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December 2, 2002

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Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 021061-TP - Petition of CNM Networks, Inc. for declaratory statement that CNM's phone-to-phone Internet protocol (IP) telephony is not "telecommunications" and that CNM is not a "telecommunications company" subject to Florida Public Service Commission jurisdiction.

Dear Ms. Bayó:

Enclosed for filing are an original and fifteen copies of Sprint's Response to CNM Network Inc.'s motion to dismiss petitions for intervention, or, in the alternative, to conduct a generic proceeding or rulemaking or to stay pending FCC action.

Service has been made this same day via hand delivery and U.S. Mail to the parties listed on the attached service list.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Sincerely,

Susan S Masterton / Ssk
Susan S. Masterton

SSM/tk

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CNM Network)
For Declaratory Statement regarding)
Florida Public Service Commission)
Jurisdiction)
_____)

Docket No. 021061-TP

Filed: December 2, 2002

**SPRINT'S RESPONSE TO CNM NETWORK INC.'S MOTION TO DISMISS
PETITIONS FOR INTERVENTION, OR, IN THE ALTERNATIVE, TO
CONDUCT A GENERIC PROCEEDING OR RULEMAKING OR TO STAY
PENDING FCC ACTION**

Sprint-Florida, Incorporated (hereinafter "Sprint"), by and through its undersigned attorneys, hereby files this Response to CNM's Motion to Dismiss Petitions for Intervention, or, in the Alternative, to Conduct a Generic Proceeding or Rulemaking or to Stay Pending FCC Action (hereinafter "Motion").

INTRODUCTION AND BACKGROUND

On October 18, 2002, CNM filed a Petition for Declaratory Statement (hereinafter "Petition") with the Commission asking that the Commission make a determination that CNM's provision of phone-to-phone Internet Protocol ("IP")¹ telephony² is not

¹ "Protocol" refers to the specific set of rules governing the formatting and timing of data transmissions between two devices and covers such issues as framing, error handling, transparency and line control. Internet Protocol refers to part of the Transmission Control Protocol /Internet Protocol ("TCP/IP") family of protocols describing software that is used to track communication across interconnected networks. *Newton's Telecom Dictionary* 662, 816 (15th ed. 1999).

² The phrases "Internet telephony" and "Internet Protocol telephony" ("IP telephony") refer to similar, but distinct concepts. IP telephony involves the provision of a telephony service or application using Internet Protocol. IP telephony may be provided over the public Internet or over a private IP network. In contrast, Internet telephony is a subset of IP telephony that is distinguished by the fact that it is provided over the public Internet and uses the domain-name system for routing. *See, e.g., In the Matter of Federal-State Joint Board on Universal Service,*

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“telecommunications” and that CNM is not a “telecommunications company” subject to the Commission’s jurisdiction.³ Although the Petition discusses and analyzes various Florida and federal statutes, in addition to rulings by this Commission and the Federal Communications Commission (“FCC”), the petition is short on facts as to the services CNM offers and the networking arrangements used to provide those services. The Petition also mischaracterizes the nature and status of the determinations that have been made regarding these issues and oversimplifies the analysis needed to make a proper determination. Moreover, the Petition fails to address significant industry impacts of the declaration CNM seeks, including the impact on universal service support mechanisms, customer service issues, and a host of other important consequences.

Sprint, several other Florida incumbent local exchange companies, and the Florida Cable Telecommunications Association have filed petitions to intervene in the proceedings. On November 19, 2002, CNM filed its Motion asking the Commission to deny all of the petitions for intervention or in the alternative initiate a generic investigation or stay the proceedings pending the FCC’s ruling on a request for declaratory statement involving IP telephony issues filed by AT&T with the FCC (“AT&T Petition”)⁴. Sprint files this response replying to CNM’s motion and setting forth Sprint’s opposition to CNM’s request for a declaratory statement.

Report to Congress, 13 FCC Rcd. 11501, 11541-51, PP83-104 (“Universal Service Report”) (discussing Internet and IP telephony).

³ CNM Petition at page 17.

