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February 4, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
WT Docket No. 97-207

Dear Ms. Salas:

On Thursday, February 03, 2000, Lawrence R Krevor, Director of Government Affairs for Nextel Communications, Inc. ("Nextel"), and Stephen McPhail, Manager of Strategic Pricing for Nextel, and Leonard J. Kennedy and Laura H. Phillips, counsel for Nextel, met with James D. Schlichting, Deputy Chief of the Wireless Telecommunications Bureau, Kris A. Monteith, Division Chief of the Policy Division, and Janet L. Sievert, Deputy Division Chief of the Policy Division, regarding the above-referenced proceeding.

During the meeting, they discussed the calling party pays service option ("CPP") and the reasons supporting the need for mandatory ILEC billing and collection for CPP. These reasons are discussed further in a written *ex parte* that Nextel filed on December 22, 1999. A copy of the December *ex parte* is attached hereto. Also discussed was the CPP notification mechanism and Nextel's belief that a simple and unobtrusive CPP notification message is necessary for the viability of CPP.

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Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and a copy is being provided to Mr. Schlichting, Ms. Sievert and Mr. Monteith. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,

Laura S. Roecklein

cc: James D. Schlichting,
Kris A. Monteith
Janet L. Sievert

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December 22, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation
WT Docket No. 97-207

Dear Ms. Salas:

I have enclosed a written *ex parte* presentation that we are filing today on behalf of Nextel Communications, Inc., in the above-referenced proceeding.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and two copies of this written *ex parte* are being submitted to the Secretary's office and a copy is being provided to Chairman Kennard and each of the parties listed on the carbon copy list. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,

Laura Phillips

Laura H. Phillips
Counsel for Nextel Communications, Inc.

Enclosure
LHP/lsr

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December 22, 1999

VIA HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation
WT Docket No. 97-207

Dear Chairman Kennard:

Nextel Communications, Inc. ("Nextel") submits this *ex parte* presentation to highlight its interest in providing calling party pays ("CPP") as a service option to its customers on a nationwide basis. Nextel's ability to offer CPP is largely dependent, however, on the Federal Communications Commission ("FCC" or "Commission") requiring – at least on a temporary basis – mandatory nationwide availability of incumbent LEC ("ILEC") billing and collection services for CPP calls at reasonable rates.

I. Introduction

A stated primary purpose of the Commission's CPP proposals is to enable CMRS providers to offer services that are more competitive with landline local services. [1] Critical to achieving this is the removal of obstacles to the ability of all CMRS providers to offer seamless, easy-to-use CPP services to their customers. The Commission will squander a significant opportunity to advance local competition by not dealing effectively with ILEC billing and collection for CPP.

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[1] Calling Party Pays Service Offering in the Commercial Mobile Radio Services, *Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 10861 (1999) ("CPP holds the potential for making mobile wireless services more attractive to large numbers of customers who do not subscribe today, and spurring the acceptance and development of services offered by mobile wireless telecommunications providers as competitive alternatives to the services of local exchange carriers").

Throughout this proceeding, non-ILEC wireless carriers have demonstrated that CPP will not be a viable or economic service option without some requirement that ILECs cooperate with all CMRS carriers in matters of CPP call billing and collection. As discussed below, the FCC has the authority to mandate that ILECs make available their billing and collection services to enable all CMRS providers to offer CPP. Without this requirement, non-ILEC affiliated CMRS providers will lack any reasonable means to collect CPP service revenues and thus will be unable to offer this service to their customers.

The record shows that individual, voluntary arrangements for ILEC CPP billing and collection are insufficient to support nationwide, or even widespread CPP availability. Indeed, the record demonstrates that certain ILECs, for competitive reasons, refuse to offer billing and collection for CPP altogether. Additionally, ILECs have asserted that there are viable alternatives to ILEC billing and collection, including use of national or regional clearinghouses and credit card billing. These purported alternatives, however, are not workable. Indeed, the clearinghouses themselves have stated that they cannot provide ubiquitous billing and collection functions across the country.

Credit card billing is also problematic as there are no databases currently capable of correlating credit card holders with their phone numbers for billing purposes. Moreover, those CPP callers that have credit cards – and many prospective CPP users do not – are unlikely to want to take the time or effort of providing a credit card number prior to initiating each CPP call. Thus, while the ILECs assert that billing for CPP is "competitive," they have utterly failed to address the numerous demonstrations in the record that their purported alternatives are illusory or unsuited to enabling all CMRS carriers to offer CPP. While competitive billing and collection alternatives may develop over time, mandatory ILEC participation currently is essential given their virtual monopoly billing fulfillment capabilities for CPP at this time.

