obligations imposed on Sprint by 47 U.S.C. § 251(g).

IV. ARGUMENT

A. The FCC Has No "Specialized Expertise" In Awarding Damages for Sprint's Violation of CenturyLink's Federal and State Access Tariffs.

On its face, 47 U.S.C. § 207 authorizes damage claims against carriers like Sprint to be brought ***either*** in the FCC ***or*** "in any district court of the United States of competent jurisdiction." Notwithstanding this "either/or" grant of concurrent jurisdiction, Sprint would have this Court effectively cede to the FCC its statutory authority to award damages for federal

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(footnote continuation)

[28] Because the "referral" to the FCC that Sprint seeks would be of indefinite duration, it would — as a practical matter — be tantamount to dismissal.

tariff violations. The FCC, however, has "repeatedly declined to entertain 'collection actions.'" *Global Crossing*, 550 U.S. at 68. *See also AT&T Access Charge Order* at ¶ 23 n. 93 ("Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariff charges.").[29] Moreover, the FCC has no jurisdiction to decide CenturyLink's claim for damages arising from Sprint's failure to make payments required by the State Access Tariffs. Many of the State commissions that previously approved the State Access Tariffs lack statutory authority to award damages to CenturyLink.[30] Last but not least, CenturyLink's Complaint does ***not*** "require[] the resolution of predicate issues or the making of preliminary findings" by either the FCC or any State commission. *Northwinds*, 69 F.3d at 1311.

1. Primary jurisdiction does not apply to cases involving *enforcement* rather than the *reasonableness* of a tariff.

The doctrine of primary jurisdiction "does not apply to cases involving the ***enforcement of a tariff***, as opposed to a challenge to the ***reasonableness of a tariff***." *Nat'l Communs. Ass'n v. AT&T*, 46 F.3d 220, 223 (2d Cir. 1995) (emphasis added), citing *C.A.B. v. Aeromatic Travel Corp.*, 489 F.2d 251, 253 (2d Cir. 1973), *Danna v. Air France*, 463 F.2d 407, 410 (2d Cir. 1972). Relying on this distinction between merely enforcing filed rates and determining their reasonableness, another district court in the Fifth Circuit recently held that the doctrine of primary jurisdiction did not warrant dismissal:

> AT&T Texas' claims to recover the amounts allegedly unpaid by Affordable Telecom are unrelated to rate-setting, which is in the particular expertise of the

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[29] *Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services Are Exempt from Access Charges*, 19 F.C.C.R. 7457 (Order April 21, 2004), cited in Def. Mem. at 18-20.

[30] For example, "the [Indiana] Commission has no judicial power to render a money judgment." *State ex rel. Indianapolis Water Co. v. Niblack*, 240 Ind. 32, 34, 161 N.E.2d 377, 378 (1959). Similarly, in Missouri, "[t]he Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund." *Straube v. Bowling Green Gas Co*, 227 S.W. 2d 666, 668 (Mo. 1950) (citations omitted).

> FCC. Rather, to the extent Plaintiff's claims implicate the rate charged, they seek only to enforce it. This matter is within the Court's conventional expertise.

Southwestern Bell Tel. Co. v. Fitch, 643 F. Supp. 2d 902, 912 (S.D. Tex. 2009).

Sprint ignores altogether this critical distinction between cases involving the ***enforcement*** of a tariff and those involving only the ***reasonableness*** of a tariff." Indeed, Sprint fails to cite a single reported decision in which the court referred to an administrative body a claim "seek[ing] only to enforce" the tariffed rate. *Fitch,* 643 F. Supp. 2d at 912. In every reported case cited by Sprint in which the court invoked primary jurisdiction, the FCC or applicable State commission had not yet decided the predicate issue of whether the tariff was "just and reasonable." Even then, the court did not allow Sprint or any other defendant to evade its obligation to pay the tariffed rates while an administrative body decided the tariff's validity.

In *Advamtel,*[31] for example, the court awarded damages based on the tariff rate for the services that Sprint had previously ordered and received. *See* 125 F. Supp. 2d at 803:

> Sprint must pay plaintiffs for these services at the tariff rate and seek a refund later, if warranted by the FCC's resolution of the already-referred issue concerning the reasonableness of the tariff.

