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

In the Matter of )  
 )  
Communications Assistance for ) CC Docket No. 97-213  
Law Enforcement Act )  
 )

To: The Commission

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**  
**REGARDING FURTHER NOTICE OF PROPOSED**  
**RULEMAKING FOR ASSISTANCE CAPABILITY**  
**REQUIREMENTS**

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## **SUMMARY**

Nextel Communications, Inc. ("Nextel") submits these Comments regarding the Further Notice of Proposed Rulemaking ("FNPRM") regarding the assistance capability requirements necessary to satisfy the obligations imposed by Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA"). Nextel continues to believe that the punch list is not required by CALEA and that much of it requests information that is not reasonably available to carriers.

Even if the punch list was required and produced reasonably available information, the Commission should reject it because it cannot ensure cost-efficient implementation with the least impact on subscriber rates.

Should the Commission nonetheless require changes in the industry standard, it should remand those changes to the industry standards-setting body for implementation. As to technologies not covered by the current industry standard, the Commission does not have the authority to set technical requirements absent a specific petition from any concerned party.

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Nextel Communications, Inc. ("Nextel"), through its attorneys, submits these Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") regarding the assistance capability requirements necessary to satisfy the obligations imposed by Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA").<sup>1</sup> Nextel commends the Federal Communications Commission ("Commission") for its careful analysis of the issues presented in its Public Notice

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<sup>1</sup> *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket 97-213 (Released Nov. 5, 1998).

dated April 20, 1998, and comments submitted by interested parties in response thereto.<sup>2</sup>

The Commission, in this FNPRM, tentatively has concluded that several of the U.S. Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") punch list items are within the ambit of Section 103 of CALEA. Yet, appropriately, before mandating that industry design and implement these features, the Commission has asked for further comment on whether the information sought by DOJ/FBI is "reasonably available" and satisfies the Section 107(b) "cost and competition" factors. Nextel still believes, as the industry comments submitted in response to the Public Notice uniformly show, the Commission has been presented a compelling case for rejecting all of the so-called "punch list" of additional capabilities, but Nextel does not argue with the approach taken by the Commission to reach its conclusions. The term "reasonably available" must be defined, and, the Section 107(b) factors must be analyzed before any final rule can issue. And if any punch list item fails to meet the announced tests, it must be excluded from the rule.

Nextel and others supported the development and use of industry standards for CALEA implementation, but Nextel raised the concern that the Commission's ultimate

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<sup>2</sup> *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket 97-213, DA 98-762 (Apr. 20, 1998) ("Public Notice") at 4.

standard not become a compliance checklist for those who choose to comply in other ways.<sup>3</sup> Compliance with a standard, and therefore the rule, must be recognized to be voluntary, leaving carriers free to choose other implementations that may be cheaper or more efficient for their networks.

Moreover, the Commission must not preclude other industry associations or standard-setting organizations from promulgating standards or requirements that are aimed more at specific services or technologies such as paging, digital dispatch or wireless data to the extent any of these services are covered by CALEA. CALEA certainly contemplates multiple or different standards for such industry segments so long as they meet the requirements of Section 103.

## **I. TECHNICAL CAPABILITIES UNDER CALEA**

### **A. WHEN IS CALL-IDENTIFYING INFORMATION REASONABLY AVAILABLE?**

Section 103 requires carriers to provide only "reasonably available" call-identifying information.<sup>4</sup> The question of when call-identifying information is "reasonably available" was addressed and answered by the Telecommunications

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<sup>3</sup> Nextel Comments at 13.

<sup>4</sup> 47 U.S.C. § 1002.

Industry Association ("TIA") expert subcommittee on lawfully authorized electronic surveillance standards. JSTD-025 defines it as follows:

Call-identifying information is reasonably available if the information is present at an Intercept Access Point (IAP) for call processing purposes. Network protocols (except LAESP) do not need to be modified solely for the purpose of passing call-identifying information. The specific elements of call-identifying information that are reasonably available at an IAP may vary between different technologies and may change as technology evolves.<sup>5</sup>

Nextel believes that definition, which makes clear that information is "reasonably available" when it is present for call processing at an IAP, is comprehensive and can be applied in a neutral fashion to all call-identifying information generated by any technology.

