

DOCKET FILE COPY ORIGINAL
LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW
SUITE 802
WASHINGTON, D.C. 20006

RUTH MILKMAN
PHONE (202) 777-7726

PHONE (202) 777-7700
FACSIMILE (202) 171-7763

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November 12, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Verizon Telephone Companies Tariff FCC Nos. 1, 11,
14, and 16. Transmittal No. 226. WC Docket No. 02-317

Dear Ms. Dortch:

Attached for inclusion in the record of the above referenced proceeding are **an** original and four copies of the Redacted version of the Opposition of Nextel to Verizon Direct Case pursuant to the Protective Order entered in the above-referenced proceeding on October 31, 2002 (DA 02-2949).

Sincerely,



Ruth Milkman

Attachments

cc: Julie Saulnier (w/encl.)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter Of)
)
The Verizon Telephone Companies) WC Docket No. 02-317
Tariff FCC Nos. 1, 11, 14, and 16)
Transmittal No. 226)

OPPOSITION OF NEXTEL TO VERIZON DIRECT CASE

NEXTEL COMMUNICATIONS, INC.

By Its Attorneys:

Regina M. Keeney
Ruth Milkman
Lawler, Metzger & Milkman, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700

On the Non-Confidential Brief Only:

Thomas D. Hickey
Vice President and Deputy General Counsel

Robert H. McNamara
Senior Counsel – Regulatory

Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

November 12, 2002

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SUMMARY

Nextel Communications, Inc. (“Nextel”) requests that the Commission reject as unlawful Verizon Telephone Company’s (Verizon’s) suspended tariff language, authorizing it to require security deposits, letters of credit or advance payments from interstate access customers. In its direct case, Verizon failed to meet its legal burden of demonstrating that its proposed replacement tariff is just, reasonable, and not unreasonably discriminatory under Sections 201 and 202 of the Communications Act.

Verizon’s proposed use of bond ratings to determine the risk that a customer will not pay for access charges is arbitrary. Investment ratings on senior debt securities are unrelated to a carrier’s ability to pay, and are unrelated to the likelihood that a carrier will pay, its access charge bills. The criteria of “admissions” by the customer about its ability to pay its bills is also unreasonably ambiguous, by failing to specify the identity of the speaker, the form of the admission, and its content. In addition, Verizon’s direct case fails to explain how price-capped access rates, which already reflect uncollectible costs, should change if the tariff provisions take effect. The suspended tariff also unreasonably applies a “one-size-fits-all” approach to the “adequate assurance” determinations in bankruptcy proceedings, raising concerns that Verizon is prioritizing its bankruptcy claims ahead of similarly situated, financially healthy creditors, such as Nextel. In addition, Nextel opposes Verizon’s proposal to shorten the notice periods for a carrier customer’s payment of a security deposit and for disconnections from Verizon’s network.

The tariff provisions that Verizon proposes would give Verizon a powerful weapon that could be deployed against its competitors, such as Nextel. Verizon’s competitors remain highly dependent on Verizon’s network for interstate access services. For most routes, facilities-based

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competition for interstate access continues to be conspicuous by its absence. In Nextel's case, Nextel relies heavily on special access services purchased from Verizon and other incumbent local exchange carriers ("LECs") to offer its commercial mobile radio services in 197 of the top 200 U.S. markets, together with its affiliate Nextel Partners, Inc. At the same time, Nextel competes with incumbent LEC affiliates, such as Verizon Wireless. Should requirements for security deposits, letters of credit, or advance payments increase substantially, Verizon will be able to raise its rivals' costs and tie up its competitors' scarce working capital. In effect, the proposed tariff provisions would empower Verizon to impose additional economic hardships on financially healthy companies like Nextel. Moreover, the end result of such increased requirements is that Nextel would be paying more for Verizon's special access services – services that are repeatedly subject to outages.

The Commission should find that Verizon has failed to meet its burden to justify its suspended security deposit tariff provisions as just, reasonable, and not unreasonably discriminatory. Carrier customers with track records of on-time payments should not be subject to Verizon's proposed onerous security deposit requirement. The Commission should find Verizon's tariff transmittal to be unlawful.

