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Susan S. Masterton  
Attorney

Law/External Affairs  
Post Office Box 2214  
1313 Blair Stone Road  
Tallahassee, FL 32316-2214  
Mailstop FLTLH00107  
Voice 850 599 1560  
Fax 850 878 0777  
susan.masterton@mail.sprint.com

February 28, 2003

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk  
& Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

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Re: Undocketed: In Re: The Matter of Internet Protocol Telephony

Dear Ms. Bayó:

Please find enclosed the Addendum to Sprint's Comments Presented at the Florida Public Service Commission Staff Workshop on January 27, 2003.

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

Thank you for your assistance in this matter.

Sincerely,

Susan S. Masterton

SSM/th

Enclosures

cc: Richard Moses  
Patricia Christensen, Esq.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In RE: Undocketed  
In the Matter of  
INTERNET PROTOCOL TELEPHONY.

Filed: February 28, 2003

**ADDENDUM TO SPRINT'S COMMENTS PRESENTED AT THE  
COMMISSION'S JANUARY 27, 2003 WORKSHOP**

On January 27, 2003, the Commission staff held a workshop to invite comments from interested persons to address several issues staff had identified concerning phone-to-phone voice over internet protocol (VOIP) traffic. Sprint made a presentation addressing many of these issues at the workshop. Sprint files these additional comments to address, in particular, legal issues raised by staff concerning VOIP.

**What is the current state of federal law?**

Current FCC proceedings

This issue is currently before the FCC in a declaratory proceeding based on a request for a declaratory statement filed by AT&T.<sup>1</sup> The parties filed comments in that proceeding on December 18, 2002 and reply comments on January 24, 2003. In its comments and reply comments Sprint stated that access should apply to phone-to-phone VoIP. In its Reply Comments Sprint defined phone-to-phone VoIP in the following manner.

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<sup>1</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361.

- Real-time voice communication is taking place.
- The devices connected to both ends of the voice communication are traditional telephones.
- The voice communication leaves the originating customer premises in TDM protocol and is terminated to the PSTN in TDM protocol. Transport between the originating customer premises and the terminating PSTN that utilizes IP protocol in whole or in part does not constitute a net protocol change.
- Finally, the use of a private IP network or the public Internet has no bearing on the definition.

The FCC, as yet, has established no firm time frame for issuing a decision on AT&T's petition. To further complicate resolution of VOIP issues by the FCC, pulver.com filed a Petition for Declaratory Ruling requesting a ruling on additional regulatory issues regarding VOIP on February 5, 2003. A copy of the FCC order establishing a pleading cycle for that proceeding is attached.

#### Previous FCC Decisions

Several previous FCC decisions are relevant to a discussion of the current state of federal law. 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<sup>2</sup>, the analysis undertaken and the tentative conclusions reached by the FCC in that proceeding would lead to the conclusion that phone to phone IP telephony without a net change in form or content is a telecommunications service.

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<sup>2</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, 13 FCC 11501 (April 10, 1998) ("*Universal Service Report*")

In the *Universal Service Report* the FCC reached a tentative conclusion with respect to "phone-to-phone" IP telephony services. The FCC defined the service in the following fashion.<sup>3</sup>

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 (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:<sup>4</sup>

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."

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<sup>3</sup> *Universal Service Report 13 FCC Rcd. 11501*, paragraph 87.

<sup>4</sup> *Universal Service Report 13 FCC Rcd. 11501*, paragraph 89.

The normal classifications of services offered over a telecommunications network as either basic or enhanced are delineated in the earlier FCC *Computer II*<sup>5</sup> proceeding. Under this well-established standard, phone-to-phone VOIP that is not subject to any net change in form or content is a basic service which is not entitled to the enhanced services exemption from access charges. In *Computer II*, the FCC defined basic service as “transmission capacity [offered on a common carrier basis] for the movement of information,” including “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.” (Final Decision, 77 FCC Rcd at 419, paras. 93-94.) Basic services are regulated under Title II of the Act, and are subject to interstate access charges. Enhanced services, on the other hand, were defined to include:<sup>6</sup>

Services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

Enhanced services are not subject to Title II regulation and are not assessed interstate access charges.