Like *Advamtel,* the other reported decisions upon which Sprint attempts to rely involved situations in which the validity of the tariff — including whether it was "just and reasonable" — had yet to be decided by the FCC or applicable State commission.[32]

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[31] Cited in Def. Mem. at 12.

[32] *See* Def. Mem. at 12-13, citing *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966) (plaintiff's antitrust challenge to ***validity*** of tariff properly referred to FCC for determination whether tariff "just and reasonable"); *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 187 (5th Cir. 1990) ("Primary jurisdiction applies in this case because the legislature has specifically authorized the PUC to ensure that rates are not discriminatory."); *AMC Liquidating Trust v. Sprint Communs. Co., L.P.*, 295 F. Supp. 2d 650 (M.D. La. 2003) ("the issue of whether the access charges by AMC are just and reasonable ... is within the special competence of the FCC"); *AT&T v. MCI Communs. Corp.*, 837 F. Supp. 13, 16 (D.D.C. 1993) ("the FCC is better suited to determine the unresolved issue of whether either Sprint's tariffs or the tariffs filed by MCI after the *AT & T v. FCC* decision violate Section 203 of the Communications Act.").

In this case, it is undisputed that CenturyLink's Federal Access Tariffs have already been "filed with and approved by the FCC." (Compl. ¶ 29). "The rates and other terms contained in the CenturyLink Plaintiffs' Federal Access Tariffs are 'deemed lawful' pursuant to 47 U.S.C. § 204(a)(3)." (Compl. ¶ 29). As a result of the FCC's approval:

> The rates and other terms contained in the CenturyLink Plaintiffs' Federal Access Tariffs:
>
> a. are "just and reasonable" as a matter of federal law;
>
> b. are lawful until modified by the FCC prospectively; and
>
> c. cannot be refunded on a retroactive basis.
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> *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-132 (1990); *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222-23 (1998).

(Compl. ¶ 30). Similarly, CenturyLink's "State Access Tariffs have been filed with the applicable 'State commissions' and are deemed to be 'just and reasonable.'" (Compl. ¶ 74). Neither a court nor a State commission can modify CenturyLink's State Access Tariffs retroactively — just as the FCC lacks the authority to do so with respect to the Federal Access Tariffs. *See* Compl. ¶ 30 and authorities cited therein. Under the circumstances, Sprint's effort to avoid the merits of CenturyLink's Complaint by invoking the doctrine of primary jurisdiction is unavailing.

2. <u>On their face, CenturyLink's Access Tariffs apply to the calls that Sprint delivers for termination by CenturyLink.</u>

"When ... the issues before a court can be resolved by 'using the plain language of the tariffs and the ordinary rules of construction,' the court should adjudicate the case without referral to the agency." *Fitch*, 643 F. Supp. 2d at 912, quoting *Advance United Expressways, Inc. v. Eastman Kodak Co.*, 965 F.2d 1347, 1353 (5th Cir. 1992). This is just such a case.

Ignoring the Fifth Circuit's admonition, Sprint instead hangs its hat on two unpublished decisions of U.S. district courts in New Jersey and Wyoming, respectively. These two cases, according to Sprint, stand for the proposition that "deference is particularly important in disputes concerning the applicability of a tariff to different types of traffic."[33] In the hope that this Court will find these two precedents to be persuasive, Sprint claims that "the parties in this case have a fundamental dispute as to whether CenturyLink's access tariff rates apply to VoIP-originated traffic." (Def. Mem. at 12). Rather than decide CenturyLink's damage claim, Sprint insists, this Court must sit on the sidelines unless and until the FCC and each of the individual State commissions listed in Exhibit A to CenturyLink's Complaint has decided that the Access Tariffs apply in this case.

Sprint's newfound argument that the Access Tariffs do not apply may well fall in the category of "be careful what you ask for, you just might get it."[34] If the termination of VoIP-originated calls is ***really*** not covered by CenturyLink's Federal and State Access Tariffs, Sprint faces potential claims for quasi-contract claims such as unjust enrichment and common law and statutory claims for deceptive practices. *See, e.g., Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183, 185-186 (5th Cir. 1990) ("Even if the proper adjudicatory body were to find that Bell did not discriminate against the Pennys in the rates it charged them, the Pennys could still maintain their other causes of action. Because those claims correctly lie in a court empowered to interpret and apply the [Texas Deceptive Trade Practices Act], they are not under the PUC's jurisdiction."); *N. Valley Communs., LLC v. Qwest Communs. Corp.*, 2009 DSD 11, 2009 U.S.