It is true that Congress did not define "reasonably available" in CALEA or much discuss it in the report accompanying the statute. However, in the context of the statute overall and the legislative history addressing call-identifying information, it is clear that Congress viewed call-identifying information as "the numbers dialed or otherwise transmitted for the purpose of routing calls through the carrier's network."<sup>6</sup> For pen register cases, Congress understood call-identifying information to be limited

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<sup>5</sup> JSTD-025 at § 4.2.1.

<sup>6</sup> H.R. Rep. No. 103-827, 103d Cong., 2d Sess., at 23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3501 [hereinafter "House Report"].

to "the numbers dialed from the facility that is the subject of the court order."<sup>7</sup> And for trap and trace investigations, Congress limited call-identifying information to "the originating number of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order."<sup>8</sup>

Thus, JSTD-025 gets the definition of reasonably available just right -- dialing or signaling used for call processing which is available at the IAP. It is this same information that carriers reflect on call billing records, not the punch list information sought in these proceedings. In fact, today, the distinction between call billing records and pen registers is disappearing and Nextel understands that law enforcement regularly demands and is satisfied with billing records as they are generated in lieu of pen register data.<sup>9</sup> Thus, even law enforcement through its own practices recognizes what information Congress contemplated being reasonably available to a carrier.

Noting that different technologies and equipment may yield different information,<sup>10</sup> the Commission asks what factors it should consider in its

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Indeed, Nextel recently received an order from a federal agency demanding just that -- the billing records as soon as they were available at the switch.

<sup>10</sup> The Commission has recognized this fact in other proceedings and has mandated different solutions or treatment for carriers accordingly. See *In the Matter of Revision of the Commission's*

"determination of reasonable availability."<sup>11</sup> Nextel again believes that the definition in JSTD-025 is applicable to all technologies. For example, if some element of call processing takes place in the handset or customer premises equipment ("CPE"), it would not be reasonably available under JSTD-025 even if it otherwise was call-identifying because the information was not available at an IAP and the network is not aware of it.<sup>12</sup> As a practical matter, the Commission should strive to produce a unifying definition of "reasonably available" rather than rely on ad hoc determinations.

The reason for preferring a principled definition to ad hoc determinations is simple. Case-by-case determinations give no certainty or guidance to carriers or to future standards setting bodies. Unlike the common law where precedent comes from individualized determinations, no carrier wishes to be a test case in an enforcement proceeding under Section 108.<sup>13</sup> Standards setting under CALEA was intended to create a safe harbor to avoid just this situation, and it is a standard, albeit by rule, that

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*Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102 (released Dec. 23, 1997).

<sup>11</sup> FNPRM, ¶ 26.

<sup>12</sup> The Commission itself relies on this principle in its discussion of several punch list items. *See e.g.*, FNPRM, ¶ 92.

<sup>13</sup> 47 U.S.C. § 1007.

the Commission is here declaring. Thus, Nextel supports the industry definition of "reasonably available."<sup>14</sup>

**B. CALL-IDENTIFYING INFORMATION UNDER THE DOJ PUNCH LIST**

With the above discussion of reasonable availability in mind, Nextel next comments on the punch list information. The order of discussion follows the Commission's format in the FNPRM, but that order is not an indication of which punch list item is more important than another, more complex, more costly or more invasive from a privacy point of view.

**1. Party Hold, Join and Drop on Conference Calls**

The Commission describes this punch list item as "features designed to aid a LEA in the interception of conference calls . . . [and] would permit the LEA to receive from the telecommunications carrier messages identifying the parties to a conversation at all times."<sup>15</sup> This is a remarkable description for its inaccuracy.

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<sup>14</sup> In light of these comments, Nextel does not address the Commission's query whether the reasonable achievability factors under Section 109 of CALEA are applicable to a determination of whether information is reasonably available. Nextel submits that the perspective is backwards -- reasonable achievability determines whether a carrier must do something going forward; reasonable availability determines, in the present, whether information exists. The distinction is important. Otherwise, through this process, information will be made completely available in the future that doesn't exist today -- turning the statutory limitation on its head.