⁴ *Petition for Declaratory Ruling that AT&T’s Phone-to- Phone IP Telephony Services are Exempt from Access Charges*, filed October 18, 2002, WC Docket No. 02-361, Notice Establishing Pleading Cycle issued November 18, 2002, copy attached to CNM’s Motion (“AT&T Petition”)

ARGUMENT

SPRINT'S SUBSTANTIAL INTERESTS WILL BE AFFECTED BY THE COMMISSION'S DECISION ON CNM'S PETITION

In its Motion CNM alleges that Sprint has not met the requirements of Florida law in establishing that its substantial interests will be affected by the Commission's ruling on CNM's Petition. CNM acknowledges Sprint's assertion that, as an incumbent local exchange company in Florida, it will be substantially affected by any determination of the appropriate regulation and intercarrier compensation for IP telephony⁵ services. However, CNM alleges that this assertion is insufficient to establish Sprint's substantial interests in the outcome of the Commission's decision on CNM's Petition. CNM appears to believe that Sprint should be required to demonstrate with greater specificity how it would be affected by the Commission's decision.⁶

The standard for evaluating the substantial interests of a party, for the purposes of granting standing to either initiate or intervene in an administrative proceeding, is well-established in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). That standard is two-pronged, providing that a party's substantial interests are affected if 1) the party will suffer injury in fact which is of sufficient immediacy to entitle participation in the proceeding, and 2) that the party's substantial injury is of a type or nature which the

⁵ As used throughout this pleading IP telephony will refer to traffic that uses IP protocol and does NOT actually traverse the Internet. It appears from the Petition that the nature of the services offered by CNM, is IP Protocol traffic that does not traverse the Internet.

⁶ CNM does not dispute that Florida case law clearly recognizes the right of a substantially affected party to intervene in declaratory proceedings. Motion at par. 5, citing *Chiles v. Dept. of State*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). As stated in Sprint's Petition to Intervene, the 1st DCA's ruling in *Chiles* regarding the right to intervene in declaratory statement proceedings was cited favorably by the Florida Supreme Court in *Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999).

proceeding is designed to protect. Sprint meets the two prongs of the *Agrico* test and therefore its Petition to Intervene should be granted.

As more fully discussed below, CNM is asking for a ruling that amounts to a general determination of the rights or obligations of broad classes of persons, i.e., IP telephony providers, interexchange service providers and local exchange service providers. Even if CNM's request were more narrowly drawn, the requirement for notice of petitions for declaratory statements in the Florida Administrative Weekly "accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties." (*Chiles*, 711 So.2d at page 155) It is this possibility that is the basis for the First District Court's holding that "any substantially affected party can intervene in a declaratory statement before the agency." (*Id.*)

Sprint meets the first prong of the *Agrico* test because a ruling by the Commission on the declaratory statement requested by CNM would likely govern Sprint's relationship with CNM as well as any other similarly situated provider of IP telephony services or interexchange provider using CNM to terminate its long distance traffic to Sprint.⁷ Specifically, to the extent that CNM terminates any phone-to-phone IP telephony traffic to Sprint, whether Sprint is compensated for that traffic and the level of that compensation could be affected by the Commission's determination of CNM's Petition.

⁷ CNM offers service to the general public. Information available from its Internet site (<http://www.cnmnetwork.com>) indicates it offers a variety of products, including residential flat rate long distance voice service and other service available to carriers and "enterprises". DS3 termination service is apparently available to carriers to terminate their long distance calls to ILECs. CNM states that "no gateway numbers or new equipment [is] needed" and the service provides "transparent integration with existing networks." It appears that long distance traffic comes to CNM from interexchange carriers and is delivered to ILECs with no net protocol conversion. Access to the residential voice service is achieved through dialing a local access number and, when prompted, then dialing the desired phone number.

Because Sprint is a certificated incumbent local exchange telecommunications company that terminates or originates voice traffic that could include IP telephony services as described in CNM's petition, its interests are affected by any Commission determination as to the nature of that traffic. Sprint is also affected in a broader sense through the impact of CNM's obligations relative to the industry as a whole. The applicability of the rules governing interconnection and compensation for the exchange of telecommunications traffic under both federal and state law are implicated by any determination by the Commission of the issues raised by CNM. If the Commission determines that phone-to-phone IP telephony or CNM's interexchange traffic termination scheme is not telecommunications service, as requested by CNM, then Sprint is directly affected financially. The current intercarrier compensation schemes applicable to telecommunications traffic would no longer apply to CNM's traffic, or that of an interexchange carrier using CNM, that is terminated by Sprint or originated from Sprint to CNM. Sprint is also affected in the broader sense as the general obligations and relationships between carriers might be changed dramatically by the outcome of the Petition.