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The Verizon Telephone Companies) **WC Docket No. 02-317**
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OPPOSITION OF NEXTEL TO VERIZON DIRECT CASE

I. INTRODUCTION

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby opposes the direct case filed by the Verizon Telephone Companies (“Verizon”) in the above-captioned tariff investigation, and requests that the Commission reject the suspended tariff language as unlawful. On October 7, 2002, the Wireline Competition Bureau released an order designating issues in the investigation of Verizon Transmittal No. 226. In that transmittal, Verizon sought substantial changes in previously-prescribed tariff provisions governing security deposits, letters of credit, or advance payments that Verizon could demand from its interstate access customers.’ In its direct case, Verizon failed to meet its legal burden of demonstrating that its proposed replacement tariff is just, reasonable, and not unreasonably discriminatory under Sections 201 and 202 of the Communications Act.²

¹ *The Verizon Telephone Companies, Tariff FCC Nos. 1, 11, 14 and 16, Transmittal No. 226, WC Docket No. 02-317, Order (rel. Oct. 7, 2002) (DA 02-2522) (hereinafter “Designation Order”).*

² 47 U.S.C. §§ 201-202.

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The tariff provisions that Verizon proposes would give Verizon a powerful weapon that could be deployed against its competitors, such as Nextel. As Nextel will discuss below, Verizon's competitors remain highly dependent on Verizon's network for interstate access services. For most routes, facilities-based competition for interstate access continues to be conspicuous by its absence. In Nextel's case, Nextel relies heavily on special access services purchased from Verizon and other incumbent local exchange carriers ("LECs") to offer its commercial mobile radio services in 197 of the top 200 U.S. markets along with its affiliate, Nextel Partners, Inc. At the same time, Nextel competes with incumbent LEC affiliates, such as Verizon Wireless. Should requirements for security deposits, letters of credit, or advance payments increase substantially, Verizon will be able to raise its rivals' costs and tie up its competitors' scarce working capital.³ In effect, the proposed tariff provisions would empower Verizon to impose additional economic hardships on financially healthy companies like Nextel. Moreover, the end result of such increased requirements is that Nextel would be paying more for Verizon's special access services – services that are repeatedly subject to outages. In Nextel's view, Verizon's carrier customers that have a track record of on-time payments should not be subject to onerous security deposits or their equivalent.

11. DISCUSSION

In its order initiating an investigation, the Bureau designated a number of issues and made numerous data requests. Of the issues designated, there are two of particular concern to Nextel. In this Opposition, Nextel first addresses whether the security deposit provisions

³ The carrier customer has virtually no bargaining power against demands for security deposits, since Verizon has the ability to discontinue service to that customer, and the customer has no practical alternatives to Verizon's network.

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applicable to interstate access customers are just and reasonable and not so vague as to permit Verizon to discriminate unreasonably among its interstate access customers.⁴ In Nextel’s view, Verizon’s proposed use of bond ratings to determine the risk that a customer will not pay for access charges is arbitrary, and the criteria involving “admissions” by the customer itself are unreasonably ambiguous. In addition, Verizon’s direct case fails to explain how price-capped access rates, which already reflect uncollectible costs, should change if the tariff provisions take effect. The suspended tariff also unreasonably applies a “one-size-fits-all” approach to the “adequate assurance” determinations in bankruptcy proceedings, raising concerns that Verizon is placing itself ahead of similarly situated, financially healthy creditors, such as Nextel. In addition, Nextel opposes Verizon’s proposal to shorten the notice periods for a carrier customer’s payment of a security deposit and for disconnections from Verizon’s network.’

A. The Provisions Requiring Security Deposits, Letters of Credit or Advanced Payments Are Vague, Ambiguous and Unreasonable

1. Verizon Has Failed to Explain Which Type of Security Will Be Rewired.

Verizon’s tariff language, allowing it to apply security deposits, require letters of credit, or compel advance payments, is unlawful under the Act, the Commission’s rules, and precedent.⁶ The Designation Order states that Verizon has given itself “considerable discretion” to require different forms of security, noting the tariffs deficiency in explaining how a carrier customer

⁴ Designation Order ¶¶ 11-23.

⁵ *Id.* ¶¶ 26-21.

⁶ For the sake of brevity, these various forms of security that Verizon has indicated it would accept are referred to as “security deposit” requirements in this pleading.

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could discern which of these requirements would be applied to the customer.’ Verizon’s Direct Case does not respond to the question presented – how a customer would know which option would apply to that customer. Verizon simply states that its carrier customers will have options in lieu of security deposits, namely letters of credit or advance payments. The Commission should not find that the existence of “options” makes the various alternatives lawful. There are substantial costs associated with each of the options Verizon presents. Payment of security deposits to Verizon ties up the cash of a competitor that would otherwise be put to other corporate purposes. A Letter of Credit requires payment of fees, and requires collateral in the form of cash or by a reduction in credit otherwise available to a company. The collateral requirement therefore reduces financial flexibility. Similarly, advance payments to Verizon would tie up the customer competitor’s scarce working cash, thereby reducing liquidity. Competitors would incur real costs replacing this liquidity.