<sup>15</sup> FNPRM, ¶ 80.

Under JSTD-025, and as proposed by the Commission,<sup>16</sup> law enforcement will obtain the content of a conference call even when it is placed on hold by the subject. The party messages do not aid a bit in that process.

Second, this trilogy of messages do not identify any parties to a conversation at any time. With or without these messages, law enforcement will not be able to determine who is talking to whom at any time or to focus on the subject's role in the conversation.<sup>17</sup> The messages would only report the existence of a connection between parties; no message can verify that a party heard or participated in any conversation.

The Commission has tentatively concluded that "party hold/join/drop information falls within CALEA's definition of 'call-identifying information' because it is 'signaling information that identifies the origin, direction, destination, or termination of each communication generated or received' by the subject."<sup>18</sup> All of industry disputed this notion in its initial and reply comments on CALEA capabilities as the Commission has noted in the FNPRM. While Nextel believes the

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<sup>16</sup> FNPRM, ¶¶ 73-79.

<sup>17</sup> FNPRM, ¶ 85.

<sup>18</sup> FNPRM, ¶ 85.

Commission's determination is wrong, Nextel next addresses whether the information is reasonably available.

When the Commission states that these messages are designed to aid law enforcement, Nextel wonders if the Commission believes this signaling exists today. It does not. Even DOJ does not dispute this fact, admitting that they do not receive any such information today.<sup>19</sup> That should be the end of the inquiry. There is no reason to even consider the JSTD-025 definition of reasonable availability because signals that do not exist will never be present at an IAP for call processing purposes.

Nextel does not gather and use any signaling to dynamically record the addition to or drop from a conference call. The subject does not know who is on a conference call in either the interconnected service offered by Nextel or on its digital "Direct Connect" service.

But what the subject does know is reported to law enforcement under JSTD-025. For example, an origination message is generated when the subject initiates a call. If the subject places the call on hold and dials another party, a second origination message is sent. If the subject joins the calls into a conference call, a change message is generated. When the call ends, a close message is sent, whether or

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<sup>19</sup> DOJ Petition at 42 ("law enforcement [has been] unable to obtain information that a particular participant was placed on hold during, or dropped from, a multi-party call.")

not one of the called parties has hung up before the subject or other party.<sup>20</sup> Thus, not only is the party message information not available today at all, the standard contains an effective alternative to this information.

The Commission also seems to believe that the reasonably available inquiry is about what "could [] be reasonably made available to the LEA" in the future.<sup>21</sup> If that is the standard, the apparent limitation on call-identifying information ironically becomes an enabling clause for future carrier development efforts. Through this legerdemain, call-identifying information becomes *completely available* with the only apparent relief available through a petition under Section 109 for a determination that compliance is not reasonably achievable. Needless to say, the Commission cannot rewrite CALEA so that one provision becomes "mere surplusage."<sup>22</sup>

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<sup>20</sup> The party hold message, like other subject-initiated signaling, is intended to report when a subject, having established a conference call as above, receives or initiates another call and then toggles between the conference call and other call. JSTD-025 shows either an origination or termination attempt message for the nonconference call. It would not report the hold signal as the subject moves back and forth between calls. But inasmuch as this signal, under the JSTD-025 definition, is not signaling used in call-processing, it would not be deemed reasonably available. Subject-initiated signaling is discussed further below. The hold signal is not call-identifying in Nextel's view.

<sup>21</sup> FNPRM, ¶ 86.

<sup>22</sup> FNPRM, ¶ 57 n. 106 (rendering a statute's provision mere surplusage violates usual rules of statutory construction) (citations omitted).