The outcome of a declaratory ruling likely would have a significant impact on the telecommunications industry as a whole with respect to a host of issues that could be directly affected by the regulatory treatment afforded either IP telephony or interexchange termination services relying on claimed IP telephony status. It is possible that some of Sprint's customers use CNM for at least some aspect of the provision of long distance services. Under these circumstances, Sprint would be affected by the intercarrier compensation mechanism, as potentially determined by the Commission, that

would apply between Sprint and CNM for the exchange of traffic directly or indirectly. Customer relations and service issues could also be affected by any FPSC-determined regulatory classification of CNM, as those issues relate to end users who are also end user customers of Sprint. If CNM is not regulated as a telecommunications company this may impact Sprint's relationship with its customers. Finally, the relationship of Sprint to interexchange carriers that use CNM to potentially arbitrage traditional access arrangements for terminating their bread and butter long distance calls also becomes an issue.

In addition, Sprint's relative contribution to universal service support mechanisms or other subsidy programs could be directly impacted if CNM or carriers using CNM's services are not classified as telecommunications carriers. Furthermore, the obligations Sprint or other ILECs may have to provide other services under the Telecommunications Act, such as UNEs, resold services or interconnection, could also be affected if CNM is found not to be a telecommunications carrier and those facilities or services are used to provide or access CNM's services.

As required by the second prong of the *Agrico* test, the nature of this injury to Sprint is specifically one that a request to interpret chapter 364, F.S., which establishes the Commission's jurisdiction over the regulation of telecommunications services, telecommunications providers, and intercarrier compensation arrangements, is designed to protect. Inasmuch as ch. 364, F.S. establishes certain rights and responsibilities for Sprint, a determination that could completely eviscerate the fundamental underpinnings of the chapter, such as CNM has requested, would place this situation within the second prong of *Agrico*. Even if, *arguendo*, a declaratory proceeding is not "designed to protect"

Sprint's asserted injury, the Commission determination of that question should be in a proceeding in which Sprint may participate. Sprint should be granted standing in this proceeding, if for no other reason than to present its arguments as to the propriety of the declaratory statement vehicle. Because of Sprint's substantial interests in the outcome of this proceeding, it should clearly be allowed to intervene in this proceeding and CNM's Motion should be denied.

CNM'S PETITION FOR DECLARATORY STATEMENT IS IMPROPER AND SHOULD BE DENIED

In paragraph 7 of its Motion, CNM states that "if the FPSC believes that the substantial interests of the putative intervenors will be affected by any determination in this docket...such a determination could only amount to a broad agency policy or a rule." Sprint agrees. CNM has asked the Commission to determine that phone-to-phone IP telephony is not "telecommunications" and that CNM is not a "telecommunications company" subject to the jurisdiction of the Commission. Such a determination would, indeed, constitute a statement of policy or rule by the Commission.

Section 120.565, F.S., which sets forth the scope of the Commission's authority to issue declaratory statements, specifies that declaratory statements are appropriate to obtain an agency's opinion as to the applicability of a statutory provision, rule or order as it applies to the petitioner's particular set of circumstances. CNM's Petition does not meet this standard.

The Florida Supreme Court has held that:

Where a declaratory statement provides a response which is not limited to specific facts and specific petitioners, but in reality adopts a broad agency policy or provides statutory or rule interpretations that apply to an entire class of persons, it will be set aside on appeal. *Florida Department of Business and Professional Regulation v. Investment Corp. of West Palm*

Beach et.al., 747 So. 2d 374, 376 (Fla. 1999), citing *Tampa Elec. Co. v. Florida Dep't. of Community Affairs*, 654 So. 2d 998 (Fla. 1st DCA 1995) and *Regal Kitchens, Inc. v. Florida Dep't. of Revenue*, 641 So. 2d 158 (Fla. 1st DCA 1994).

To support its request for declaratory relief, CNM describes the telephony services it provides in a general way, but CNM does not materially distinguish its services from the phone-to-phone IP telephony services offered by other similarly situated providers.⁸ Because CNM fails to distinguish its services from the services provided by the broad class of IP telephony providers, its Petition is simply a thinly disguised attempt to request a generic ruling from the Commission as to the status of IP telephony services. Such a determination by the Commission would, prima facie, substantially affect any local exchange company that terminates or originates voice traffic delivered via the IP protocol CNM describes.

