

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

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| In the Matter of |) | |
| |) | |
| Petition for Emergency Declaratory And Other Relief |) | WC Docket No. 02-202 |
| |) | |

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO VERIZON’S PETITION FOR EMERGENCY DECLARATORY
AND OTHER RELIEF**

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby opposes the Petition for Emergency Declaratory and Other Relief filed by Verizon in the above-referenced docket.¹ In that petition, Verizon requests that the Commission grant it and other incumbent local exchange carriers (“LECs”) unprecedented authority to require customers to provide security deposits and payments in advance, if the incumbent LEC makes a unilateral and completely discretionary determination that a customer is a credit risk. The security deposit provisions in the interstate access tariffs of Verizon and other incumbent LECs were originally approved by the Commission at the time the initial access tariffs became effective in 1984. As demonstrated below, Verizon has made no showing that the sweeping changes that it proposes are either necessary or consistent with the public interest. Nextel respectfully requests that the Commission deny Verizon’s petition.

¹ See Petition for Emergency Declaratory and Other Relief, WC Docket No. 02-202 (filed July 24, 2002) (“Verizon Petition”).

I. BACKGROUND AND INTRODUCTION

Nextel is the fifth largest commercial mobile radio service (“CMRS”) provider in the nation, providing a unique combination of cellular, short messaging, Internet access, data transmission, and Direct Connect® – a digital two-way radio feature that enables subscribers to reach other Nextel customers with the push of a button even if they are hundreds of miles apart. In conjunction with its affiliate Nextel Partners, Inc., Nextel currently serves 197 of the top 200 U.S. markets. As do all major CMRS providers, Nextel relies heavily on special access services purchased from Verizon and other incumbent LECs pursuant to interstate tariffs. At the same time, Nextel competes with incumbent LEC affiliates, such as Verizon Wireless and the SBC-BellSouth joint venture, Cingular Wireless.

Accordingly, Nextel, like many carriers, is not only a customer of the incumbent LECs, but is also a competitor.² Incumbent LECs, as dominant carriers, have the incentive and ability, absent FCC regulation, to discriminate unreasonably against their competitors in order to raise their rivals’ costs. If Verizon and the other incumbent LECs are granted the relief requested here, their ability to act in an anticompetitive manner will be increased significantly.

Verizon requests that the Commission grant incumbent LECs authority to impose and enforce – in their sole discretion – security deposits, advance payments,³ and unreasonably

² Nextel competes with incumbent LEC affiliates in the provision of mobile wireless service; it is also an actual or potential competitor with the incumbent LECs’ wireline offerings to the extent that customers use Nextel as their primary telephone service and/or as a potential substitute for wireline service.

³ Although Verizon does not specify in its petition the precise tariff provisions that grant of the petition would authorize, its recent tariff filing and those of other incumbent LECs offer ample examples. For example, BellSouth has proposed a complicated formula that would allow it to use “credit scoring” and “financial scoring” tools, which together consider no fewer than twelve different types of data to determine whether a security deposit is required. BellSouth Tariff F.C.C. No. 1, § 2.4.1(A) (filed July 19, 2002). Verizon’s and SBC’s proposed modifications incorporate six different purportedly “independent” criteria, including whether a

abbreviated notice periods for disconnecting and refusing service. Verizon Petition at 4-6. Verizon also requests that the Commission intervene in bankruptcy proceedings to advocate preferential treatment for incumbent LECs, effectively moving them to the front of the line of unsecured creditors during any bankruptcy proceeding in which they participate. *Id.* at 6-8. Verizon further asks the Commission to confirm that any carrier that wishes to receive the benefits of an existing service arrangement of a bankrupt carrier must “cure” all prior indebtedness owed by the bankrupt carrier or risk having its customers disconnected. *Id.* at 8-10.