## **2. Subject-Initiated Dialing And Signaling**

The Commission states that this requirement, when implemented, will inform law enforcement when the subject "has invoked a feature which would place a party on hold, transfer a call, forward a call, or add/remove parties to a call."<sup>23</sup> The Commission also asks whether "remote operation of these features" from other than the subscriber's equipment should affect the Commission's decision.<sup>24</sup> The Commission appears to confuse feature status messages with other subject-initiated signaling. Nextel understands this issue to involve such signals as those generated when a subject goes off-hook and then on-hook without dialing any digits, a switchhook flash, hold key, flash key, transfer key, or conference key.

Nextel does not believe that any of the signaling identified above is call-identifying. The only rationale the Commission provides for its tentative conclusion that such signaling is call-identifying is that such signals are needed to permit association of the event with the content of the communication.<sup>25</sup> As noted above, other messages in JSTD-025 adequately report whenever a new communication is

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<sup>23</sup> FNPRM, ¶ 88.

<sup>24</sup> FNPRM, ¶ 91.

<sup>25</sup> FNPRM, ¶ 92.

initiated or terminated. The signals here are precursors to another activity of the subject, which is reported otherwise under the standard.<sup>26</sup>

Notwithstanding the above, if the Commission ultimately mandates that all subject-initiated signals must be reported, the Commission should limit the requirement by requiring only that signals known to the accessing switching system are reported. Other signals are not reasonably available to the carrier.<sup>27</sup>

### **3. In-Band and Out-of-Band Signaling**

The Commission describes this requirement as carrier notification of law enforcement "when any network message (ringing, busy, call waiting signal, message light, etc.) is sent to a subject using facilities under surveillance."<sup>28</sup> By way of example, for voice message waiting indicators, the Commission states that the notification message would also "indicate the type of message notification sent to the subject (such as the phone's message light, audio signal, text messages, etc.)."<sup>29</sup> Yet,

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<sup>26</sup> For example, when a call is forwarded, law enforcement receives a message identifying the terminating number. What does it add to provide a separate message that the call forwarding feature key was pressed?

<sup>27</sup> This is consistent with the determination of the Commission that if such signals are generated by CPE, then no reporting is required because "no network signal is generated." FNPRM, ¶ 92.

<sup>28</sup> FNPRM, ¶ 95.

<sup>29</sup> *Id.*

the Commission appears only to have concluded that voice message waiting indicators are call-identifying.<sup>30</sup>

Network signals to a subscriber do provide information to a subscriber but they do not route or process calls through a network. In short, they are not call-identifying.<sup>31</sup> Only by stretching the definition of call-identifying information can the Commission reach such signals. Nextel submits that what identifies the origin, direction, destination or termination of a call is the numbers dialed, not any subsequent network signal that provides information *about* the call (i.e., that the call ended up in voice mail).

The voice mail indicator is particularly useful to illustrate the point. The signal would not be delivered to the wireless subscriber until he or she next registers on the system, perhaps days after the event. Law enforcement should know already -- before any call is deposited in voice mail -- that the subscriber has voice mail if they did their investigative homework by issuing a subpoena to the carrier covering the services of the subscriber. Under JSTD-025, law enforcement would have received a termination attempt message, notifying them of the call attempt and its redirection.

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<sup>30</sup> FNPRM, ¶ 99.

<sup>31</sup> It should go without saying that signals that do not route calls are not present at an IAP and therefore are not reasonably available.

Before the subject ever knows about the voice message, law enforcement should know who called and left the message. The agency can then obtain an order or warrant under the Electronic Communications Privacy Act to obtain the contents of the stored communication from the voice mail provider (which may not be the same entity as the carrier). Thus, before the subject even hears the communication, law enforcement should be in possession of it.

What then does the network signal provide law enforcement? Only that the subject has been made aware of the availability of a voice message for retrieval.<sup>32</sup> What network element generates the signal? An information service that is exempt from CALEA as the Commission readily acknowledges.<sup>33</sup> How does a voice message waiting indicator identify the origin, destination, direction or termination of a communication? Only by ipse dixit if information *about* a call is the same as *identification of* a call. Nextel rejects this logic and urges the Commission to rethink its position.<sup>34</sup>

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<sup>32</sup> Nextel understands that law enforcement actually wants two messages -- one when the message waiting indicator is applied (usually at or near the time the message is deposited) and another when the target perceives it. Nextel also understands that a message would be required when the indicator is removed. As discussed in this section, law enforcement really is attempting to force redesign of information services to provide information they want but CALEA exempted from coverage.

