

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policy and Rules Concerning the)
Interstate Interexchange Marketplace)
)
Implementation of Section 254(g))
of the Communications Act of 1934,)
as Amended)
)
To: the Commission)

CC Docket No. 96-61

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REPLY OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its Reply to the oppositions to Nextel's Petition for Reconsideration of the Commission's *Order*^{1/} concerning the integration of commercial mobile radio service ("CMRS") interexchange rates ("*Petition*") filed by the states of Alaska and Hawaii.^{2/}

Both Alaska and Hawaii contend that Section 254(g)'s rate integration requirements unambiguously apply to *all* interexchange providers and that the legislative history of Section 254(g) supports their position that rate integration applies to CMRS. As Nextel explained in its

^{1/} See Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (rel. Dec. 31, 1998) ("*Order*").

^{2/} Opposition of the State of Alaska to Petition for Reconsideration of Nextel Communications, CC Docket No. 96-61 (filed April 16, 1999) ("*Alaska Opposition*"); Opposition of the State of Hawaii to Petition for Reconsideration of Nextel Communications, CC Docket No. 96-61 (filed April 16, 1999) ("*Hawaii Opposition*"). The Cellular Telecommunications Industry Association filed comments supporting the *Petition*. See Comments of the Cellular Telecommunications Industry Association, CC Docket No. 96-61 (filed April 16, 1999) ("*CTIA Comments*").

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Petition, however, neither the “plain language” of Section 254(g), nor any other provision of the Telecommunications Act of 1996 (the “Act”), supports the imposition of a rate averaging and rate integration obligation on CMRS providers. In addition, the application of the rate integration requirements to CMRS carriers will harm CMRS consumers and is inconsistent with the Commission’s policies in favor of CMRS service and price competition. Nextel does, however, recognize the concerns of Alaska and Hawaii that their residents receive the same general benefits of CMRS competition as other U.S. residents. The Commission has squarely raised this issue in its just-released Further Notice of Proposed Rulemaking addressing CMRS implementation of Section 254(g) and Nextel intends to participate in developing this record.^{3/}

Significantly, Alaska and Hawaii declare that they are not opposed to providing Nextel and similar CMRS providers with flexibility regarding the appropriate “interexchange” boundary for CMRS rate integration purposes. The willingness of the staunchest defenders of rate integration to concede that there may be a problem with a major trading area (“MTA”)-specific approach to defining the CMRS rate integration obligations demonstrates that additional options or flexibility on this issue is warranted. The Commission must reconsider its application of the rate integration obligations to CMRS providers and its use of MTAs as the “interexchange” boundary for any CMRS rate integration requirement.

^{3/} See Policy and Rules Concerning the Interstate Interexchange Marketplace, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-61, FCC 99-43 (rel. April 21, 1999).

I. THE ACT IS AMBIGUOUS AS TO WHETHER CMRS PROVIDERS ARE “PROVIDERS OF INTERSTATE INTEREXCHANGE TELECOMMUNICATIONS SERVICE” FOR SECTION 254(g) PURPOSES

Pursuant to Section 254(g) of the Act, all “providers of interexchange telecommunications service” are subject to interexchange rate integration requirements. What is noticeably absent from the “plain language” of Section 254(g), or any other provision in the Act, is any definition, instruction or guidance as to what is meant by a “provider[] of interstate, interexchange service.”

While Alaska and Hawaii assert that there is “no ambiguity in the statute concerning the application of rate integration to all providers of interexchange telecommunications services,”^{4/} they fail to recognize that the ambiguity lies not in the application of the rate integration obligation to *all* interexchange providers, but rather with the scope of the term “interexchange telecommunications” providers. Indeed, even the Commission has found this term to be ambiguous when it was considering whether to extend Section 254(g)’s rate integration requirements to affiliated companies.

Both Alaska and Hawaii contend that because the Commission has found the definition of “interexchange telecommunications provider” to be ambiguous in one context, *i.e.*, the applicability of Section 254(g) to affiliates, does not mean that it is ambiguous as to whether it includes CMRS carriers. As Nextel has pointed out, and the law makes plain, it would be highly unusual for a statute that is unambiguous to be subject to differing interpretations by the

^{4/} *Alaska Opposition* at 4. *See also Hawaii Opposition* at 3-4.

Commission.^{5/} Indeed, neither Alaska, Hawaii nor the Commission provide any explanation as to why the term “interexchange telecommunications provider” is ambiguous in the context of whether it includes affiliated companies and unambiguous as to whether it encompasses CMRS providers.

It is undisputed that Congress did not define anywhere in the 1996 Act the term “interexchange telecommunications provider.” Such silence on the meaning of a term or terms in a statute strongly suggests that the term or terms are ambiguous.^{6/} Moreover, looking to the definition provided in the Act of a “telephone toll service” — the closest the Act comes to defining an interexchange service — it is evident that term does not cover CMRS.

Pursuant to Section 153(48), a provider of telephone toll service offers telephone service “between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”^{7/} CMRS service typically is not provided in a manner consistent with these landline telephony definitions. For one, CMRS providers have entirely different “exchange service” local calling areas than landline carriers.^{8/} Under Commission rules, MTA local calling areas for CMRS services are only used to determine

^{5/} See *Petition at 4* (citing *Local Union 1261, District 22 United Mine Workers of America v. Federal Mine Safety and Health Review Comm’n*, 917 F.2d 42, 46 (D.C. Cir. 1990)).

^{6/} See *National Med. Enterprises v. Shalala*, 43 F.3d 691, 695 (D.C. Cir. 1995) (“Under *Chevron*, when Congress has left an ambiguity or *silence* to a specific issue, we proceed to what is called the second step of *Chevron*.”) (emphasis added); *ICC v. Mr. B’s Servs.*, 934 F.2d 117, 120-21 (7th Cir. 1990) (statutory provision deemed ambiguous because the term “taxicab service” was left undefined).