Nextel agrees with Verizon that the stability of incumbent LECs is important to the continued viability of the telecommunications industry. Contrary to Verizon’s claims, however, its petition and proposed tariff revisions are unnecessary to protect their financial health. While the proposed changes would effectively indemnify dominant carriers like Verizon against losses due to bad debt, they would also allow those carriers – at their complete discretion – to tie up competitors’ scarce working capital by demanding excessive and unnecessary security deposits and advance payments. Thus, any benefit to Verizon would be at the cost of further destabilizing the competitive telecommunications industry.⁴ Moreover, as discussed below, the Commission and the bankruptcy courts already have in place a legal and regulatory framework for addressing assurance of payment issues. Verizon’s petition offers no basis for abandoning these time-tested procedures – including tariff provisions that have been in effect since 1984. To minimize the

carrier has an investment-grade debt securities rating, to determine whether a carrier is a credit risk. *See, e.g.*, Verizon Tariff F.C.C. No. 1, § 2.4.1(A)(2) (filed July 25, 2002); SWBT Tariff F.C.C. No. 73, § 2.5.2(B) (filed Aug. 2, 2002). The Competitive Pricing Division has suspended the BellSouth proposed tariff modifications for the full statutory period, finding that substantial questions regarding the lawfulness of the revisions have been raised. *See BellSouth Telecommunications, Inc., Tariff FCC No. 1, Transmittal No. 657, Order ¶ 5, DA 02-1886* (rel. Aug. 2, 2002).

⁴ *See generally* Petition of Nextel to Reject or Alternatively Suspend and Investigate, SWBT Transmittal No. 2906 (filed Aug. 9, 2002) (“Nextel SWBT Petition”).

potential adverse impact on an already troubled industry, Nextel urges the Commission to deny the Verizon Petition.

II. DISCUSSION

A. Current Tariff Provisions Adequately Address Assurance Of Payments Issues

Since 1984, incumbent LECs have had in place interstate access tariff provisions that permit them to require security deposits or advance payments based upon a customer carrier's payment history.⁵ The Commission concluded that those protections were just and reasonable under Sections 201 and 202 of the Act.⁶ Under these existing provisions, incumbent LECs may require payment assurances under two circumstances: (1) the carrier has a "proven history of late payments" or (2) the carrier does "not have established credit." *1984 Tariff Order*, Appendix D (§ 2.4.2(A)).

In approving these tariff provisions, the Commission disapproved proposed language that would have allowed the incumbent LECs unfettered discretion – much as Verizon seeks here – to require security deposits. *1984 Tariff Order* at 1168-69. Indeed, the Commission found that the proposed security deposit language swept so broadly that only one carrier at that time – AT&T – would have escaped the deposit requirement. *Id.* at 1169. As a result, the Commission concluded that the proposed deposit revisions were potentially anticompetitive and unreasonably onerous, and required that they be amended to apply only to carriers with a proven history of late payments or with no established credit. *Id.* Several years later, in 1987, BellSouth attempted to increase the level of its required security deposit by 50% to help to offset the risk

⁵ Compare Investigation of Access and Divestiture-Related Tariffs, CC Dkt. No. 83-1145 Phase I, 97 FCC.2d 1082 (1984) ("*1984 Tariff Order*"), Appendix D (quoting language of Section 2.4.1(A)), with Verizon FCC Tariff No. 1, § 2.4.1(A)(1) (including identical language).

⁶ 47 U.S.C. §§ 201, 202.

associated with providing service to carriers in bankruptcy.⁷ The Commission determined that the proposed tariff provision was unreasonable because the “advantages to be gained by the proposed revisions seem to be outweighed by the disadvantages to customers that may not pose a risk to BellSouth.” *1987 Tariff Order* at 318. In both cases, the Commission refused to allow the incumbent LECs to use their dominant position to impose onerous, costly, and anticompetitive payment assurances.

In addition to existing payment assurance protections under federal tariffs, bankruptcy law offers protections that balance effectively the public policy objectives of allowing companies to restructure and emerge as viable competitors, and ensuring that creditors are treated fairly. Under the Bankruptcy Code, utilities (which may include the incumbent LECs) may not discontinue service unless the debtor fails to provide adequate payment assurances such as a “deposit or other security.” 11 U.S.C. § 366(b). The bankruptcy court – not the Commission – has the “exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service for non-payment of pre-petition utility bills.”⁸ Verizon fails to explain why application of bankruptcy law does not provide adequate

⁷ See *Annual 1987 Tariff Filing*, 2 FCC Rcd 280, 317-318 (1987) (“*1987 Tariff Order*”).

