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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Petition To Extend Rate Regulation of ) PR Docket No. 94-108  
The Public Service Commission, State )  
of New York )

**REPLY**

NYNEX Mobile Communications Company ("NYNEX"), by its attorney, submits its reply to the comments filed in response to the petition to extend rate regulation filed by the Public Service Commission of the State of New York ("NYPSC").<sup>1</sup>

**I. INTRODUCTION**

NYNEX has previously demonstrated that the NYPSC's petition seeking to extend its rate regulation over certain commercial mobile radio services ("CMRS") cannot be granted under the applicable legal criteria. The NYPSC has simply failed to show that rate regulation is justified because of significant market failures. NYNEX's Opposition does not simply rest on the NYPSC's failure of proof. NYNEX provided empirical data which demonstrates that prevailing conditions in New York are such that market conditions have protected, and will continue

<sup>1</sup> Comments were filed by Nextel Communications, Inc. ("Nextel"), National Cellular Resellers Association ("NCRA"), Southwestern Bell Mobile Systems, Inc. ("SWB"), on behalf of Syracuse Telephone Company, Utica Telephone Company and Pegasus Telephone Company, American Mobile Telecommunications Association ("AMTA"), E.F. Johnson Company ("Johnson"), Paging Network, Inc. ("PNI"), Mobile Telecommunication Technologies Corp. ("MTTC"), Contel Cellular Inc. ("Contel"), McCaw Cellular Communications, Inc. ("McCaw"), Personal Communications Industry Association ("PCIA"), Vanguard Cellular Systems, Inc. ("Vanguard"), and Cellular Telecommunications Industry Association ("CTIA").

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to protect, CMRS subscribers from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory.<sup>2</sup>

In addition to NYNEX, 12 parties filed comments in response to the NYPSC's petition. Only NCRA supports the petition in its entirety,<sup>3</sup> while most vigorously oppose the request.<sup>4</sup> In this reply, we demonstrate that NCRA's generalized, and often incorrect, characterizations of the competitive nature of cellular and other CMRS services are simply inadequate to sustain the statutory burden imposed on the NYPSC.

**II. THE NYPSC'S PETITION CANNOT BE GRANTED BASED ON GENERALIZED ALLEGATIONS REGARDING THE LACK OF COMPETITION IN THE CELLULAR INDUSTRY**

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NCRA urges the Commission to grant the requests of the eight state commissions seeking to maintain their existing rate authority. NCRA does not offer any New York-specific data which purports to show that market forces are inadequate to protect New York consumers from unreasonable or discriminatory rates. Instead, NCRA asserts<sup>5</sup> that these requests are consistent with previous findings of the Commission

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<sup>2</sup> NYNEX Opposition at pp. 3-14.

<sup>3</sup> Nextel supports continued state rate regulation of cellular rates where states have met the statutory test and demonstrated that rate regulation is necessary to protect subscribers. Nextel at p.2. Significantly, Nextel does not contend that the NYPSC has met its evidentiary burden. Nextel asserts that only the State of California's evidence meets the statutory standard. Nextel at p. 14.

<sup>4</sup> SWB, AMTA, Johnson, PNI, MTTC, Contel, Vanguard, McCaw, PCIA and CTIA.

<sup>5</sup> NCRA at 3.

and the Department of Justice ("Department") that cellular markets are not competitive. Even if NCRA's assertions were correct, and they are not, they would provide no basis for approval of the NYPSC's petition.

NCRA overreaches in its characterization of the Commission's conclusions with respect to the competitiveness of the cellular industry. NCRA, for example, fails to acknowledge the Commission's conclusion in the Second Report and Order<sup>6</sup> that CMRS competition is sufficiently vigorous to render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers.<sup>7</sup> The fact that the Commission has concluded that the cellular market may not be "fully competitive" does not, as NCRA suggests, warrant approval of NYPSC's petition. As McCaw correctly points out:

Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation, the 'substantial hurdle' to be met by states seeking to regulate cellular services cannot be satisfied with NYPSC's dubious evidence of market imperfections or less than fully competitive conditions.<sup>8</sup>

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<sup>6</sup> In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994).

<sup>7</sup> NCRA's reliance on the Department of Justice's findings is also unavailing. The Department is wrong about the current state of competition in cellular services. As NYNEX has demonstrated in its filings with the MFJ Court, the Department's analysis is not based on its own economic analysis but relies on its misreading of Commission orders and quotations from Bell company documents taken completely out of context. Moreover, none of the documents relied upon by the Department of Justice were authored by NYNEX employees or address the state of cellular competition in New York. Furthermore, NYNEX has shown that the Department's conclusions are undermined by uncontroverted evidence which shows that the cellular industry's pricing activity is characteristic of competitive markets. See Reply Of The Bell Companies To Comments On Their Motion For A Modification Of Section II Of The Decree To Permit Them To Provide Cellular And Other Wireless Services Across LATA Boundaries, filed September 2, 1994 in United States Of America v. Western Electric Co., Inc. (Civil Action No. 82-0192).

<sup>8</sup> McCaw at p. 5 (citations omitted). See also, Contel at pp. 6-8; SWB at pp. 5-6; and CTIA at pp. 7-10.

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), among other things, preempts state regulation of market entry of CMRS providers and generally preempts state regulation of CMRS rates except in carefully circumscribed instances where a showing could be made that market conditions could not protect consumers adequately.<sup>9</sup> Thus, to retain authority to regulate intrastate CMRS rates, states must show, by the submission of empirical evidence, that prevailing market conditions will not protect CMRS subscribers adequately from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory. The NYPSC has not made the required evidentiary showing and NCRA's comments do not cure that deficiency. In contrast, NYNEX, McCaw, SWB and Contel have presented uncontroverted empirical evidence which shows that cellular competition in New York is robust and provides CMRS subscribers with adequate market protection.

### **III. CONCLUSION**

The continued rate regulation of intrastate cellular rates by the New York is not necessary to protect consumers from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory. NCRA's comments fail to provide any meaningful support for the extension of the NYPSC's rate authority.

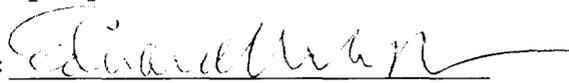
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<sup>9</sup> AMTA at 5.

WHEREFORE, for the reasons set forth herein and in our  
Opposition, the Petition to Extend Rate Regulation filed by the New  
York Public Service Commission should be denied.

Respectfully submitted,

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October 19, 1994

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY COMMENTS OF THE NYNEX TELEPHONE COMPANIES, was served by first class United States Mail, postage prepaid, on each of the parties indicated on the attached service list, this 19th day of October, 1994.

A handwritten signature in cursive script that reads "Mildred Schuman". The signature is written in black ink and is positioned above a horizontal line.

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