Some have suggested that ILECs be required to offer non-discriminatory CPP billing and collection service to non-affiliated wireless carriers if they offer CPP billing to their wireless affiliates. *The record developed in this proceeding demonstrates, however, that a non-discrimination requirement will fail to achieve the Commission's stated objectives.* ILECs such as SBC, for competitive reasons, have chosen to withhold all CPP billing, making any nondiscrimination requirement irrelevant as to them and frustrating the Commission's objective of allowing CPP viability to be determined in the marketplace, rather than blocked by ILECs claiming they have no regulatory obligation to cooperate in CPP billing and collection.

The Commission has the requisite authority to order ILECs to provide, for compensation, the billing and collection cooperation Nextel and other non-ILEC affiliates need to offer CPP. Whether the FCC determines that some aspects of CPP billing and collection are ILEC unbundled network elements, or uses its *UNE Remand Order* analysis to instead create a national

"backstop" rule requiring ILEC billing for CPP,[2] the Commission must prevent the ILECs from raising barriers to non-affiliated CMRS providers offering CPP. The Commission's previous actions detariffing billing and collection is not controlling precedent and does not prevent the Commission from taking the necessary action to ensure all CMRS providers are not blocked from offering CPP by the strategic business decisions of individual ILECs.

II. ILEC Billing And Collection Is Necessary For CPP Implementation

Non-ILEC affiliated CMRS providers at every stage in this proceeding have demonstrated that any regulatory model for CPP that fails to comprehend the economics of billing and collection for CPP calls will not be practical, viable, or economic. There is significant information in the record demonstrating that without ILEC billing cooperation, a CPP offering is economically prohibitive, *i.e.*, the cost of generating a bill will often exceed the cost of a wireless call. Wireless carriers have shown that while the cost of generating a standalone bill ranges from approximately $2.50 to $3.00, the incremental cost for an ILEC to add a CPP call to an existing bill is approximately $0.05.[3] Given that the average length of wireless calls is roughly 2.5 minutes and that CPP charges likely will be no higher than current air time charges, with the average cost of a call at $0.37 per minute, a landline customer would have to make three calls to a CPP customer of a particular CMRS provider before the wireless carrier could even cover the costs of simply generating a bill. When the other costs of billing and collection are considered, in most cases the cost to bill and collect would exceed the total call charges. If the only way for a CMRS provider to offer CPP is for each CMRS carrier to directly bill each landline caller for each CPP call, then CPP will not be a viable service.[4]

Another concern with a direct CMRS carrier billing model for CPP is that bad debt would substantially increase, creating a self-defeating cycle of CMRS providers having to raise CPP rates beyond consumers willingness to pay. Indeed, Airtouch's comments demonstrated that ILEC rates of bad debt are lower than those of existing CMRS subscribers – those that have a current billing relationship to the CMRS provider. Bad debt is likely to be a far larger problem

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[2] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order*, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

[3] *See, e.g.*, Comments of Vanguard on CTIA Petition at 10. This includes the costs of recording, transmitting and formatting the bills as well as the costs of printing, stuffing, and posting of the bills and the envelopes. It does not include, however, processing costs, collection costs, or the costs of finding names and addresses. *See also* PCIA Comments, Detecon White Paper (Attachment 1) at 32 ("It is not unusual for the cost of a Bill to run around $1.50 - $3.50 if you include all of the functions from CDR [creation of call detail records] collection through Bill Fulfillment.").

[4] *See, e.g.*, CERB Comments at 4 ("Direct billing of CPP charges is not a viable option because the cost of a CPP call will often be less than the cost of preparation and postage for a direct bill.")

in an environment where the caller's only relationship with the called party's carrier is an occasional CPP call.[5]

ILEC cooperation on billing and collection permits wireless carriers to collect revenues generated from the offering of CPP services.[6] ILECs understand the tremendous competitive advantage that their existing billing and collection mechanisms provide to them and their affiliates. While some of the ILECs conditionally have asserted their "willingness" to discuss the issues of billing and collection for CPP with CMRS providers, these indications are far from any undertaking to actually provide billing to CMRS providers. Further, as many CMRS carriers have pointed out in their comments, some ILECs are totally unwilling to provide billing and collection for CPP at any price.