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[33] *See* Def. Mem. at 13, citing *Combined Cos. v. AT&T Corp.*, No. 95-908, 2006 WL 1540917 (D.N.J. June 1, 2006) (Doc. 11-3) and *Union Tel. Co. v. Qwest Corp.*, No. 02-CV-209, 2004 WL 4960780 (D. Wyo. May 11, 2004), *aff'd*, 495 F.3d 1187 (10th Cir. 2007) (Doc. 11-4).

[34] *Riddle v. Bed, Bath & Beyond, Inc.*, 2007 U.S. Dist. LEXIS 40504 (S.D. Ind. May 31, 2007) (App. Ex. 10).

Dist. LEXIS 88276 (D.S.D. Sept. 24, 2009) ("Where, as here, it is alleged that the charges as set out in Northern Valley's tariffs do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.") (App. Ex. 11), citing *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006).

Like *Fitch* and *Advance United Expressways*, this is a case in which "the plain language of" CenturyLink's Access Tariffs warrant the Court's "adjudicate[ion of] the case without referral to the agency." In the *Combined Cos.* case cited by Sprint, the New Jersey court found that "the tariff provision is 'not clear on its face.'" 2006 WL 1540917, at *7. No such ambiguity is present here. With respect to CenturyLink's Federal and State Access Tariffs alike, the only question that Sprint has raised is whether the traffic that it delivers to Sprint is "telecommunication(s) service" and whether Sprint is engaged in "(tele)communication(s)." *See* Def. Mem. at 13-14. For purposes of Sprint's Rule 12(b)(6) motion, this Court must accept the truth of CenturyLink's allegation that "[a]t the point that a call enters [CenturyLink's] network, TDM-originated calls and VoIP-originated calls are indistinguishable to [CenturyLink]." (Compl. ¶ 35). Even if Sprint could — under the Federal Rules — dispute this allegation, Sprint in fact concedes its accuracy. *See* Def. Mem. at 2-3 (Sprint's "network converts the call to Time Division Multiplex ('TDM') protocol before it is delivered to" CenturyLink). These undisputed facts establish, as a matter of law, that Sprint is providing "telecommunications service" when it delivers calls to CenturyLink in TDM format. If Sprint is not providing "telecommunications service," CenturyLink has no obligation to grant Sprint terminating access to CenturyLink's local exchange facilities. Sprint simply cannot have it both ways.

Just as CenturyLink's Access Tariffs "do not distinguish between transmission protocols" (Compl. ¶ 34), the various definitions of telecommunications service at both the federal and state

level are similarly technology neutral. Here in Louisiana, for example, "telecommunications" is defined as follows:

> the bi-directional transmission of information of the user's choosing between or among points specified by the user, including voice, data, image, graphics and video, without change in the form or content of the information as sent and received, by means of an electromagnetic and/or fiber optic transmission medium, including all instrumentalities, facilities, apparatus and services (including the collection, storage, forwarding, switching and delivery of such information) essential to such transmission.

La. PSC Regs. § 101 (App. Ex. 1). CenturyLink's Complaint alleges that "Sprint is a 'telecommunications carrier' within the meaning of 47 U.S.C. § 153(44)" and "provides 'telecommunications service' within the meaning of 47 U.S.C. § 153(46)." (Compl. ¶¶ 22, 23). To conclude that Sprint is in fact providing "telecommunications service" when it delivers VoIP-originated traffic to CenturyLink for termination, this Court need look no further than Sprint's own filings with the FCC.

3. "Novel issues" of compensation for *origination* and *transmission* of VoIP traffic are irrelevant to compensation for *termination*.