<sup>33</sup> FNPRM, ¶ 93.

<sup>34</sup> Under subject-initiated dialing and signaling, the Commission tentatively concluded that information that a subject was accessing his voice mail is call-identifying. FNPRM, ¶ 93. Because

#### **4. Timing Information**

Nextel believes that JSTD-025 already addresses timing and correlation adequately. The Commission's desire to specify a delivery time for call-identifying information messages is an engineering requirement, not a CALEA requirement, best left to individual implementations.

If the Commission determines that such timing requirements are necessary, it should be flexible and express the requirement in terms of good engineering practice so that compliance is measurable. For example, delivery of the first bit of a message should be made within the specified timing requirement for the particular message at least 95% of the time.<sup>35</sup>

#### **5. Surveillance Status and Continuity Check**

Nextel supports the Commission's conclusion that a surveillance status message and continuity check is not required by CALEA. These functions are available

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this can be accomplished remotely from any phone, not just the phone under surveillance, the information is not reasonably available without modifying the information service itself, which the Commission acknowledges is not required by CALEA. To the extent the subject uses the target phone to access voice mail to either leave or retrieve a message, the dialing and signaling to accomplish the task is reported with JSTD-025 messages and the content is made available to law enforcement when authorized. Of course, the post-cut-through dialed digits such as the target's password or other information is not reported under the standard and as discussed below such reporting is prohibited by CALEA.

<sup>35</sup> It is a basic engineering tenet that the greater the percentage of accuracy, the more complex and therefore costly is the system.

already in the form of carrier-law enforcement cooperation in the provisioning of a wiretap.

Reading CALEA as the DOJ does, one would conclude that a carrier has strict liability if a wiretap is ever interrupted.<sup>36</sup> Normal maintenance and operations can impact surveillance just as these activities can impact any call in progress. System failures, however, are addressed quickly and in cooperation with law enforcement when surveillance is active.

Most recently, Nextel worked with various state and federal agencies with active surveillance at one of Nextel's switches when customers, including surveillance subjects, were migrated to another switch to prevent system overload at the first switch. This cooperative effort began several weeks in advance of the planned activity and was delayed several times at law enforcement request to permit one agency adequate time to get equipment at the new site to carry out the surveillance. DOJ's suggestion that such manual surveillance status and continuity check cooperation is too costly and impractical<sup>37</sup> is a false comparison and fails to consider

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<sup>36</sup> FNPRM, ¶ 107.

<sup>37</sup> DOJ Reply Comments at 73.

that such manual cooperation will always be necessary and present in every wiretap.<sup>38</sup> Congress, in CALEA after all, mandated that no wiretap in the future be conducted without affirmative carrier intervention.<sup>39</sup>

## 6. Feature Status

Nextel agrees with the Commission's conclusion that a feature status message is not required by CALEA.<sup>40</sup> Such information today is provided by manual means by way of a subpoena to the carrier and will continue even if this message were added. Because subpoena compliance is an enormous expense to carriers, and one that is NOT reimbursed under current law,<sup>41</sup> adding an automated reporting system to the carrier's obligation would be unconscionable.

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<sup>38</sup> Further, all that these messages accomplish is to inform law enforcement when the surveillance has been interrupted. The messages do not get the problem fixed -- it still requires manual intervention to resolve the problem.

<sup>39</sup> See 47 U.S.C. § 1004 ("A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.").

<sup>40</sup> FNPRM, ¶ 121.

<sup>41</sup> 18 U.S.C. § 2706.