CNM's Petition does not comply with the requirements for a declaratory statement under Florida law in other respects. CNM is asking the Commission for a retroactive determination as to whether CNM has complied with chapter 364, F.S., by offering its phone-to-phone IP telephony services without obtaining a certificate from the Commission. Florida case law has held that a declaratory statement proceeding is not the proper forum for determining the legitimacy of past behavior. See, *Novick v. Department of Health*, 816 So. 2d 1237, 1240, (Fla. 5th DCA 2002).⁹

In addition, because CNM's petition is asking for a broad policy determination from the Commission regarding the nature of phone-to-phone IP telephony, full consideration of this issue by the Commission would necessarily involve disputed and

⁸ See par. 7 of CNM's Petition.

⁹ In fact, Sprint notes that staff has initiated a show cause docket against CNM for failure to obtain a certificate. (Docket No. 020737).

complex issues of fact, policy and law. Consideration of such issues is not appropriate for a declaratory statement proceeding, which does not envision or accommodate the full development of a factual record or an adversarial hearing.¹⁰

As discussed above, CNM's petition for a declaratory statement concerning the nature and appropriate regulatory treatment of phone-to-phone IP telephony service is improper under s. 120.565, F.S. Therefore, CNM's request for a declaratory statement should be denied.

CNM MISCHARACTERIZES FLORIDA AND FEDERAL DECISIONS RELATING TO PHONE-TO-PHONE IP TELEPHONY

In its Petition, CNM attempts to establish that rulings in previous FPSC dockets have, at least implicitly, established that phone-to-phone IP telephony is not a telecommunications service subject to regulation by the Commission. CNM's interpretation of these prior FPSC rulings is erroneous. The issue of the proper treatment of phone-to-phone IP telephony for the purpose of determining appropriate intercarrier compensation has been raised in proceedings before the Commission on several occasions. In the context of a BellSouth arbitration proceeding with Intermedia Communications the Commission determined that:

With regard to phone-to-phone IP Telephony, witness Jackson provided no persuasive testimony to support his contention that BellSouth's attempt to include phone-to-phone IP Telephony within the definition of switched access is improper and contrary to law, nor did he cite any specific law which will be violated. The witness argued that because the FCC has not made a determination on the regulatory classification of phone-to-phone IP Telephony, any suggestion that phone-to-phone IP Telephony is telecommunications service is premature. We

¹⁰ See, e.g., *Sun Coast Home Care v. State of Florida*, 710 So. 2d 120 (Fla. 2d DCA 1998), in which the court reversed a declaratory statement issued by the Department of Insurance because the record was insufficient to support the declaration. Rule 28-105.003, F.A.C., authorizes an agency to hold a hearing to consider a petition for declaratory statement but it appears to specify a hearing in accordance with s. 120.57(2), F.S., which provides the process for hearings that do not involve disputed issues of material fact.

disagree, because as BST's testimony indicates, phone-to-phone IP telephony is technology neutral. A call provisioned using phone-to-phone IP Telephony but not transmitted over the internet, to which switched access charges would otherwise apply if a different signaling and transmission protocol were employed, is nevertheless a switched access call. *In re: Petition of BellSouth Telecommunications, Inc. for Section 252 (b) arbitration of interconnection agreement with Intermedia Communications, Inc.*, Docket No. 991854-TP, Order No. PSC-00-1509-FOF-TP, issued August 22, 2000 at Issue XVI.

While, as CNM notes, this issue was ultimately settled between BellSouth and Intermedia and the arbitration order as to this issue essentially rendered moot as to these two parties, the decision does represent a Commission determination regarding the nature of phone-to-phone IP telephony based on the evidence submitted in that proceeding and its interpretation of the relevant federal law. The Commission has not withdrawn its order on this issue.