2. Existence of Nondominant Tariffs with Similar Provisions Is Not Relevant to Lawfulness of Verizon’s Tariff.

Verizon argues that the existence in nondominant carrier tariffs of security deposit provisions similar to Verizon’s is evidence of the reasonableness of the Verizon tariff.⁸ Verizon’s argument is misleading. It is fundamental tariff law that, while tariffs of nondominant carriers are “presumed lawful,” the presumption is not a finding of lawfulness. Nondominant carrier tariffs have been found unlawful in both the tariff review process, and in the complaint

⁷ Designation Order ¶¶ 18-19.

⁸ Verizon Direct Case at 2-3, 9

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process.’ **An** unreviewed tariff is simply unreviewed. While the tariff has the force of law with respect to a customer obtaining service under its terms and conditions, there is no inference that can be drawn about its lawfulness under the Act. Moreover, as will be explained in Section 7 below, Verizon is a dominant carrier possessing market power and the ability to harm competitors by raising competitors’ costs. This factor alone should distinguish Verizon’s circumstance.

3. The Tariff Provisions Specifying Use of Bond Ratings Are Unjust and Unreasonable.

The Designation Order notes six criteria that Verizon will use to invoke a security deposit or advanced payment or letter of credit. The establishment of any one of the six criteria triggers the enhanced security provisions.” Two of the criteria specifically singled out by the Designation Order link a carrier customer’s senior debt security rating to Verizon’s ability to demand a security deposit.“ The Designation Order directs Verizon to explain how an investment rating on senior debt securities is a valid predictor of timely access payments.

⁹ *Capital Network System, Inc. v. FCC*, 28 F.3d 201 (1994) (affirming the Commission’s rejection, without hearing, of a nondominant carrier tariff); *Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corporation and Freedom Technologies, Inc. v. MCI Telecommunications Corporation*, 13 FCC Rcd 22568 (1998) (complaint decision finding **an** MCI tariff to be both unlawfully ambiguous and unreasonable in violation of section 201(b) of the Act).

¹⁰ Designation Order ¶ 21

¹¹ The two securities criteria are “(5) the customer’s or its parent’s senior debt securities are below investment grade as defined by the Securities and Exchange Commission; or (6) the customer’s or its parent’s senior debt securities are rated the lowest investment grade rating category by a nationally recognized statistical rating organization and are put on review by the rating organization for a possible downgrade.” *Id.*

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The short answer to the Commission’s question is that investment ratings on senior debt securities are unrelated to a carrier’s ability to pay, and are unrelated to the likelihood that a carrier will pay, its access charge bills. As a result, the criteria are unreasonable. Senior debt securities, or bonds, are long term (*e.g.*, having a term of more than one year) investments in a company. The bond investor agrees to receive the principal back at a specified future time (*e.g.*, when the bond reaches maturity), and in general also agrees to receive periodic payments of interest,

A bond’s credit rating¹² reflects an independent rating agency’s opinion of the issuer’s ability to pay interest on the bond and ultimately to repay the principal upon maturity. If those payments aren’t made in full and on time, the issuer has defaulted on the bonds.¹³

¹² Different rating companies use different rating systems. For example, Standard and Poors rates bonds as triple-A, double-A, single-A, or triple-B. High yield or “junk” bonds are rated double-B, single-B, triple-C, double-C or single-C. D signifies “default” – a company that has failed to meet its interest or principle commitments. *See* The Vanguard Group, “What’s A Credit Rating?”, *available at*: <<http://flagship2.vanguard.com/web/planret/AdvicePTIBInvestmentsWhatsACreditRating.html>> (last visited Nov. 12,2002). Moody’s uses a slightly different ranking system, *e.g.*, Baa instead of BBB and Ba instead of BB. In general, investment grade bond ratings contain the letter “A”, or are the highest of the “ B ratings a company uses. High yield or “junk” bond ratings are any rating below investment grade.