"Further complicating" this matter, according to Sprint, are various cases addressing "novel questions related to VoIP services." *See* Def. Mem. at 15 *et seq.* These "novel questions," however, have absolutely nothing to do with any issue before this Court. Sprint itself explained why in its submission that led to the FCC's *Time Warner Declaratory Ruling*.[35] The principal issue before the FCC in that proceeding was whether Sprint's wholesale services to cable companies were those of a "telecommunications carrier" within the meaning of 47 U.S.C. § 153 (44). As a "telecommunications carrier," Sprint would be entitled to, *inter alia*, interconnection from LECs pursuant to 47 U.S.C. § 251. For the express purpose of obtaining

[35] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55.

interconnection provisions from local exchange carriers under the 1996 Act in that case, Sprint urged the FCC to rule that the ***origination*** of VoIP traffic had no bearing on Sprint's rights as a "telecommunications carrier."[36] In its *Time Warner Declaratory Ruling*, the FCC agreed.[37]

Sprint's Motion to Dismiss simply ignores this and other precedents that Sprint has obtained — for the purpose of ***obtaining*** interconnection under Section 251 — which have uniformly held that Sprint is be a "telecommunications carrier" when it delivers VoIP-originated calls for termination. Now that Sprint wants to avoid its Section 251 obligation to make payment for termination services, however, Sprint tries to call into question its own status as a "telecommunications carrier." Sprint does so by citing proceedings related to compensation for the ***origination*** of VoIP traffic. [38] These cases have nothing to do with whether Sprint is a "telecommunications carrier" when it delivers for ***termination*** calls that may have originated in VoIP format — as Sprint has argued successfully at both the federal and state levels.

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[36] *See Petition of Time Warner Cable*, Sprint Comments at 23-24:

> A telecommunications carrier's right to interconnection, and an [incumbent exchange local carrier] ILEC's obligation to interconnect, are unaffected by the potential regulatory classification of the carrier's wholesale customer. The Act focuses solely on the "requesting telecommunications carrier."...**It does not matter what technology is used** by the carrier's customers, nor whether the customer's own retail subscribers are receiving traditional voice service, wireless service, information services, or any type of VoIP service. **It does not matter whether the customer's subscribers utilize a Vonage-type service, or a more conventional voice service utilizing VoIP technology.**
>
> The classification of the customer's own retail service offering is irrelevant to the wholesale carrier's status under the Act. The wholesale carrier's status as a "requesting carrier" determines whether it is entitled to interconnection under section 251. Whenever a telecommunications carrier is providing services on a common carrier basis, then the Act entitles it to interconnection, regardless of whether it sells transmission to another carrier or to an information service provider.

(App. Ex. 12) (emphasis added).

[37] See *Time Warner Declaratory Ruling* at ¶ 15 ("[t]he regulatory classification of the service provided to the ultimate end user has no bearing on [Sprint's] rights as a telecommunications carrier to interconnect under Section 251."), ("[T]he statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Section 251(a) and (b).").

[38] These cases are identified in the Fed. R. Evid. 1006 Summary of Irrelevant Cases Cited in Sprint's Motion to Dismiss Related to Compensation for ***Origination*** of VoIP Traffic attached as **Exhibit A**.

In an effort to "further complicat[e]" this matter, Sprint cites cases addressing the ***transmission*** of "IP in the Middle" traffic[39] — including the FCC's "*AT&T Access Charge Order*."[40] Sprint's attempt to rely upon these "IP in the middle" decisions is curious for the following reasons:

1. The FCC's *AT&T Access Charge Order* held that the IXC was liable to pay the same types of terminating access charges that Sprint has refused to pay CenturyLink in this case — as noted in a subsequent "IP in the middle" decision cited by Sprint.[41]

2. This subsequent decision distinguished the FCC's decision on the grounds that "[n]othing in the *AT&T Access Charge Order* extends the obligations to pay terminating access charges to non-IXCs, however, and plaintiffs do not allege that the UniPower defendants are an IXC." (2005 WL 2033416 at *3). In contrast, CenturyLink's Complaint expressly alleges that Sprint is an IXC. (Compl. ¶ 27).

3. Even if the FCC's *AT&T Access Charge Order* were otherwise helpful to Sprint's cause, Sprint — by its own admission — does ***not*** provide "IP in the middle" transmission services. *See* Def. Mem. at 18-21.