III. Third Parties Are Incapable Of Filling The Void At This Time

Throughout this proceeding, ILECs have attempted to deflect attention from the economic realities of CPP billing by claiming that ILEC billing and collection for CPP is unnecessary as CPP billing is a competitive market. Uniformly, the ILECs have failed to reply to demonstrations in the record of their unparalled economies of scope in billing and collection and the unsuitability of their claimed alternatives. This lack of engagement by the ILECs in any principled debate, however, should not dissuade Commission action mandating ILEC cooperation on CPP billing.

The national clearinghouses that ILECs assert are the primary alternative to ILEC billing for CPP have stated that the ILECs are unwilling to negotiate with them to put clearinghouse charges for CPP on ILEC subscriber bills.[7] Additionally, the clearinghouses themselves have

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[5] *See* AirTouch Comments (Declaration of Dr. Michael L. Katz and David W. Majerus) at 7.

[6] As a practical matter, ILEC billing and collection will prevent undue customer confusion and inconvenience that predictably may arise from multiple bills from numerous wireless providers. Billing for roaming among wireless providers works only because wireless customers receive a single bill. What is different about roaming, however, is that wireless providers generally have a mutual interest in allowing callers to roam onto their networks and cooperating in the billing of those calls. Further, FCC rules have promoted roaming as an important mobile service.

[7] Only one lone third-party billing provider Illuminet, has argued against regulatory intervention "at this time." Illuminet nevertheless admits that "there is still debate with respect to how these [billing and collection] functions will be provided for a CPP call . . ." Illuminet Comments at 5-6. BellSouth trumpets Illuminet's statement that "the underlying processing and settlement capabilities exist today" for Illuminet's clearinghouse proposal. This "solution" refers, however, only to technical aspects of the upstream portion of the billing process. The clearinghouse would still have to "forward the [billing] messages to the appropriate company for billing." Illuminet NOI Comments at 5. BellSouth points to technology-based products by Nortel and AG Communications Systems as alternatives to LEC billing, yet these products provide no alternative to creating and mailing a separate bill, which is the very bottleneck that makes non-

stated that there are no providers other than the ILECs capable of offering ubiquitous billing and collection across the country.[8] Clearinghouses depend upon ILECs to accept their billing records and perform the bill fulfillment and collection functions on their behalf. Thus, while CMRS providers may be able to use clearinghouses to handle the first steps of the billing process, *i.e.*, up to invoice creation, clearinghouses are unable to go beyond this point, *i.e.*, to the printing, mailing and bill collection stages. Clearinghouses rely on the ILEC for bill fulfillment. Generalized ILEC assertions that clearinghouses provide some billing functions that assist a carrier's billing process cannot be credited as evidence that clearinghouses in fact are a full-fledged alternative for ILEC billing.

A credit card payment mechanism for CPP calls is also unworkable. As with the clearinghouses, credit card issuers cannot provide ubiquitous billing and collection for CPP calls because there is no current database that can correlate phone numbers with credit card holders.[9] Moreover, since one-third of American families – particularly those with low incomes – do not have general purpose credit cards, any widespread reliance upon credit card billing would severely limit the usefulness of CPP to consumers.[10]

Even assuming that the alternatives the ILECs claim exist are actually available, they are too costly to be feasible when compared to the economies of scale enjoyed by the ILECs. Bell Atlantic Mobile's ("BAMs") "Call Me" trial service in Delaware provides a prime example. Callers placing calls to a Bell Atlantic Mobile customer from a Bell Atlantic landline phone will be charged on their Bell Atlantic landline bill at a rate of 25 cents a minute. Those callers that do not use Bell Atlantic local landline service to call the wireless subscriber must use a credit card and are charged 35 cents a minute. BAM is thus able to use the billing service of its ILEC affiliate to create a 40% price differential in favor of BAMs and Bell Atlantic landline subscribers.[11]

ILEC billing solutions uneconomic for CPP. BellSouth Comments at 15-16. U S West's response to the prohibitive expense of non-ILEC CPP billing is as simple as it is arrogant: CPP "should not be offered." *See* U S Reply West Comments at 12.

[8] *See* CERB Comments at 3 ("Aside from the local bill, there is no nationally ubiquitous, reliable, economically feasible billing platform for CMRS providers to bill CPP calls."); Pilgrim Telephone Comments at 23 ("LEC billing systems . . . represent the only practical means currently available by which CPP providers can efficiently bill and collect for their services.").