In several subsequent arbitrations in which the IP telephony issue was initially raised the parties agreed to defer a decision on the issue to the Commission's generic reciprocal compensation docket, thus obviating the need for a Commission ruling.¹¹ Ultimately, in the *Generic Reciprocal Compensation Order*, the Commission declined to rule generically on the IP telephony issue.¹² However, in its discussion of the issue the Commission reiterated its finding in the *Intermedia* decision that "the technology used to

¹¹ See, e.g., *In re: Petition by MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996*, Docket No. 000649-TP, Order No. PSC-01-0824-FOF-TP; *In re: Petition by AT&T Communications of the Southern States, Inc. d/b/a AT&T for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. pursuant to 47 U.S.C., Section 252*, Docket No. 000731-TP; *In re: Petition by Level 3 Communications, LLC for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc.* Docket No. 0000907-TP; *In re: Petition by BellSouth Telecommunications, Inc. for arbitration of an interconnection agreement with US LEC of Florida, Inc. pursuant to the Telecommunications Act of 1996*, Docket No. 000084-TP.

¹² *In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order No. PSC-02-1248_FOF-TP, issued September 12, 2002 (hereinafter, "*Generic Reciprocal Compensation Order*.")

deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access charges should apply.” *Generic Reciprocal Compensation Order* at 36. This is still the law in Florida until the Commission, Legislature or courts determine otherwise. CNM mischaracterizes the Commission’s ruling in the *Generic Reciprocal Compensation Order* when it states that the Commission decided “that the reciprocal compensation scheme does not apply to IP telephony.” Petition at page 9.

CNM also mischaracterizes FCC rulings related to phone-to-phone IP telephony when it states that the “federal definition currently excludes phone-to-phone [IP] telephony from the scope of regulated telecommunications offerings.”¹³ Simply put, the FCC has made no such finding. Although the FCC deferred a final definitive determination as to the proper classification of phone-to-phone IP telephony based on the record in the *Universal Service Report* docket, the analysis undertaken and the tentative conclusions reached by the FCC in that proceeding would lead to the exact opposite conclusion. In this regard CNM has taken great liberties with the concept of IP telephony while failing to note important information that the FCC found relevant in its discussion.

The FCC noted that in the case of "computer-to-computer" Internet telephony, individuals use software and hardware at their premises to place calls between two computers connected to the Internet.¹⁴ The Internet telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider. Under this scenario the Internet service provider, over whose networks the information passes, will likely not even be aware that a particular customer is using Internet telephony

¹³ CNM Petition at par. 11.

software, because the packets carrying voice communications are indistinguishable from other types of packets.¹⁵ As noted by the FCC, under the Telecommunications Act, telecommunications is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹⁶ The key element the FCC focused on in this discussion was that the provision of telecommunications service should apply only to the "offering" of telecommunications. The FCC made no definitive determination as to whether telecommunications was taking place under this scenario but did note that the Internet service provider does not appear to be providing or offering telecommunications to its subscribers.¹⁷

However, the FCC reached a different tentative conclusion with respect to "phone-to-phone" IP telephony services. The FCC was discussing what appears to be a service that is indistinguishable from the service offered by CNM and recognized that this seems to present a different case with a different conclusion. The FCC defined the service in the following fashion.¹⁸

In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and

¹⁴ *Universal Service Report 13 FCC Rcd. 11501*, paragraph 87.

¹⁵ *Id.* See also, www.cnmnetwork.com where CNM holds itself out to carriers, enterprise customers and end users to provide long distance service and call termination service.

¹⁶ 47 U.S.C. § 153(46).

¹⁷ *Id.*

¹⁸ *Universal Service Report 13 FCC Rcd. 11501*, paragraph 87.

(4) it transmits customer information without net change in form or content.

Specifically, the FCC noted that when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network.

Although these providers may use a different technology in the provision of services, they typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate voice calls, which makes the service indistinguishable from the end users perspective from circuit switched services. The FCC noted that from a functional standpoint, users of these services obtain only voice transmission, rather than “information services” such as access to stored files. In this regard the FCC noted:¹⁹

The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."

Although the FCC declined to make a final determination based upon the record present in the *Universal Service Report* proceeding, it is clear that the FCC did not reach the conclusions that are represented by CNM in its Petition.

Sprint submits that this Commission should not formulate a conclusion on the Petition without a thorough investigation of the issues presented and an analysis of the potential industry impacts. Sprint submits that the instant proceeding based on CNM's

¹⁹ *Universal Service Report 13 FCC Rcd. 11501*, paragraph 89.

request for a declaratory statement does not present an opportunity for such analysis or the creation of a complete record.