4. "The rates, terms, and conditions of [CenturyLink's] Access Tariffs do not distinguish between transmission protocols." (Compl. ¶ 34).

Under the circumstances, it would appear from Sprint's citation to these "IP in the middle" cases that Sprint is either confused or deliberately trying to be confusing.

4. It requires no "specialized expertise" of the FCC to determine that Sprint's failure to pay tariffed rates violates Section 201(b).

Sprint's final argument in support of its primary jurisdiction argument is that the presence of CenturyLink's Section 201(b) claim "provides further justification for an FCC referral." (Def. Mem. at 24). Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), imposes upon common carriers the duty that their practices in connection with communication services be "just

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[39] These cases are identified in the Fed. R. Evid. 1006 Summary of Cases Cited in Sprint's Motion to Dismiss Related to Compensation for "IP in the Middle" ***Transmission*** attached as **Exhibit B**.

[40] *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, 19 F.C.C.R. 7457 (2004) (the) cited in Def. Mem. at 23.

[41] *See Southwestern Bell Tel., L.P. v. Vartec Telecom, Inc.*, 2005 WL 2033416 at *3 (E.D. Mo. 2005) (Doc. 11-3) (the "*AT&T Access Charge Order*" held that "the interexchange carrier is obligated to pay terminating access charges"), *aff'd on other grounds*, 530 F.3d 676 (8th Cir. 2008), cited in Def. Mem. at 21.

and reasonable," and provides that all unjust and unreasonable practices are unlawful. (Compl. ¶ 69). "Courts regularly defer to the FCC," Sprint insists, "to determine whether specific conduct is unjust and unreasonable conduct prohibited by Section 201(b)." (Def. Mem. at 24).

In each of the cases cited by Sprint, however, the practices alleged to be ***un***just and ***un***reasonable were so novel that determination of their legality required the FCC's expertise. The practices at issue consisted of (1) "charging for uncompleted calls, ring time and holding time, and failing to inform customers of this practice,"[42] (2) "double-taxing" customers by assessing "surcharges for both federal and state USFs [Universal Service Funds],"[43] and (3) "an illegal scheme of conspiring to overcharge [AT&T, Sprint, and MCI] for ... USF fund pass-through charges, thereby creating a secret profit center that allowed defendants to deceptively advertise lower rates for their services."[44]

In contrast, this case involves a garden-variety violation of Section 201(b). The principal conduct at issue consists of Sprint's "refus[al] to pay [CenturyLink] the proper rate under the Federal Access Tariffs." (Compl. ¶ 71). Determining whether this conduct violates Section 201(b) does not require any "specialized expertise" of the FCC because the Supreme Court has already held that a carrier's refusal to pay compensation is ***un***just and ***un***reasonable in violation of 47 U.S.C. § 201(b). *See Global Crossing,* 550 U.S. at 59. The Supreme Court so held even though the refusal at issue in *Global Crossing* did not violate the express terms of either the statute or any tariff that had been filed with the FCC. Rather, the carrier's refusal

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[42] *In re Long Distance Telecommunications Litig. v. ITT-U.S. Transmission System, Inc.*, 831 F.2d 627, 628 (6th Cir. 1987), cited in Def. Mem. at 24.

[43] *Telestar Resource Group, Inc. v. MCI, Inc.*, 476 F. Supp. 2d 261, 271-72 (S.D.N.Y. 2007), cited in Def. Mem. at 24.

[44] *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1113 (D. Kan. 2003), cited in Def. Mem. at 24.

violated a regulation that had been promulgated by the FCC. *Id.* at 60. As the Supreme Court observed in *Global Crossing*, it is well settled that violations of tariffs filed with and approved by the FCC violate Section 201(b). *See id.* at 54. Sprint's claim that the FCC needs to first resolve an issue that the Supreme Court has already decided is — in a word — frivolous.

B. Section 251(g) Entitles Sprint to Interexchange Access and Obligates Sprint to Pay CenturyLink for Use of Its Local Exchange Facilities.