[9] *See* AirTouch Comments (Declaration of Dr. Michael L. Katz and David W. Majerus) at 12.

[10] *See* CERB Comments at 5. Even for those persons that can use their credit card for CPP payment, the use of a credit card is far more cumbersome and time consuming for callers and expensive for carriers.

[11] *See* Bell Atlantic News Release, "Bell Atlantic Mobile Customers Say 'Call Me;' No Longer Pay for Incoming Calls with New Feature," November 15, 1999. *Also see* Bell Atlantic Mobile *ex parte* filed in this proceeding on November 23, 1999 (describing the terms of the trial).

IV. A Simple ILEC Non-Discrimination Obligation Is Insufficient To Launch CPP

While it has been suggested that a non-discrimination obligation on ILECs for billing and collection would provide a suitable solution to the billing and collection economic conundrum, this will not work in those instances where ILECs refuse outright to bill and collect for CPP calls. SBC, for instance, will not provide billing and collection service on a non-discriminatory basis because it has chosen, as a competitive matter, not offer CPP billing at all. In a letter to AirTouch, for example, SBC stated that its "ability to market additional products and services would be negatively impacted if we were to bill CPP on Pacific Bell's telephone bill."[12]

SBC's strategic decision to withhold billing and collection for CPP completely eliminates any possibility that CPP can be deployed on a nationwide scale. Indeed, SBC alone now controls over 57 million access lines in 13 states, making up one-third of the nation's total telephone lines.[13] The FCC must address this problem if it intends for CMRS carriers to have the opportunity to offer CPP seamlessly throughout the country.[14] *If the current ILEC pronouncements come true, there will be no significant ILEC billing for non-affiliated carriers west of the Mississippi, unless the FCC acts as advocated herein.*

In addition to the problem of nationwide deployment, a simple non-discrimination provision does not address the potential for ILECs to charge prohibitively high rates for CPP billing and collection. ILECs may choose to charge their own affiliates artificially high rates for CPP billing and collection services to raise a barrier to other wireless carriers offering that service in the same market.[15] By charging an artificially high rate, these ILECs would not be

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[12] *See* AirTouch NOI Comments at Appendix B (attached letter from David Kerr, Southwestern Bell Corp., to Scott Falconer, AirTouch Cellular, Nov. 19, 1997).

[13] *See* SBC Communications, Inc., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, Mar. 15, 1999 at 4; Ameritech Corp., *Annual Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934,* Mar. 31, 1999 at 4 (reporting access line data).

[14] Although not mentioning CPP billing by name, U S West recently announced that it will stop billing for "most enhanced services *provided by other companies*," but will continue to bill for long-distance service and for "enhanced services provided by U S West or vendors working with U S West."

[15] *See* Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, 5035 (1996). CMRS carriers argued, in the context of LEC/CMRS interconnection, that "mutual compensation does not account for potential discrimination: a LEC could negotiate a high interconnection rate with its cellular affiliate, since the LEC's shareholders would not care which corporate entity was accruing the profit. The unaffiliated CMRS firm, however, would be forced to pay the same high rate and thereby be inhibited from competing with the LEC in its local exchange." Thus, while a "non-discriminatory mutual compensation requirement is a necessary component of any

"discriminating" *per se* against non-affiliated wireless carriers. They would, however, be engaging in strategic anti-competitive behavior to forestall cost effective entry of non-affiliated carriers. Thus, a simple non-discrimination obligation will fall short of achieving the Commission's stated goals.

V. The Commission Has Authority To Act

The Commission has ample authority to address the substantial competitive issues posed by the market failure of ILECs to make reasonably priced billing and collection available to competing CMRS carriers.[16] It can determine that aspects of CPP billing are unbundled network elements, or that the ILECs should provide CPP billing on a transitional basis under the Commission's authority over local competition and interconnection. In any case, there is no question that the Commission will have squandered an important opportunity for wireless-landline competition by not dealing effectively with this critical matter. In every other notable area where the Commission has interpreted its new authority and obligations under the 1996 Act, it has not hesitated to break out of stale regulatory paradigms where, after consideration, it concludes that such action is necessary to achieve the new pro-competitive goals and purposes so boldly proclaimed in the statute. The Commission is certainly capable of doing the same thing here to empower CMRS carriers to compete more directly with ILECs. As discussed below, there are several alternative legal bases for FCC action.