The basic/enhanced framework adopted in *Computer II* is a bedrock principle on which the FCC and Congress have relied heavily over the past 22 years to set policies regarding the appropriate degree of regulatory oversight for both existing and new services. For example, in drafting the 1996 Act, in its definition of “telecommunications,”

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<sup>5</sup> In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry) Part 2 of 2, Docket 20828, 77 FCC 2d 384

<sup>6</sup> *Computer II*, 77 F.C.C. 2d 384, pg 522

Congress adopted the *Computer II* “change to form or content of the information as sent and received” standard almost verbatim. Based on such statutory language and on the legislative history of the 1996 Act, the FCC concluded that “Congress intended the 1996 Act to maintain the *Computer II* framework.”<sup>7</sup>

The FCC again relied upon the *Computer II* “net change in form or content” standard in considering how to implement the non-accounting safeguard provisions of Section 271 and 272 of the 1996 Act. The FCC concluded, “no net protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.”<sup>8</sup>

#### **How have other states addressed VOIP?**

Activity by other states regarding VOIP to date generally has not been extensive or conclusive. The New York Public Service Commission has issued, perhaps, the most comprehensive decision on the issue. In August 2001, Frontier Telephone of Rochester filed a complaint with the PSC alleging that US DataNet Corporation had refused to pay its tariffed intrastate access charges. DataNet’s defense was that it is providing VOIP and that it is not required to pay access charges under federal law. The PSC granted the Frontier complaint in a nine-page order issued on May 31, 2002; ruling that DataNet is “not providing enhanced information services, but rather telecommunications services for which access charges should apply.”<sup>9</sup> The PSC found the following factors persuasive:

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<sup>7</sup> Universal Service Report to Congress, 13 FCC Rcd at 11524 (para. 45).

<sup>8</sup> Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 21958 (para. 106) (1996).

<sup>9</sup> *Frontier Telephone of Rochester v. US DataNet Corporation*, Case 01-C-1119, *Order Requiring Payment of Intrastate Carrier Access Charges*, at 6 (May 31, 2002).

- The FCC tentatively concluded in its *Universal Service Report* that “phone-to-phone” VOIP was not an information service.
- DataNet holds itself out as a provider of voice telephony service;
- Its customers use an ordinary telephone and use NANP numbers in making their calls;
- There is no net protocol conversion (DataNet receives circuit-switch voice at the originating end and delivers circuit-switch voice at the terminating end); and

DataNet makes the same use of the ILEC network as traditional IXCs.

The Colorado Commission has issued conflicting decisions addressing VOIP. In a decision issued in July 2000, an ILEC filed a complaint with the PUC seeking recovery of intrastate access charges from an IXC VOIP provider. The IXC conceded that its service was a telecommunications service, but argued that the access charge issue should be decided by the FCC rather than by the PUC. In July 2000, the PUC summarily rejected this argument in three sentences:

[R]egardless of the technology used, the provision of interexchange services without payment of access charges is improper. This Commission has authority over the provision of intrastate interexchange services and it is appropriate to exercise that authority here. VNI is engaging in conduct that threatens serious harm to the system of regulation established by the Commission, in particular the access and toll charge system which help to fund the public switched telephone network.<sup>10</sup>

In an arbitration decision released the next month, the Colorado PUC ruled that ICG did not have to pay access for its VOIP service. The PUC ruled that it need not

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<sup>10</sup> *El Paso County Telephone v. Voice Networks, Inc.*, Docket No. 99K-335T, Decision No. C00-760 (July 11, 2000).

decide the “is VOIP an information or telecommunications service” question because VOIP service does “not use Qwest’s network in the same manner as calls for which switched access charges apply” and because “ICG is not attempting to avoid access charges.”<sup>11</sup> The PUC ruled that Qwest was entitled to compensation for services performed, and that the parties should attempt to negotiate a non-access rate for ICG’s use of Qwest’s network. This PUC decision is confusing because its description of ICG’s VOIP service suggested that it used Feature Group A (FGA) service. The Colorado PUC reaffirmed this ruling in March 2001 in rejecting a Qwest definition of switched access that would include virtually all VOIP services.<sup>12</sup>

Several states have declined to address the VOIP issue. In a decision in Alabama an arbitration panel declined to address IP telephony in the arbitration because the FCC had not as yet addressed the classification of such services. The Alabama Commission ultimately approved this determination.<sup>13</sup> In Georgia, the PUC declined to address the VOIP issue until a more complete record is available.<sup>14</sup> In Kentucky, the PSC has also declined to address the VOIP issue “in the absence of a more complete record on individual service offerings.”<sup>15</sup> In North Carolina, the PUC has declined to define VOIP because of the “uncertainty” surrounding the issue.<sup>16</sup>

### **What are the applicable Florida statutes and rules?**

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<sup>11</sup> See *ICG Telecom/US WEST Arbitration*, Docket No. 00B-103T, Decision No. C00-858 (Aug. 7, 2000), *recon. denied*, Decision No. C00-1071 (Sept. 27, 2000).