¹³ *See* The Vanguard Group, “Investing in Bonds,” *available at*: <<http://flagship2.vanguard.com/web/planret/AdvicePTIBInvestmentsInvestingInBonds.html>> (last visited Nov. 12,2002); *see also* Moody’s Investors Service, Global Credit Research, “Understanding Moody’s Corporate Bond Ratings and Rating Process,” Special Comment at 6, *available at*: <<http://www.moody.com/moodys/cust/staticcontent/2001400000399032/74982.pdf?section=rdef>> (May 2002): “Credit analysis consists of opinion forecasts (predictions) about the probability that a [bond issuer] will make promised payments. . . . There is an expectation that ratings will, on average, relate to subsequent [bond] default frequency, although they typically are not defined as precise default rate estimates.” While the paper notes that bond ratings have been applied in other contexts as a measure of financial health, the paper is very specific that the analysis and rating system exist to predict relative expected loss rates on corporate bond investments. *Id.* at 7.

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Stated simply, in the context of bonds a “credit rating” is regarded as a predictor of the likelihood that the bond issuer will pay interest and principal *on bonds*. Interstate access charge bills are not analogous to bonds. Furthermore, bond credit ratings are unlike, and completely disassociated from, consumer credit ratings that are based on outstanding debt and past payment history and that are used to predict the likelihood of a consumer to repay consumer credit. A bond rating issued by an independent agency does not predict whether a company will pay its bills for operating expenses, and certainly does not predict a camer’s ability or willingness to pay its access charge bills.

In addition, bonds that are rated just above or below investment grade levels represent one common way companies raise capital to operate and invest in their businesses. These bonds, which pay higher yields than do the “investment grade” bonds, no longer carry with them the negative connotations that they did in the 1970s or 1980s.

Issuers whose bonds trade in the high-yield market include many household names in addition to many lesser-known companies. . . . Why are high-yield bonds so popular today? For many issuers, high-yield bonds are a cost-saving alternative to borrowing money from banks.¹⁴

An estimated 80 percent of corporate debt is financed by commercial paper and public bond markets.” High yield bonds are commonly used in virtually every economic sector.

¹⁴ See Spear, Leeds & Kellogg, “Investor’s Guide to High Yield Bonds,” *available at*: <http://www.slk.com/bond/ig_hiyl/grown.html> (last visited Nov. 12, 2002). This guide also notes that in 1998, over 80% of all high yield bonds were rated single-B or above. This suggests that, depending on broader economic trends, numerous companies could issue high yield bonds for legitimate corporate purposes, but yet fail to meet Verizon’s “investment quality” criteria of triple-B or above.

¹⁵ See Eric Uhlfelder, “Making the Grade,” *Registered Rep.* (Oct. 1, 2002), *available at*: <<http://registeredrep.com/magazinearticle.asp?magazinearticleid=157912&magazineid=156&mode=print>>.

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Verizon's suggested criteria will have a discriminatory effect on competitors who use these high yield bonds as a routine form of financing. No Verizon affiliate will be subject to security deposits for any other requirement under this new tariff,¹⁶ Most tariff petitioners in this proceeding have a Standard & Poors bond rating below investment grade and therefore will be subject to security deposit requirements under the proposed tariff regulations. AT&T's bond rating was listed at the lowest investment grade level, and would also subject AT&T to security deposit requirements. But Verizon and its affiliates were listed at "A+."¹⁷ Under Verizon's criteria, only Verizon, BellSouth and SBC and their affiliates will escape the increased security deposit and/or advanced payment requirements.¹⁸

Verizon attempts to defend its two "credit-rating" criteria" by presenting an internal study that it claims demonstrates that the likelihood of paying interest and principal on bonds is

¹⁶ Verizon Direct Case at A-30

¹⁷ See Standard and Poor's, "Fixed Income Credit Ratings List" (Nov. 8, 2002), *available at*: <http://www2.standardandpoors.com/NASApp/cs/ContentServer?pagename=sp/Page/FixedIncomeRatingsListPg&r=1&b=2&s=&ig=&i=>>.

¹⁸ Moreover, Verizon's unreasonably discriminatory policy will yield an increasingly discriminatory outcome if the current economic downturn continues. Bond rating downgrades are currently more prevalent than upgrades. Moody's recently issued a rating action advising its clients that nearly one out of thirteen rated corporate issuers globally is currently under review for a downgrade. According to Moody's, utilities and telecommunications firms account for 40 percent of the bond issues under review. See Moody's Investors Service, "Rating Action: Correction to Text: Moody's Reports: Telecoms, Utilities, and Financial Institutions Dominate Watchlist (Nearly One Out of Thirteen Corporate Issuers On Review For Downgrade, Not One Out of Seven)" (Oct. 23, 2002).

¹⁹ Per Verizon's proposed tariff, security deposits would apply to customer carriers whose bonds are rated below investment grade, or where bonds are rated at the lowest level of investment grade. See *supra*, n. 11.