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interconnection system, they argue that it is not sufficient to ensure that CMRS providers will be able to compete with the LEC in the local service market." If, however, ILEC billing and collection for CPP is classified as an unbundled network element, then TELRIC pricing would apply.

[16] The Commission already has established that Calling Party Pays is a CMRS service offering. Specifically, the Commission has stated that "CPP offerings . . . are properly classified as CMRS services pursuant to Section 332 of the Act." *Declaratory Ruling*, 14 FCC Rcd at 10869. Under Section 332, states may only regulate the "other terms and conditions" of CMRS service. 47 U.S.C. § 332(c)(3)(A). States may not regulate the "rates charged" by CMRS carriers. On November 24, 1999, the Commission released an order addressing a petition for declaratory ruling filed by Southwestern Bell Mobile Systems, Inc. ("SWBM") on whether the FCC's jurisdiction over CMRS providers under Section 332 bars claims in state courts alleging that the CMRS providers have violated state consumer fraud and/or contract laws by marketing and *billing* for incoming calls. Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, FCC 99-356 (rel. November 24, 1999). There, among other things, the Commission concluded that the term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states may not prescribe how much may be charged for these services, and also may not prescribe the rate elements for CMRS. Based on these decisions, it is plain that only the Commission has the authority to address the ILEC billing issues surrounding CPP implementation.

A. Unbundled Network Element Authority

ILEC billing and collection meets the statutory definition of network element, as interpreted by the Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.*, because it involves "functions or capabilities" provided by means of facilities or equipment used in the provision of telecommunications service.[17] Moreover, billing and collection for CPP satisfies the important standard articulated by the FCC in its *UNE Remand Order*, because lack of access would "materially diminish" a CMRS carrier's ability to provide CPP service, and because there is a "substantive difference" between this ILEC service and any non-ILEC alternative, including self-provisioning.[18]

In its *UNE Remand Order*, the Commission stated that its impairment analysis evaluates the ILECs' cost advantages, calculated on a forward-looking basis, as well as the economies of scale that the ILEC has achieved based on its former monopoly status. Applying this analysis to Bell Atlantic Mobile's (BAMs) CPP trial in Delaware, Bell Atlantic is offering its wireless affiliate the ability to bill Bell Atlantic landline customers for CPP calls made to the customers of BAMs, its subsidiary. This ILEC billing for CPP results in a 40% cost advantage over credit card billing. BAMs benefits from this significant cost advantage not because it has a better service or product, but because it has access to its ILEC affiliate's legacy landline billing and collection system.

There is no question that the ILECs' significant economies of scale in billing and collection spring directly from their monopoly legacy. It is equally obvious that some ILECs are prepared to misuse this monopoly-based advantage. The *UNE Remand Order* recognized that limitations on the geographic scope of customers a carrier could serve without access to a network element could be an indicator of impairment.[19] Another factor considered is whether failure to require unbundling will delay competitive alternatives to consumers. As recognized in the *Notice*, CPP, if implemented, could offer a "near-term competitive alternative" to ILECs. The Commission's failure to recognize a situation of market failure and take action will deprive non-ILEC CMRS of the ability to offer CPP seamlessly, and in turn hinder increased ILEC-CMRS competition.

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[17] The FCC has determined that billing and collection is a communications service, as it is "incidental to wire communication." LEC Validation and Billing Information for Joint Use Cards, *Second Report and Order*, 7 FCC Rcd 3528, 3533 n.50 (1992). UNEs need not be – indeed most are not – "telecommunications services," despite rhetoric from some ILECs to the contrary.

[18] *UNE Remand Order* at ¶ 51.

[19] The impairment analysis also considers whether a carrier can afford to incur the costs of alternative provisioning in low revenue generating markets, such as the CPP market.

Because billing and collection service is composed of a series of discrete functions, the FCC could evaluate each function separately and only designate those that individually meet the impairment standard as UNEs.[20] Thus, the Commission might determine that the aggregation of billing data can be done by alternative providers and should not be a UNE, but conclude that ILEC bill fulfillment and collection is, at present, a network element to be unbundled for requesting CPP providers.