^{7/} 47 U.S.C. § 153(48).

^{8/} Likewise, in the CMRS industry there is no statutory or policy requirement of “equal access” to the local exchange, which means that CMRS carriers typically self-provide or resell interexchange services to their customers.

intercarrier compensation obligations — local calling areas for customer call rating purposes, for example, are typically carrier defined. Thus, a wireless call placed between two landline telephone exchanges that would be a toll call on the landline network might well fall within a CMRS “local calling area.”^{9/} Second, some CMRS subscriber service contracts provide a “bucket” of telecommunications services, such as local, long distance and international services for a single specified price. The customer is not charged separate rates by separate local exchange and long-distance carriers as in the case of traditional landline calls, and thus Section 254(g)’s applicability is questionable. The Commission’s most recent conclusion that Section 254(g)’s provisions *directly* apply to CMRS, must be reconsidered.^{10/}

II. THE OPPOSITIONS DEMONSTRATE THE INHERENT PROBLEMS ASSOCIATED WITH THE USE OF MTAS TO DISTINGUISH “INTEREXCHANGE” CMRS CALLS

However well-meaning, the Commission’s decision to use an MTA-specific approach to define the CMRS rate integration obligation is flawed in that it fails to recognize the distinctive licensing and operational characteristics of the various subsets of CMRS providers. As

^{9/} On the landline network, for example, it is a toll call to call between Bethesda and Annapolis, Maryland. On Nextel’s network (as well as those of other CMRS providers), the same call is treated as a local call.

^{10/} While Alaska and Hawaii both assert that the legislative history of Section 254(g) indicates Congress’ intent to expand the scope of Section 254(g) to cover CMRS providers, this contention ignores Congress’s *express* intention to codify in Section 254(g) the Commission’s *existing* rate integration policies for landline interexchange carriers, which did not cover CMRS providers. *See Petition* at 5 (citing H.R. Conf. Rep. No. 104-458, at 132 (1996) (emphasis added)). *See also CTIA Comments* at 2. According to Hawaii, “had Congress intended to exempt CMRS providers from the requirements of Section 254(g), it would have done so expressly. . . .” *Hawaii Opposition* at 4. What Hawaii fails to recognize, however, is that by expressly incorporating the rate integration policies of the past, Congress also expressly exempted CMRS providers.

explained by Nextel's *Petition*, not all CMRS carriers operate with common network designs or under common licensing environments. Indeed, unlike cellular and personal communications service ("PCS") licenses, which were granted on a wide-area geographic basis, specialized mobile radio ("SMR") licenses were granted on a site-by-site basis.^{11/} Because Nextel and other ESMR carriers use site licensing and ESMR Economic Area licensing, their networks do not treat calls placed between different MTAs as interexchange and the development of this capability could be expensive.^{12/} Simply put, the Commission's determination to use MTAs to distinguish CMRS "interexchange" calls unreasonably restricts ESMR providers' ability to establish efficient routing among its switches and to create local calling areas responsive to marketplace conditions and competition. The resulting artificial network configuration and call classification would increase costs and disadvantage subscribers — a result wholly at odds with the Commission's CMRS goals.^{13/}

Significantly, Alaska and Hawaii state that they would not be opposed to providing Nextel and similar CMRS providers with leeway regarding the use of MTAs as the definitional boundary for rate integration purposes. This willingness on the part of even the most ardent defenders of rate integration to provide flexibility in defining "interexchange" calls for CMRS

^{11/} Only recently has the Commission begun the auction and licensing of wide-area Enhanced Specialized Mobile Radio ("ESMR") licenses. These wide area licenses are not based on MTAs, but on Economic Areas ("EAs"). Cellular licenses were also not issued on an MTA basis, but rather on an MSA/RSA basis.

^{12/} Moreover, many CMRS carriers structure their networks and operations on broader regional bases than a single EA or MTA.

^{13/} Nextel recognizes that the *Further Notice of Proposed Rulemaking* solicits comment from CMRS carriers on these and related issues. Nextel intends to add to the Commission's record on these issues by commenting on the *Further Notice*.

strongly suggests that MTAs are unworkable as a hard and fast rule for any CMRS rate integration requirement. Thus, on reconsideration, the Commission must acknowledge the differences between CMRS providers' serving areas and must permit CMRS providers the flexibility to adopt their own local calling areas for any rate integration and rate averaging purposes.

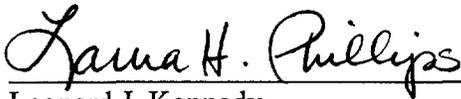
III. CONCLUSION

For all these reasons, as well as those set forth in Nextel's *Petition*, Nextel respectfully requests that the Commission act in accordance with this Reply.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jeanette M. Corley, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 26th day of April, 1999, I caused copies of the foregoing "**Reply of Nextel Communications, Inc.**" to be served upon the parties listed below via hand delivery or first class mail:

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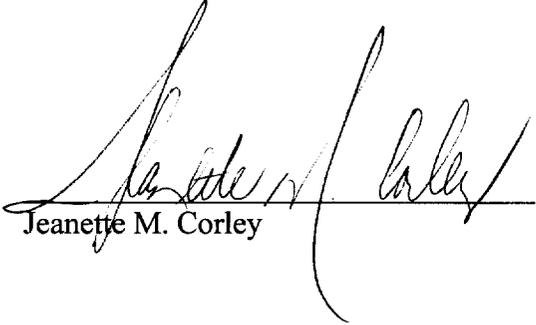
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