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related to the likelihood that a carrier customer will pay access charges.²⁰ [BEGIN

PROPRIETARY] [REDACTED]

[REDACTED]

[REDACTED] [END PROPRIETARY] Moreover, Verizon is incorrect in asserting that higher bond default rates experienced in the broader marketplace should justify its security deposit policy. Whatever decisions companies make about senior debt, the decision about paying access charge bills is a completely different order of decision-making. Access services are essential to a carrier's ability to continue to operate and therefore enable cash flow, and this payment of access charges is unlike the payment of senior debt. Bond ratings predict debt payment – not operating expense payment. The Commission should not allow Verizon to confuse the two, with the unreasonably discriminatory result that Verizon imposes security deposit requirements on everyone except itself and its affiliates.

²⁰ Verizon Direct Case at Exhibit A-11.

4. Verizon’s Criteria that Carrier “Admissions” of Inability to Pay its Bills Permit Increased Security Deposits is Vague and Ambiguous.

The Designation Order raises concerns about the provisions in Verizon’s tariff that allows Verizon to require security deposits if “the customer or its parent informs Verizon or publicly states that it is unable to pay its debts as such debts become due.” The Designation Order directs Verizon to explain how such statements, as compared to past payment history, enable Verizon to predict accurately whether it will receive access payments. The Order also asks Verizon to explain how its criteria would be applied in a manner that would not produce arbitrary and/or unreasonably discriminatory results.”

Verizon’s response, that the answer to the questions posed is “obvious,”” fails to defend or justify the inherently arbitrary and ambiguous tariff requirement that would impose higher security deposits for carrier customers. For example, Verizon’s tariff fails to specify who within the hierarchy of its carrier customer would be considered to have made an admission about inability to pay the bills. Would it be the chief executive officer, the chief financial officer, the corporate treasurer, the head of the investor relations office, or any vice president with any responsibility for paying any subset of operating expenses as an ongoing matter? Would the admission have to come from the Board of Directors? Or, could it be any employee of any rank or function? It is also unclear what form the admission would take. In addition, the tariff is completely silent on the content of the admission itself. What words other than “Corporation X is unable to pay its bills” would Verizon consider as an admission for the purpose of triggering

²¹ Designation Order ¶ 21.

²² Verizon Direct Case at 8.

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this tariff requirement? The tariff provides no guidance. Verizon’s Direct Case also **fails** to explain how this inherently ambiguous tariff requirement could be applied in a nondiscriminatory manner.

Verizon’s proposed tariff provision is inherently arbitrary and thus unlawful. Sections 61.2(a) and 61.54(j) of the Commission’s rules require that tariff language be clear and definite.²³ As the U.S. Court of Appeals for the D.C. Circuit has held, “[i]f a party could not reasonably ascertain the ‘proper application’ of the tariff at the time it **was** filed, the tariff **was** unclear and therefore was invalid.”²⁴ There is no way to ascertain who among the employees and directors of the carrier customer would speak the words that constitute the “admission” under Verizon’s tariff, Nor is there any guidance on what form the communication would take or what content would need to be communicated for Verizon to declare that an admission has been made. Without such specificity, the tariff can easily be applied in an arbitrary manner. The Commission should reject the tariff as unlawfully vague and ambiguous.

²³ 47 C.F.R. §§ 61.2(a) and 61.54(j). The former rule provides that “all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.” The latter rule states “[t]he general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely.”

²⁴ *Global NAPS, Inc. v. FCC*, 247 F.3d 252,258 (2001). See also *GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 988*, 11 FCC Rcd 3698, ¶ 7 (1995) (impossible to determine how GTE would exercise its discretion in deciding how it will provide services under a proposed tariff); *Southwestern Bell Telephone Co., Revisions to F.C.C. Tariff No. 73, Transmittal No 2312*, 9 FCC Rcd 1616, ¶ 11 (1994).

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5. Verizon’s Proposed “Insurance Policy” Against Uncollectible Debt is Unjust and Unreasonable.

The Designation Order directed Verizon to explain why its rates under price cap regulation do not adequately compensate it for the risk of uncollectibles.²⁵ The Order made a number of data requests. It also stated that permitting the tariff to take effect would “increase customer-supplied funding as well as reduce Verizon’s exposure to defaults.”²⁶ Accordingly, the Order requested that Verizon address what modifications the Commission should make to its price cap indexes and service band indexes.