UNE classification need not be permanent, but could be reevaluated and removed as part of the FCC's regular three-year review of its UNE list if the economics of alternative provisioning should change. The FCC, however, need not wait until the next review to *add* billing and collection to the list; it already has added the high frequency portion of local loops as a UNE less than a month following the release of the *UNE Remand Order*, demonstrating that it intended the three-year review period to apply only to UNE list removals, not additions.[21]

Admittedly, UNE status would mean that the state commissions will be responsible for defining specific rates, terms and conditions governing access to ILEC billing and collection services, which could result in implementation delays and state-to-state inconsistencies that would increase operational costs for CMRS carriers. Additionally, conferring UNE status on billing and collection could permit *any* requesting telecommunications carrier (but not information service providers) to gain nondiscriminatory access to ILEC billing and collection services at TELRIC rates. Given the unique problems confronted by CPP providers, however, the FCC could determine from the record that ILEC billing and collection meets the impairment standard for the offering of CPP services, but not for other telecommunications services.[22]

B. A Transitional ILEC Billing And Collection Regime Offers An Alternative to Full UNE Regulation

Given the overwhelmingly interstate nature of CMRS, the FCC can adopt national billing standards for CPP pursuant either to its authority over interstate communications under Title I or its authority over local interconnection under Sections 201, 251 and 252. The FCC consistently

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[20] PCIA, for example, filed with its comments a White Paper by Detecon, Inc. that breaks down the various aspects of bill creation, fulfillment and collection to discrete functions. The Commission could look to this analysis to determine what should constitute a UNE under the impairment standard. (PCIA Comments, September 17, 1999).

[21] Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order* in CC Docket No. 98-147; *Fourth Report and Order* in CC Docket No. 96-98 (rel. Dec. 9, 1999).

[22] There is already precedent for "limited circumstance" UNE designation, as the *UNE Remand Order* requires the unbundling of ILEC operator services and packet switching only in certain situations.

has stated that it maintains Title I jurisdiction over billing and collection.[23] Moreover, the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.* sets forth a very broad scope of FCC authority over the development of local telecommunications. The Court held that Section 201(b) constitutes an *explicit* grant of FCC jurisdiction to implement regulations governing matters to which the Communications Act applies.[24] The Court also found that the use of the qualifier "interstate or foreign" in Section 201(a) to limit the class of common carriers with the duty of providing communications services does not limit the class of provisions that the FCC has authority to implement. Section 201(b) (coupled with Section 332(c)(3)), thus supplies the FCC with jurisdiction over all CPP services, including billing and collection services that the ILEC provides in conjunction with the CPP offering.

The *Notice* recognizes that a fair marketplace trial of CPP advances local competition.[25] Additionally, the framework of the 1996 Act gives the FCC broad additional authority to set the ground rules for local competition. If the Commission does not proceed with full UNE regulation, it could achieve similar pro-competitive results by creating a "backstop" rule, requiring as part of interconnection negotiations, that ILECs make billing and collection for CPP available for CMRS carriers that want it. The continued need for such a rule could be reevaluated periodically as conditions change in the billing market.

C. The *Billing Detariffing Order* Is Not An Impediment To Action

The Commission's 1986 *Billing Detariffing Order* interposes no barrier to mandated ILEC billing and collection for CMRS CPP service. That decision was based on a very different record focused only on the need to provide IXC billing in a post-divestiture market.[26] There, the

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[23] *See, e.g.*, Detariffing of Billing and Collection Service, 102 F.C.C. 2d 1150, 1169 (1986) ("*Billing Detariffing Order*") (noting that the FCC's Title I powers would allow regulation of exchange carrier provision of billing and collection services to interexchange carriers); Filing and Review of Open Network Architecture Plans, *Memorandum Opinion and Order*, 4 FCC Rcd 1, 59 (1988) ("our Title I authority over the BOCs' billing and collection activities is clear, since such activities are incidental to communications"); Audio Communications, Inc. Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 8 FCC Rcd 8697, 8702 (1993) ("*Audio Communications Order*").

[24] *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 730 (1999).

[25] *See* Calling Party Pays Service Offering in the Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 14 FCC Rcd 10861, 10863-64 (1999).

[26] *See* AirTouch Comments (Declaration of Dr. Michael L. Katz and David W. Majerus) at 12 ("It is important to recognize that interexchange carriers have billing needs that are very different from those of CPP. In particular, interexchange carriers to which consumers presubscribe have customer relationships that increase the likelihood that the bills will be paid. Moreover, the size of the average long distance bill is much higher than the likely average CPP bill, so the economies of scale are less of an issue.").