## 7. Dialed Digit Extraction

The Commission tentatively concludes that post-cut-through digits representing all telephone numbers needed to route a call, for example, from the subscriber's telephone, through its LEC, then through IXC and other networks, and ultimately to the intended party are call-identifying information."<sup>42</sup> But the Commission misses the point -- call-identifying information pertains only to "the equipment, facilities, or services of a subscriber of such carrier," not to subsequent LECs or IXCs.<sup>43</sup> From the perspective of the subject's carrier, the call is complete when the connection is made to the long distance carrier, the CPE, or whatever other destination dialed by the subscriber.

CALEA also mandates that law enforcement use technology reasonably available to it to restrict the recording of or decoding of electronic or other impulses to the dialing or signaling information utilized in the accessing carrier's call processing.<sup>44</sup> By requiring the accessing carrier to develop technology that extracts post-cut-through dialed digits, the Commission actually makes technology available to facilitate rather

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<sup>42</sup> FNPRM, ¶ 128.

<sup>43</sup> See 47 U.S.C. § 1002(a)(1).

<sup>44</sup> CALEA, Section 207 (codified at 18 U.S.C. § 3121(c)). Congress expressly stated that "dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information." House Report at 3501.

than restrict the recording or decoding of post-cut-through dialed digits other than those utilized by the accessing carrier in call processing.<sup>45</sup>

It certainly is technologically possible for most circuit mode voice communications to extract post-cut-through dialed digits from a content channel<sup>46</sup> for either law enforcement or a carrier -- it simply is a question of who purchases the necessary equipment to do so. What is not possible for a carrier without invading the content channel completely and analyzing the signals is to distinguish which digits are numbers dialed to trigger another carrier's equipment from any other signal such as account numbers, passwords, banking transactions, inadvertent dialing, abandoned dialing, or predetermined codes with a connected party (i.e., content).

Is the carrier to review the extracted data and decide which signals are call-identifying or does DOJ really want all of the digits for its own investigation purposes

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<sup>45</sup> In the analog world today, law enforcement is able to receive post-cut-through dialed digits because call-processing signals occur over the voice channel. In the digital world, a separate signaling channel is used for call processing. Thus, technology is available to restrict law enforcement's access to post-cut-through dialed digits. The Commission cannot ignore this simple technological fact that is express in CALEA.

<sup>46</sup> This is not the case with all technologies, however. For example, voice privacy is an integral part of Nextel's digital dispatch service. The communications are encoded at the terminal devices and sent through the dispatch network and are not sent through the interconnected switching system. Nextel cannot access the content of these dispatch calls to extract any post-cut-through dialing and therefore such signaling would not be reasonably available.

despite its protests that it will minimize?<sup>47</sup> Nextel does not believe it can provide such signaling information to law enforcement on a pen register order without substantial risk of liability and in violation of CALEA's mandate to protect the privacy of communications not otherwise authorized to be intercepted.<sup>48</sup>

Congress stated that CALEA "is not intended to guarantee 'one-stop-shopping' for law enforcement."<sup>49</sup> To impose on carriers the obligation to extract and report digits that are used by another carrier to route a call would be contrary to the intent and clear language of CALEA.

## **II. COST-EFFICIENT METHODS OF ACHIEVING COMPLIANCE**

Whether or not a specific capability is required by CALEA or call-identifying information is reasonably available, the Commission must ensure that any final rule to implement these capabilities satisfies Section 107(b)'s enumerated factors. As Nextel noted in its initial comments, under Section 107, the Commission may only set

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<sup>47</sup> The pen register statute does not contain any provision that requires minimization. 18 U.S.C. § 2518(5).

<sup>48</sup> The Commission states that in regard to packet mode communications, CALEA "would seem to be violated if the carrier were to give the LEA both call-identifying and call content information when only the former were authorized. Under those circumstances, the LEA would be receiving call content information without having the requisite authorization." FNPRM, ¶ 63. The same is absolutely true for post-cut-through dialed digits.

<sup>49</sup> House Report at 3502.

standards or requirements that implement Section 103 of CALEA by cost-efficient methods.<sup>50</sup> That is, the Commission is free to reject any capability on any one of the grounds listed in Section 107.