The **risk** of uncollectibles is a fact of life in an economic downturn, affecting all industries in all sectors of the economy, including regulated sectors, such as telecommunications. Verizon’s interstate access rates already include some level of “cost” of uncollectibles, as do the prices for most goods and services in the economy.²⁷ That “cost” was embedded in Verizon’s rates when the Commission initiated price caps for interstate access. Moreover, the ongoing adjustment in uncollectible cost is one of innumerable cost changes endogenous to the economy-wide measure of cost changes used in adjusting price cap indexes.²⁸ If the cost of interstate access uncollectibles increased, and if that cost were not reflected in interstate access rates via

²⁵ Designation Order ¶ 12.

²⁶ *Id.*

²⁷ Verizon Direct Case at 12-13.

²⁸ *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, ¶¶ 185-86 (1989) (price cap formula ensures that aggregate rates can move in response to costs, ensuring rates remain in a “zone of reasonableness” and stating that the GNP-PI component of the formula is intended to reflect “the cost of factors of production” for carriers). This same theory was applied when price cap regulation was adopted for incumbent local exchange carriers. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 50-51 (1990).

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price cap regulations, interstate access earnings would be depressed. Yet Verizon's earnings on interstate access are remarkable only for their size and growth. According to AT&T, Verizon's ARMIS data shows that Verizon's interstate rate of return for special access grew from more than 2 percent in 1996 to nearly 22 percent in 2001.²⁹ If Verizon desires to now eliminate, or virtually eliminate, uncollectible cost, then Verizon also needs to provide information to determine how much interstate access charges should be decreased. Verizon's direct case fails to address this issue.³⁰ Based on its complete failure to justify its suspended security deposit plan as just and reasonable under price cap rules, Verizon's tariff should be found to be unlawful.

6. Bankruptcy "Adequate Assurance" is a Case-by-Case Determination.

Verizon proposes to amend its tariff to allow it to demand a security deposit from any customer that has "commenced a voluntary receivership or bankruptcy proceeding (or had a receivership or bankruptcy proceeding initiated against it.)" In the Designation Order, the Commission directed Verizon to discuss whether this requirement is contrary to the U.S. Bankruptcy Code and applicable case law governing payment to utilities by debtors.³² Counter

²⁹ If NYNEX's results are removed, Verizon earned over 37 percent on special access in 2001. *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Access Services*, RM No. 10593, Declaration of Stephen Friedlander at Exhibit 1, attached at Tab A to Petition for Rulemaking (filed Oct. 15, 2002) ("*AT&T Special Access Petition*").

³⁰ Compare Designation Order ¶ 12 with Verizon Direct Case at pages 12-16 (simply arguing that price cap formulas have not taken into account growth in uncollectibles).

³¹ Designation Order ¶ 10.

³² *Id.* ¶ 15.

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to Verizon's response in its Direct Case, Verizon's proposal is in fact inconsistent with the U.S. bankruptcy law and should be rejected by the Commission.

Like Verizon, Nextel is a financially healthy carrier that has found itself among the pool of creditors in other carriers' bankruptcies. Unlike Verizon, Nextel believes that the bankruptcy court should determine "adequate assurance" arrangements for camer creditors, and in any event, a carrier creditor should not use its tariff as a self-help means of improving its legal position with respect to "adequate assurance" or to receive greater assurances than other utilities receive. Under Section 366(b) of the U.S. Bankruptcy Code, utilities (including incumbent LECs) may not discontinue service unless a debtor fails to provide "adequate assurance of payment, in the form of a deposit or other security" within twenty days of a bankruptcy court's order of relief.³³ It is well established that federal bankruptcy courts have 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."³⁴ Certainly, where a utility and a debtor-in-possession disagree on what constitutes "adequate assurance," it is the bankruptcy courts that have the experience and expertise that are necessary to balance the interests of all parties. In any given case, the ultimate form that "adequate assurance" should take is properly left to the discretion of these courts.

Significantly, what constitutes "adequate assurance" is often a highly complex question, and federal bankruptcy courts approach this issue on a case-by-case basis, weighing the unique

³³ See 11 U.S.C. § 366(b).

³⁴ See *In re Adelpia Business Solutions*, 280 B.R. 63, 80 (S.D.N.Y. 2002) (**quoting** *Begley v. Phila. Electric Co.*, 41 B.R. 402,405-406 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985)).