Commission concluded that IXCs can absorb their own billing and collection costs as their bills were typically large.[27] Even so, it is telling that most IXCs continue to rely on ILEC billing and collection for residential and many other accounts, and many of them are now imposing minimum monthly charges, which prevents their billing and collection costs from exceeding their revenues from small volume callers. Additionally, wireless carriers are competitors or potential competitors of ILECs, creating an economic incentive for the ILEC to keep non-affiliate CPP calls off its bill. Further, IXCs and ILECs were not competitors in 1986, and there was no indication that ILECs would refuse to bill for IXCs, a position they increasingly take today towards any entity they view as a competitor or a potential competitor.

The *Billing Detariffing Order* also indicated that there was "sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices on the part of [local] exchange carriers." This is simply not the case for CPP billing and collection. Rather than any evidence of "downward pressure" on billing and collection rates as the Commission found in 1986, the record in the CPP proceeding indicates, according to a report cited by USTA, that billing and collection "pricing is robust, with most companies raising, rather than lowering rates."[28] As ILECs – the low cost providers – increasingly deny access to their billing services for strategic reasons, there is no competitive pressure on third-party providers to keep rates down. The record demonstrates that third parties have no choice but to rely upon ILECs to provide them with end stage bill fulfillment functions.[29]

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[27] In 1998 the average amount expended per household per month on long distance was $22.50. Because typical households use only one or two interexchange carriers per month, the average amount billed exceeds the billing and collection costs. *See* Phil Cheilik, Federal Communications Commission, *Reference Book of Rates, Price Indices and Expenditures for Telephone Service* 60, June 1999 (Table 3.6). By contrast, CPP call revenue is not likely to reach interexchange levels. The average duration of a CMRS call is approximately two minutes. Assuming a CPP charge of $.30/minute, a household would have to place over 37 calls to customers of the same CMRS carrier to equal $22.50, the average amount households spent for interexchange services in 1998.

[28] Comments of United States Telephone Association at 7 (citing SG Cowen Securities Corp., *Telecom Billing & Customer Care Quarterly* at 3 (May 1999)).

[29] Even where the Commission withdrew from a tariffing requirement, it exercised its Title I jurisdiction to require ILECs to continue to provide the recording function for at least three years to ensure that IXCs could "provide their communications in an efficient and economical manner." This decision recognized that billing and collection is not an "all or nothing" package, and that access to certain components may be required for a limited period of time to allow requesting carriers to provide economical service. This is what Nextel seeks in advocating the adoption of an ILEC billing cooperation requirement.

D. The Commission Should Promote The Fundamental Premise Of The 1996 Act

There is no question that the FCC is obligated to reexamine its rules and policies in light of the goals of the 1996 Act. One case in point affecting CMRS providers was the *CMRS Safeguards Order*, which reversed prior decisions regarding BOC cellular structural separations in response "to the competitive paradigm established by the new legislation and the current telecommunications marketplace." The *CMRS Safeguards Order* recognized that CMRS carriers and ILECs – not merely the BOCs – are increasingly likely to be direct competitors, and that such competition could increase the incentive for all ILECs to engage in discriminatory and anticompetitive practices wherever they had landline facilities.[30] To prevent competitive harm, the FCC found it necessary to impose new non-structural safeguards on all in-region ILECs, on a transitional basis, even though the 1996 Act did not specifically require that action, and even though such action was contrary to its previous determinations.

In explaining its shift in policy, the FCC stated that its earlier decisions "were not based on a full analysis of the competitive harms that might result" when ILECs and CMRS carriers are direct competitors. Because CPP could increase the competitiveness of wireless service relative to local exchange carriers, it is appropriate for the FCC to reconsider whether its prior decisions relating to ILEC billing and collection are still fully consistent with the stated goals of the 1996 Act and changed marketplace conditions.

VI. Conclusion

For there to be a *fair* market-trial for CPP, the Commission should require ILECs to cooperate in providing the basic elements necessary for all CMRS carriers to implement a CPP service option. Specifically, the Commission must mandate ILEC billing and collection -- either by declaring aspects of ILEC billing and collection a UNE or by asserting ancillary or local interconnection authority to adopt national rules requiring ILEC billing and collection -- on at least a temporary, transitional basis. The record herein establishes the necessity of ILEC billing

[30] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, *Report and Order*, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*).

and collection to CPP viability and the inability of nationwide carriers to implement CPP on a nationwide basis without it. Accordingly, Nextel urges the Commission to act decisively as set forth above.

Respectfully submitted,

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