In its initial comments, Nextel questioned how the Commission could carry out its obligations without knowing the cost or impact of either JSTD-025 or the DOJ punch list.<sup>51</sup> Yet, in the FNPRM, the Commission asks for information only in regard to the punch list features. Nextel believes that the Commission must take the cost of JSTD-025 into consideration in determining the final rule.<sup>52</sup>

Nextel is in a unique position in regard to CALEA compliance. It is North America's leading provider of fully integrated all-digital cellular services. Nextel's service offerings include digital cellular, voice mail, paging capabilities and Nextel Direct Connect (sm) -- a unique feature that allows a user to instantly contact 1 or 100 of their co-workers at the touch of a button. Nextel has a subscriber base as of June 30, 1998, of more than 2,000,000 digital subscriber units in service.

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<sup>50</sup> Nextel Comments at 4-5.

<sup>51</sup> Nextel Comments at 5.

<sup>52</sup> Nextel understands that the Commission does not intend to reexamine any of the uncontested technical requirements of JSTD-025. FNPRM, ¶ 45. But the cost of JSTD-025 is a different matter and it is far from trivial.

Nextel uses iDEN® (integrated digital enhanced network) technology developed by Motorola. This technology combines dispatch radio with full-duplex telephone interconnect, short message service and data communication capabilities. Thus, while there is an interconnected Nextel telephony service with the Public Switched Telephone Network ("PSTN"), Nextel's digital Direct Connect service does not connect to the PSTN or rely upon switches to route calls. Direct Connect relies instead on a dispatch architecture.

Motorola is the only manufacturer of the iDEN technology and as such is the sole source for Nextel's CALEA solutions and any other new product, service or feature. On the interconnect side, switching equipment is provided by Nortel Telecom, Inc., ("Nortel") through Motorola and must be integrated into the overall iDEN network.

Nextel has asked Motorola for cost estimates for implementation of JSTD-025 and the punch list. For the voice telephony interconnected service (i.e., not Direct Connect), for hardware and software, Nextel understands that its cost will be approximately \$250,000 per switch to comply with the core of JSTD-025. With almost 30 switches today, and more planned before June 30, 1998, the cost of CALEA compliance for this service is over \$7 million now and may rise to \$10 million as Nextel expands its markets.

The amount is significant and may affect the timing and feasibility of deployment of new equipment. Moreover, the cost of JSTD-025 may place Nextel, as a new entrant and competitor with other wireless services, at a competitive disadvantage. The cost of CALEA cannot be spread across a vast subscriber base unlike some large carriers. It will have an immediate, negative impact on subscriber rates.

The cost of the punch list can only add to the burden and impact. Motorola has advised Nextel that it is not yet able to estimate the potential cost of the punch list over and above JSTD-025 interconnect compliance because it is too speculative even for a nonbinding estimate.

As the Commission has noted, JSTD-025 does not cover Specialized Mobile Radio and Nextel's digital dispatch services.<sup>53</sup> Nextel and Motorola have been working for some time to determine an appropriate surveillance solution for Direct Connect, but to date, Motorola has not been able to estimate the costs of CALEA compliance. That information will depend upon the ultimate technical solution. Motorola and Nextel are working diligently on a technical document to provide the basic engineering requirements. The task is complicated by the complexity of the

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<sup>53</sup> FNPRM, ¶ 134.

architecture, the availability of sufficient engineering resources, and the lack of a legal determination regarding whether Direct Connect is even a covered service.

In addition, Nextel has not determined its costs for network operations costs related to the ongoing management and maintenance of the CALEA equipment; plant costs in addition to hardware and software such as inspecting, testing and reporting on the condition of telecommunications plant to determine the need for replacements, rearranges and changes; rearranging and changing the location of plant not retired; inspecting after modifications have been made; the costs of modifying equipment records, such as administering trunking and circuit layout work; modifying operating procedures; property held for future telecommunications use; provisioning costs; network operations costs; training to perform plant work; the costs of direct supervision and office support of this work. These items are all recoverable under the FBI's cost recovery rules and therefore are reasonable items to consider in the price of CALEA compliance<sup>54</sup>

The Commission also should consider that Nextel, like other carriers, has to meet other regulatory mandates such as E911 requirements and must invest to prepare for Year 2000 issues. Thus, as Nextel has been told by its manufacturer, there is a critical absence of engineering resources and the company may have to choose

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<sup>54</sup> See 28 C.F.R. § 100.10.

between meeting all of its regulatory requirements or introducing new products and services to stay competitive.