⁸ See *Adelphia Business Solutions*, 280 B.R. 63, 80 (S.D.N.Y. 2002), quoting *Begley v. Phila. Electric Co. (In re Begley)*, 41 B.R. 402, 405-406 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985); see also, *Tarrant v. City of Douglas, Ga.*, 190 B.R. 704, 708 (S.D. Ga. 1995), quoting *Begley*, 280 B.R. at 405-406; *Lloyd v. Champaign Telephone Co.*, 52 B.R. 653, 656 (S.D. Oh. 1985) (“[t]he determination of ‘adequate assurance’ is within the province of the bankruptcy court”); *Kiriluk v. Chester Water Authority*, 76 B.R. 979, 984 (E.D. Pa. 1987), quoting *Begley*, 41 B.R. at 406 (declining “to grant the utility leverage over a bankrupt debtor which it would not have absent the petition in bankruptcy”).

protection of incumbent LEC interests, nor does Verizon explain why incumbent LECs should be given preferential treatment over other creditors or utilities.⁹

Although Verizon complains that the financial plight of some customer carriers is undermining its ability to ensure continuity of service, Verizon Petition at 3-4, it has not provided any evidence of financial harm, nor reported such concerns in the 10-Q¹⁰ it recently filed with the SEC. Indeed, the evidence available shows that the incumbent LECs are continuing to generate very substantial earnings from their interstate operations. Verizon reported an aggregate interstate rate of return in 2001 of 17.1%.¹¹ Three of SBC's four operating companies showed an increase in their rates of return from 2000 to 2001. All four reported interstate rates of return in 2001 in excess of 18%, and three of the companies reported rates of return ranging from 23 to 25.5%.¹² In 2001, BellSouth earned a return of 21.22% on its interstate investment.¹³

Notwithstanding these robust rates of return, Verizon asks the Commission to permit it and the other incumbent LECs to force their carrier customers to tie up potentially hundreds of

⁹ It appears that Verizon is trying to address its bankruptcy disputes with WorldCom in its request for relief here. *See Communications Daily*, WorldCom Criticizes Bells for Withholding Payments, at 1 (Aug. 15, 2002). In so doing, however, Verizon seeks relief that would allow it to impose onerous security deposits and other advanced payment assurances on financially stable telecommunications companies.

¹⁰ Form 10-Q, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Quarterly Period Ended June 30, 2002.

¹¹ WorldCom Petition to Reject or, in the Alternative, Suspend and Investigate, Verizon Transmittal No. 226, at 18 (filed Aug. 1, 2002).

¹² Petition of Sprint to Reject or Alternatively Suspend and Investigate, Ameritech Transmittal No. 1312, Pacific Bell Transmittal No. 77, SNET Transmittal No. 772, SWBT Transmittal No. 2906, at 4 n.2 (filed Aug. 9, 2002).

¹³ WorldCom Petition to Reject or, in the Alternative, Suspend and Investigate, BellSouth Transmittal No. 657, at 17 (filed July 26, 2002).

millions of dollars of funds industry-wide in security deposits and advance payments regardless of their customers' actual payment history. The Commission's analysis of Verizon's petition must include the likely harm to carriers reorganizing under Chapter 11 bankruptcy, as well as to financially stable carriers like Nextel. Viewing the industry as a whole, there can be no doubt that the likely harms engendered by the requested relief far outweigh any alleged benefits to the earnings of incumbent LECs, as discussed below.

First, grant of the petition will create a competitive imbalance that insulates, if it does not indemnify, incumbent LECs from ordinary business risks. If non-dominant carriers attempted to impose such onerous conditions, customers could switch to another provider. Because the incumbent LECs are the dominant, and in many cases the only providers, competitive carriers frequently have no choice of alternative service providers. Nextel and other CMRS carriers have no choice but to do business with Verizon and other incumbent LECs in order to provide wireless communications services to their customers in an interconnected nationwide network of wired and wireless providers.