SPRINT AGREES THAT A GENERIC PROCEEDING WOULD BE A MORE APPROPRIATE FORUM FOR DECIDING WHETHER, IF AT ALL, TO CHANGE THE *STATUS QUO*

In the *Generic Reciprocal Compensation Order*, the Commission declined to issue a “generic judgment” on IP telephony, but expressly did not preclude carriers from petitioning the Commission for decisions regarding specific IP telephony services through arbitration or complaint proceedings. *Generic Reciprocal Compensation Order* at page 37. In paragraph 7 of its Motion to Dismiss, CNM suggests that if the Commission determines that the substantial interests of the parties requesting intervention are affected by its determination of CNM’s request, then the proper forum for determining the issues is a generic proceeding in which all affected parties may have an opportunity to participate. Sprint agrees that, to the extent that the Commission determines that it is necessary to more fully consider and determine the issues relating to IP telephony, a generic docket is an appropriate forum for considering the issues raised in CNM’s Petition. As CNM states, the issues involved in determining the nature of IP telephony services are complex and diverse. A forum that allows for submission of comments by all affected parties, with an opportunity to present positions concerning all factual, policy and legal issues, would enable the Commission to fully consider all of the implications of any decision it might make to alter the telecommunications landscape.

As a third alternative CNM suggests that the Commission stay this proceeding pending the outcome of a request for declaratory statement addressing similar issues that AT&T has filed at the FCC. Sprint does not believe that the Commission has the

authority under the governing statute to stay a request for a declaratory statement. Section 120.565, F.S., requires that the Commission either issue a declaratory statement or deny the request within 90 days from the date the request was filed. There are no provisions in the statute, or in the rules implementing the statute, for delaying Commission action on the request.

Although the majority of the parties in the generic reciprocal compensation docket agreed that a decision on IP telephony was not ripe at that time, it has been over a year since the hearing was held in that docket.²⁰ Significant advances in technology and increased implementation of IP telephony technology have occurred during that time. While the FCC has initiated a proceeding that may ultimately address some of these issues, the Commission is not deprived of its authority to determine the status of intrastate phone-to-phone IP telephony traffic under its state authority. To ensure a timely resolution of the issues arising from the use of IP telephony technology and to provide certainty to the parties as to how this traffic is to be compensated on an intrastate basis, the Commission should consider initiating generic proceedings as suggested by CNM.

CNM's stay request is curious and should arouse suspicion since CNM possesses full discretion to withdraw its own petition and grant itself the relief it purports to ask from the Commission. Perhaps CNM seeks to create the appearance of uncertainty by the mere presence of its pleading and the open docket. Sprint urges the Commission to be especially vigilant and avoid inadvertent creation of a situation where customers may seek to withhold payment of compensation based on artificially manufactured doubt. Sprint's annual intrastate access charge revenues alone in Florida exceed \$150 million.

²⁰ The hearing in Phase II of the Generic Reciprocal Compensation Docket was held on July 5, 2001. Posthearing briefs were filed on August 10, 2001.

The evasion of or non-payment of these charges and/or reciprocal compensation would unreasonably jeopardize Sprint in a time of alarming bankruptcy trends among some of Sprint's largest customers.

The presumption of the applicability of intercarrier compensation to specific IP telephony service arrangements should not be affected pending the Commission's consideration of possible changes to the regulatory scheme for IP telephony services based on the issues merely raised by CNM. Similarly, any complaints filed regarding compensation for such specific arrangements, as contemplated by the Commission in the *Generic Reciprocal Compensation Order*, should not be delayed or stayed (through deferral or consolidation with any generic docket) during the pendency of a generic IP telephony docket. The commission should take pains to ensure that the mere filing of the CNM Petition does not fundamentally alter existing business relationships entered into based on existing statutory and decisional law.

CONCLUSION

Based on the foregoing, Sprint requests that the Commission grant its Petition to Intervene and deny CNM's Petition for Declaratory Statement for the reasons set forth above. To the extent that the Commission determines that IP telephony issues should be addressed at this time, the Commission should, with the appropriate caveats set out above, open a generic docket to investigate and examine the appropriate classification of IP telephony service.

Respectfully submitted this day of 2nd day of December 2002.

Handwritten signature of Susan S. Masterton in cursive script, with a horizontal line under the name and a flourish extending to the right.

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