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facts of each scenario.³⁵ Federal bankruptcy courts have concluded that adequate assurance to utility creditors can come in a variety of forms, and have rejected the notion that substantial security deposits or advance payments are necessary in every instance.³⁶ For example, these courts have found in several recent cases that an adequate assurance of payment is provided by a guarantee of an administrative expense priority in the post-petition setting.³⁷

In its Direct Case, Verizon has no choice but to concede that the bankruptcy courts are the “final arbiter[s]” of what constitutes adequate assurance of payment.³⁸ At the same time, in an effort to justify its proposed tariff provision, Verizon states that “the amount constituting adequate assurance of payment may be initially set by the utility” and that utilities have a right to a deposit as demanded unless the debtor can show cause to modify that amount.³⁹ In the cases cited by Verizon, however, the creditors’ “demands” were submitted directly to the bankruptcy

³⁵ See, e.g., *In re George C. Fye Co. (In re Frye)*, 7 B.R. 856,858 (D. Me. 1980).

³⁶ See, e.g., *Virginia Electric & Power Co. v. Caldor, Inc.*, 117F.3d 646, 650-51 (2d Cir. 1997); *In re Fye*, 7 B.R. at 858.

³⁷ Bankruptcy courts have found that where the “estate is sufficiently liquid, the guarantee of an administrative expense priority may constitute adequate assurance of payment for future services.” *In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010, 1014 (N.D.N.Y. 1982) (quoting H.Rep. No. 95-595, 95th Cong., 1st Sess. 350 (1977), U.S.Code Cong. & Admin.News 1978, p. 6306). In the WorldCom bankruptcy proceeding, the court recently found that an administrative expense priority provided Verizon and other carriers with adequate assurance, and concluded that security deposits were not necessary. *Order Pursuant to Sections 105(a) and 366(b) of the Bankruptcy Code Authorizing WorldCom to Provide Adequate Assurance to Utility Companies*, Case No. 02-13533 (Bankr. S.D.N.Y.) (Aug. 14,2002). That court came to the same conclusion in the Global Crossing bankruptcy proceeding several months earlier. *Order Pursuant to Sections 105(a) and 366(b) of the Bankruptcy Code Authorizing Debtors to Provide Adequate Assurance to Additional Utility and Telecommunications Companies*, Case Nos. 02-40187 (REG) through 02-40241 (REG) (Bankr. S.D.N.Y.) (Mar. 25,2002).

³⁸ Verizon Direct Case at A-24.

³⁹ *Id.* (citing *In re Tarrant*, 190 B.R. 704, 708 (S.D. Ga. 1995); *In re Best Products*, 203 B.R. 51, 54 (E.D. Va. 1996)).

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court, and these cases say nothing about the appropriateness of a federally-approved tariff as a mechanism for imposing a deposit requirement on individual debtors. The Commission has no particular interest or expertise in such bankruptcy determinations, and there is no legitimate rationale for an outcome that would leave the Commission's imprimatur on a particular form of assurance for a subset of creditor carriers. While Nextel believes that Commission approval of this tariff would not necessarily lead bankruptcy courts to pre-judge these important issues, the Commission should recognize the exclusive responsibility of these courts and disallow carrier efforts to create uniform tariff requirements that conflict with the bankruptcy courts' determination of adequate assurance. The tariff provision should be rejected as unlawful.

7. Verizon's Status as a Dominant Carrier, and Record of Poor Service Quality, Are Factors that Weigh Against Verizon's Claim that its Tariff is Reasonable.

While the determination of whether a tariff provision is unreasonable or unlawfully vague and ambiguous is a legal question, the determination should be informed by both Verizon's status as a dominant carrier, and the demonstrated poor quality of its interstate access services. Access to Verizon's network is critical if facilities-based competitors such as Nextel are to reach all their retail customers. Only a very small portion of the access connections that Nextel and other competitors purchase are subject to competition.⁴⁰ Without the ability to lease Verizon circuits, competitors cannot serve their customers. In contrast, if Nextel were to mimic Verizon's proposed policy, Nextel's customers would be free to find a new provider. But Nextel cannot find another vendor to replace Verizon. Stated differently, Verizon has the ability to raise its rivals' costs. This business reality should inform the determination as to whether the tariff

⁴⁰ See *AT&T Special Access Petition* at 25-32.

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language now suspended is unlawful, and should strongly caution against providing Verizon with discretion in its tariff to discriminate unreasonably as between its own affiliates and unaffiliated competitors.

Moreover, the very interstate access services that Verizon seeks to insure against nonpayment are the same services that have provoked a pending rulemaking to determine whether the Commission needs to prescribe service quality parameters.⁴¹ Verizon's service quality problems continue to be a significant issue for carriers like Nextel that depend upon its special access services. At the same time carrier customers are being asked to pay security deposits or advanced payments, Verizon's service continues to suffer from outages, and Verizon's liability to customers from those outages is highly limited by its tariff.