Second, the requested relief would empower incumbent LECs to impose added economic hardships on financially healthy companies like Nextel, which compete with incumbent LEC affiliates today in the provision of mobile wireless services, and are beginning to win customers from the incumbent LECs' wireline operations as well.¹⁴ In today's economy, with the capital

¹⁴ See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 27 (1994) ("We believe that mobile services will play an increasingly important role in the nation's telecommunications networks, and we believe that non-discriminatory access to mobile services will give all consumers the opportunity to realize the expanding benefits of wireless technologies."); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596 (2001) (noting the importance of "ensur[ing] that the United States

markets effectively closed to the telecommunications industry, cash flow is critical. As noted, the proposed changes would allow the incumbent LECs – at their complete discretion – to tie up scarce working capital by demanding excessive and unnecessary security deposits and other forms of advance payments.

Third, as noted in Nextel’s opposition to SBC’s proposed tariff revisions, carriers that purchase special access are billed in advance for these services. Nextel SWBT Petition at 4. Thus, under existing tariffs, the incumbent LECs already have a significant assurance of payment for special access. As a result, it would be unreasonable to require an additional security deposit. In addition, it is particularly frustrating for carriers to be asked to tie up funds in order to receive service that is unacceptably poor today and getting worse. Nextel experiences severe outages on special access services it obtains from Verizon under the federal tariff. For example, Nextel has experienced multiple outages in the greater New York area in the last two months. The outages are long in duration, have a long mean time to repair, and have been increasing in frequency.

Fourth, notwithstanding its claims to the contrary, Verizon’s request undercuts the Commission’s goal of ensuring that end-user customers do not experience service disruptions. Demands for multi-million dollar deposits, coupled with shortened notice periods for termination, make it much more likely that service will be terminated and end-users will experience service disruptions. These harmful effects outweigh any claimed benefits to protecting Verizon’s earnings. Instead, the Commission should continue its current policies regarding payment assurances, which have dependably guided the industry through both favorable and poor economic conditions since 1984.

remains at the forefront of the development of wireless technology and the provision of wireless services”).

B. Verizon’s Request that the Commission Intervene in Bankruptcy Proceedings is Inappropriate

Verizon requests that the Commission intervene in bankruptcy proceedings to advocate preferential treatment for incumbent LECs, effectively moving them to the front of the line of unsecured creditors during any bankruptcy proceeding in which they participate. Verizon Petition at 6-8. Verizon also asks the Commission to confirm that any carrier that seeks to operate under an existing service arrangement for a bankrupt carrier must “cure” all pre-petition debts owed by the bankrupt carrier or risk having its customers disconnected. *Id.* at 8-10.

Verizon’s attempt to win Commission support for the efforts of incumbent LECs to jump ahead of other creditors (including potentially other telecommunications carriers) is misplaced. This request – that the FCC “unequivocally support” the efforts of incumbent LECs to gain payment assurances – is nothing short of extraordinary.¹⁵ The primary purpose of the bankruptcy courts is to address precisely these types of issues, based on the individual facts presented in each case. It is unwise for the Commission to intervene on behalf of a carrier or group of carriers in a way that would disadvantage its competitors. Absent a request from the bankruptcy court for such assistance, the Commission should deny the proposed relief.

IV. CONCLUSION

Verizon’s self-serving request that the Commission change the rules to the advantage of incumbent LECs and disadvantage of their remaining financially viable competitors can only serve to exacerbate, rather than lessen, instability and uncertainty in the telecommunications

¹⁵ See, e.g., *LaRose v. FCC*, 494 F.2d 1145, 1146 (D.C. Cir 1974) (“[A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.”); see also *NextWave Personal Communications v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001) (noting that the very purpose of Chapter 11 of the Bankruptcy Code is “to permit successful rehabilitation of debtors,” citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)).

industry. Nextel respectfully submits that existing legal requirements, both in the form of tariff provisions and the bankruptcy code framework, are sufficient to protect incumbent LECs from the risk of significant financial harm. Because Verizon has failed to demonstrate that the relief it seeks in its petition would serve the public interest, the Commission should deny the petition.

Respectfully submitted,

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August 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2002, I caused true and correct copies of the foregoing Opposition of Nextel Communications, Inc. to Verizon's Petition for Emergency Declaratory and Other Relief, the original of which was filed in the referenced proceeding via the FCC's Electronic Comment Filing System, to be mailed, postage prepaid, to:

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Dated: August 15, 2002

/s/ Ruth E. Holder