Nextel urges the Commission to ensure an on-the-record review of the cost-efficient implementation of CALEA. Nextel hopes that the critical information will be forthcoming in this proceeding and available for comment.

### **III. DISPOSITION OF JSTD-025**

#### **A. REMAND FOR AMENDMENT OF JSTD-025**

Nextel supports the Commission's proposal to permit TIA's Subcommittee TR45.2 to amend JSTD-025 to implement the Commission's determinations.<sup>55</sup> Once that process is complete, the Commission can set a date for compliance with the resulting standard. The Commission anticipates that no change in the June 30, 2000, compliance date for the core elements of JSTD-025 will be necessary, but Nextel submits that this decision may be premature. If, for example, the comments show that significant cost savings and efficiencies can be obtained by combining in the same software upgrade, for example, the resulting capabilities with JSTD-025, then the Commission should be open to extending the date to achieve that cost-efficient result.

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<sup>55</sup> FNPRM, ¶ 132.

Section 107(b) demands as much when it states that the resulting rule must meet CALEA's requirements "through cost-effective methods."<sup>56</sup>

## **B. OTHER TECHNOLOGIES AND SYSTEMS**

The Commission has correctly paraphrased Nextel's view that the Commission must be careful to not preclude other industry associations or standard-setting organizations from promulgating standards to meet specific services or unique technological issues.<sup>57</sup> Work already has commenced on other standards, as the Commission notes, through PCIA and the American Mobile Telecommunications Association ("AMTA").<sup>58</sup>

The Commission has not been asked to set standards or technical requirements for these other technologies. In the absence of a request, despite its best intentions, the Commission simply has no authority under CALEA to take up the issue on its own.<sup>59</sup> The resulting standards will provide a "safe harbor" for those carriers that

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<sup>56</sup> 47 U.S.C. § 1006(b)(1).

<sup>57</sup> FNPRM, ¶ 136.

<sup>58</sup> FNPRM, ¶ 137-38.

<sup>59</sup> Under Section 107(b), the Commission's authority is carefully defined and requires some party to petition the Commission:

Commission Authority.--If industry associations or standard-setting organizations fail to issue technical requirements or standards or if a government agency or any other person believes that such requirements or

adopt and implement them. Preserving this essential feature of CALEA is vitally important. Congress recognized as much when it stated "those whose competitive future depends on innovation will have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services."<sup>60</sup>

The Commission's work in this proceeding will be a guidepost for other standard-setting efforts. However, the resulting standard will not be a punch list itself, dictating the content of any other standard. The Commission must make clear that each technology and solution stands on its own. Any party that believes a standard is deficient may petition the Commission under Section 107 of CALEA.

#### IV. CONCLUSION

Nextel continues to urge the Commission to reject the punch list items on substantive legal grounds, because much of the punch list information is not reasonably available, and ultimately, even if it were available, because it is too costly. If changes in JSTD-025 must be made, it is best that the amendment process be under

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standards are deficient, the agency or person may petition the Commission to establish, by rule, technical requirements or standards.

<sup>60</sup> House Report at 3499.

the auspices of TIA. As to other technologies, the Commission should take no action in regard to technical requirements because CALEA grants no power for it to do so.

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Dated: December 14, 1998

**CERTIFICATE OF SERVICE**

I, Martin P. Willard, hereby certify that on this 14th day of December, 1998, a copy of the foregoing COMMENTS OF NEXTEL COMMUNICATIONS, INC., REGARDING FURTHER NOTICE OF PROPOSED RULEMAKING FOR ASSISTANCE CAPABILITY REQUIREMENTS, was delivered either by U.S. Mail or hand delivery (noted by asterisk) to the following:

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