B. Verizon's tariff unreasonably limits notice periods for cut off to 7 days.

Verizon's suspended tariff would decrease the amount of time Verizon has to discontinue service to a carrier customer, assuming no security deposit is received, from 30 days to 7 days. In addition, Verizon may refuse to process additional or pending applications for service. A security deposit is due within 10 days from receipt of written notice from Verizon. The

⁴¹ *Performance Measurements and Standards for Interstate Special Access Services: Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services; Petition of Association for Local Telecommunications Services for Declaratory Ruling; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements; AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services; CC Dockets No. 01-123, 00-51, 98-147, 96-98, 98-141, 96-149, and 00-229, and RM 10329; Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).*

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Designation Order asks whether these provisions are just and reasonable.⁴² The Order specifically raises questions about the 10-day deadline for payment of a security deposit, and asks a series of questions about the timeliness of Verizon's own billing.

Verizon's argument that an "already lengthy" process has been invoked before a discontinuance notice is sent, is unpersuasive support for shortened notice periods. For Nextel, and for many other competitors that are dependent upon Verizon's special access services to provision their networks, the 10-day deadline to pay a security deposit is simply unreasonable. Competitive carriers must manage their credit, debt, and liquidity very carefully to meet investor expectations. Decisions affecting cash or a carrier's credit facilities are not casually made, and require deliberation, or perhaps consultations with third parties. Reducing the notice period for discontinuance from 30 days to 7 days is especially unreasonable in the context of special access services that Nextel purchases.⁴³ The Commission's general rules provide for a minimum 31 day notice period for the discontinuance of service so that end user customers can find another service provider.⁴⁴ While these rules do not apply to customer-specific disconnections for nonpayment, similar policy concerns are presented when the to-be-disconnected customer is a carrier whose own network will go dark if Verizon shuts down interstate special access circuits.⁴⁵

⁴² Designation Order ¶¶ 26-27.

⁴³ *Rhythms Links, Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, 16 FCC Rcd 17024, ¶ 10 (2001) (noting that the type of service being discontinued has a bearing on the reasonableness of permitting a network to shut down at the end of a 31 day notice period).

⁴⁴ 47 C.F.R. §63.71.

⁴⁵ The decision, made nearly 20 years ago, that a 15 day notice period is sufficient if the customer receives the bill within 3 days of the billing date, should be re-examined in this docket. *Annual 1987 Access Tariff Filings*, Memorandum Opinion and Order, 2 FCC Rcd 280 (1986). Determinations made by the Commission in 1986 with respect to notice by incumbent LECs to

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The Commission's 31-day notice period is the minimum period needed to ensure that end-user customers are able to find an alternative service provider.⁴⁶

interexchange carrier customers may not be reasonable where diverse carriers compete with LECs and their affiliates for local and wireless services.

⁴⁶ See, e.g., *Rhythms Links, Inc. Emergency Application to Discontinue Domestic Telecommunications Services*, 16FCC Rcd 16372, ¶ 9 (2001) (noting that Commission review of discontinuances of service is intended to assess whether customers have a reasonable opportunity to obtain substitutable service).

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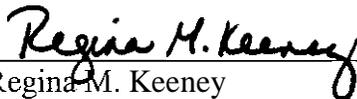
III. CONCLUSION

Based on the foregoing, the Commission should find that Verizon has failed to meet its burden to justify its suspended security deposit tariff provisions as just, reasonable, and not unreasonably discriminatory. Carrier customers with track records of on-time payments should not be subject to Verizon's proposed onerous security deposit requirement. The Commission should find Verizon's tariff transmittal to be unlawful.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

By Its Attorneys:



Regina M. Keeney
Ruth Milkman

Lawler, Metzger & Milkman, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700

On the Non-Confidential Brief Only:
Thomas D. Hickey
Vice President and Deputy General Counsel

Robert H. McNamara
Senior Counsel –Regulatory

Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

November 12,2002

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of November, 2002, I caused true and correct copies of the foregoing Opposition of Nextel to BellSouth Direct Case to be hand delivered to:

Ann H. Rakestraw
Verizon
1515 North Court House Road
Suite 500
Arlington, VA 22201

Julie Saulnier (three copies)
Federal Communications Commission
Pricing Policy Division
Wireline Competition Bureau
445 12th Street, S.W., Room 6-C222
Washington, DC 20554

Qualex International
Portals II
445 12th St., S.W., Room CY-B402
Washington, DC 20554



Ruth E. Holder