Both substantively and procedurally, Sprint's interpretation of 47 U.S.C. § 251(g) is simply wrong. Sprint's ***statutory right*** to receive interexchange access from CenturyLink is contingent upon Sprint's ***statutory obligation*** to pay access charges to CenturyLink. It is axiomatic that for every right there must be a remedy. Sprint's insistence that 47 U.S.C. § 251(g) does not afford Sprint a private right of action would, as a practical matter, eviscerate CenturyLink's statutory right to "receipt of compensation."

Whenever Sprint has sought to obtain from an LEC the interexchange access to which Section 251(g) entitles it, federal and state regulators have — consistent with the plain language — ensured that the LEC's statutory right to "receipt of compensation" is also protected. The FCC's *Time Warner Declaratory Ruling*, for example, held that the 1996 Act imposes upon Sprint the obligation to pay compensation for interconnection. Noting that Sprint and the other "wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a Section 251 arrangement between those two parties," the FCC "ma[d]e such an arrangement an explicit condition to the Section 251 rights provided herein." *Time Warner Declaratory Ruling* at ¶ 17. *See id.* at n. 53 ("Sprint Nextel Comments at 5 (offering to provide for its wholesale customers 'intercarrier

compensation, including exchange access and reciprocal compensation').''). Sprint has been subject to similar rulings from various State commissions.[45]

Each of these rulings is the only outcome consistent with the logic, structure, and plain language of 47 U.S.C. § 251(g). Sprint obtains access to CenturyLink's local exchange facilities pursuant to CenturyLink's Section 251(g) obligation to "provide exchange access, information access, and exchange services for such access to interexchange carriers." 47 U.S.C. § 251(g). Section 251(g) imposes this obligation upon CenturyLink "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (***including receipt of compensation***) that apply to [CenturyLink] on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the FCC." *Id.* (emphasis added). Like the Federal Access Tariffs themselves, the entire access regime is the equivalent of a "regulation, order, or policy of the FCC" within the meaning of 47 U.S.C. § 251(g). *Global Crossing,* 550 U.S. at 57. When Congress passed the 1996 Act, it expressly preserved the access regime through Section 251(g). *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

Under 47 U.S.C. § 207, "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" has a private right of action. Section 207 would afford Sprint a remedy if CenturyLink refused to provide Sprint with interexchange access as required by Section 251(g) and CenturyLink's Federal Access Tariffs. *See Global Crossing*, 550 U.S. at 54. CenturyLink is similarly entitled to bring suit to vindicate its Section 251(g) right to "receipt of compensation." In this case, the only entity from which CenturyLink can recover such compensation is Sprint.

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[45] These are summarized in the Fed. R. Evid. 1006 Summary of State Commission Rulings That Sprint Must Pay Intercarrier Terminating Access Charges for Interconnection Pursuant to 47 U.S.C. § 251(g) attached as **Exhibit C**.

When Congress enacted Section 251(g) requiring LECs like CenturyLink to make their local exchange facilities available to IXCs like Sprint, it never intended to deprive LECs of compensation for use of their facilities and the services they provide. This intent is reflected in, *inter alia*, Section 251(g)'s recognition of the LECs' right to "receipt of compensation." When Congress enacted the 1996 Act, it recognized that the imposition of mandatory access, interconnection, and other new pro-competitive requirements in the telecommunications industry would bear a cost for LECs for which they were entitled to full compensation at their tariffed rates. *Qwest Corp. v. U.S.*, 48 Fed. Cl. 672, 696 & n.10 (Fed. Cl. 2001). To ignore this congressional intent would violate basic principles of statutory interpretation.[46] And if Congress had required access without the payment of access charges, the resultant confiscation of private property would have been unprecedented in scope and contrary to the Takings Clause.[47]

V. CONCLUSION

In view of the magnitude of Sprint's unpaid bills, its desire to delay if not deny justice for CenturyLink is perhaps understandable. The doctrine of primary jurisdiction, however, is simply inapplicable in this case. The FCC and every State commission has already decided the validity of CenturyLink's Access Tariffs. It is now up to this Court to enforce them.

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[46] *See generally Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) ("Nothing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."), quoting *In re Chapman*, 166 U.S. 661, 667 (1897).

[47] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 304 (1989) ("[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *See also Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., concurring in part and dissenting in part) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

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Respectfully submitted,

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