<sup>12</sup> See *Level 3/Qwest Arbitration Order*, Docket No. 00B-601T, Decision No. C01-312 (March 30, 2001).

<sup>13</sup> See *BellSouth/Intermedia Recommended Arbitration Decision*, Docket No. 27385 (March 2, 2001). *Order, BellSouth/Intermedia Arbitration*, Docket No. 27385. (May 21, 2001)

<sup>14</sup> See *Sprint Communications/BellSouth Arbitration Order*, Docket No. 12444-U (May 1, 2001).

<sup>15</sup> See *AT&T/BellSouth Arbitration Order*, Case No. 2000-465 (May 16, 2001).



The issue of the proper treatment of phone-to-phone VOIP services in Florida involves a number of provisions in chapter 364, Florida Statutes, which sets forth the Commission's jurisdiction over telecommunications companies. First, s. 364.02, F.S., provides relevant definitions of "telecommunications company" and "service.". The previous request by CNM Networks, Inc. for a declaratory statement concerning the nature of VOIP telephony sought a determination by the Commission as to whether the VOIP services it provides makes CNM a "telecommunications company" requiring it to become certificated to provide its IP telephony services in Florida. To the extent that the Commission determines that phone-to-phone VOIP service as described above is a telecommunications service, and Sprint believes that it is, , provisions of ch. 364, F.S., relating to the requirements for certification, including ss. 364.33 and 364.337, F.S. may apply. In addition, ss. 364.16-.163, F.S., are relevant to determine the intercarrier compensation mechanisms applicable to the exchange of phone-to-phone VOIP traffic.

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 Florida 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 disagree, because as BST's

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<sup>16</sup> See *MCImetro/BellSouth Arbitration Order*, Docket No. P-474 (Aug. 2, 2001).

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, this issue was ultimately settled between BellSouth and Intermedia and the arbitration order as to this issue essentially rendered null 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.<sup>17</sup> Ultimately, in the *Generic Reciprocal Compensation Order*, the Commission declined to rule generically on the IP telephony issue.<sup>18</sup> However, in its discussion of the issue the Commission reiterated its finding in the *Intermedia* decision that "the technology used to

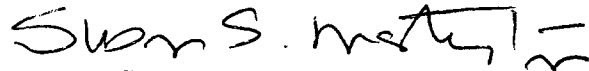
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<sup>17</sup> See, e.g., *In re: Petition by MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning 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.

<sup>18</sup> *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*.")

*Compensation Order* at 36. This is still the law in Florida until the Commission, Legislature or courts determine otherwise.

Respectfully submitted,



Susan S. Masterton  
P.O. Box 2214  
Tallahassee, FL 32316-2214  
(850)599-1560 (Phone)  
(850)878-0777 (Fax)  
[susan.masterton@mail.sprint.com](mailto:susan.masterton@mail.sprint.com)

ATTORNEY FOR SPRINT

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PULVER.COM  
PETITION FOR DECLARATORY RULING

WC DOCKET NO. 03-45

FEDERAL COMMUNICATIONS COMMISSION

2003 FCC LEXIS 809

RELEASE-NUMBER: DA 03-439

February 14, 2003, Released

ACTION: PUBLIC NOTICE

OPINION:

**Comments Due: March 14, 2003**  
**Reply Comments Due: April 2, 2003**

On February 5, 2003, pulver.com filed a petition for declaratory ruling. Pulver.com petitions the Commission for a declaratory ruling that its Free World Dialup, which facilitates point-to-point broadband Internet protocol voice communications, is neither telecommunications nor a telecommunications service as these terms are defined in section 153 of the Telecommunications Act of 1996.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. See 47 C.F.R. § 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. See 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

Pursuant to Section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on the petition for declaratory ruling on or before **March 14, 2003** and reply comments on or before **April 2, 2003**. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Suite TW-A325, Washington, DC 20554. Two (2) courtesy copies must be delivered to Janice M. Myles,

jmyles@fcc.gov, Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, SW, Suite 5-C327, Washington, DC 20554 and one (1) copy must be sent to Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.