

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

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
1998 Biennial Regulatory Review –	)	
Streamlined Contributor Reporting	)	CC Docket No. 98-171
Requirements Associated with Administration	)	
of Telecommunications Relay Service, North	)	
American Numbering Plan, Local Number	)	
Portability, and Universal Service Support	)	
Mechanisms	)	
	)	
Telecommunications Services for Individuals	)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the	)	
Americans with Disabilities Act of 1990	)	
	)	
Administration of the North American	)	CC Docket No. 92-237
Numbering Plan and North American	)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution	)	
Factor and Fund Size	)	
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

**OPPOSITION TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION**

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby opposes the Petition for Limited Reconsideration filed by the Ad Hoc Telecommunications Users Committee (“Ad Hoc”) on the Federal Communications Commission’s (“Commission”) Report and Order modifying the current revenue-based universal service assessment methodology.<sup>1</sup> Nextel also supports the Petition for Reconsideration filed by Verizon Wireless.

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<sup>1</sup> Federal-State Joint Board on Universal Service *et al.*, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 02-329 (rel. December 13, 2002) (“Report and Order”).

Specifically, Nextel opposes Ad Hoc's challenge to the Commission's decision to permit carriers to recover certain of their administrative costs associated with USF-related collection and remittance activities in end user rates.<sup>2</sup> Ad Hoc totally ignores the rate forbearance that is the cornerstone of CMRS deregulation for nearly a decade in asserting, incorrectly, that the Commission has somehow given carriers carte blanche to exploit their customers. Alternatively, Nextel supports Verizon Wireless' Petition as consistent with the positions Nextel stated in its Petition for Reconsideration, and agrees with Verizon Wireless that universal service cost recovery restrictions violate the First Amendment of the U.S. Constitution by unlawfully restricting carriers' legitimate commercial speech.

**I. AD HOC SEEKS AN "OVER THE TOP" CMRS RATE PRESCRIPTION UNSUPPORTED BY EITHER LAW OR POLICY.**

New rule Section 54.712 limits, for all telecommunications carriers, the specific USF line item cost recovery that may be placed on an individual customer's bill. Beginning April 1, 2003, the Commission will only accept a line item that reflects the interstate telecommunications portion of a customer's total bill times the relevant USF contribution factor.<sup>3</sup> Critically, this new restriction on USF cost recovery is applicable to all carriers, without any consideration for the differences among the various telecommunications industry segments or their ability to conform to this rate

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<sup>2</sup> Ad Hoc Petition for Limited Reconsideration at 2. The Commission modified the manner in which carriers recover their USF costs from their customers "to address consumer concerns regarding disparate contributor practices." The members of Ad Hoc, however, are some of the nation's largest and wealthiest corporations. These are not the "consumers" the Commission expressed concern about protecting from unreasonable practices when it promulgated its revised USF rules.

<sup>3</sup> The Commission has clarified, however, that for wireless service providers, this requirement allows the application of either the upwardly-adjusted safe harbor or a carrier's own estimate of interstate revenues to be multiplied by the total telecommunications portion of a customer's bill. Federal-State Joint Board on Universal Service *et al.*, *Order and Order on Reconsideration*, CC Docket No. 96-45, FCC 03-20 (rel. January 30, 2003).

prescription.<sup>4</sup> Thus, under the revised rule, CMRS providers are prohibited from collecting any amount above the contribution factor, including administrative costs, on any separate USF line item on customer bills. As Nextel demonstrated in its Petition for Reconsideration, however, not only is the Commission’s new “mark-up” policy impractical if not impossible for CMRS carriers to implement, it contradicts nearly a decade’s worth of law and Commission policy expressly favoring deregulation of wireless carrier rates and reliance on the market to ensure reasonable rates and practices.<sup>5</sup>

To obscure the prescriptive effect of the new “mark-up” restriction, the Report and Order stated that carriers that are not rate-regulated, including CMRS providers, will continue to “have the same flexibility that exists today to recover legitimate administrative and other related costs. In particular, such costs can always be recovered through these carriers’ rates or through other line items.”<sup>6</sup> Wireless carriers have always been, and based on the Commission’s recent statement, continue to be able to adjust their rates in response to the market and to reflect the additional costs of regulations and mandates in their rates. The Commission’s determination to impose a mark-up restriction on CMRS carriers was done without any reference to the Commission’s previous decision to forbear from CMRS rate regulation. This reversal in policy was arbitrary and unexplained.

Not satisfied that the Commission limited USF cost recovery sufficiently to suit its members, Ad Hoc suggests – without any support – that the Commission go a step further and prohibit CMRS carriers from recovering virtually any of their USF expenses through end-user

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<sup>4</sup> Report and Order at ¶¶ 40, 49.

<sup>5</sup> Nextel Petition for Reconsideration at 7-17.

<sup>6</sup> Report and Order at ¶ 55.

rates.<sup>7</sup> In particular, Ad Hoc “seeks reconsideration of that portion of the Report and Order, that seemingly would allow carriers to collect from their customers through separate line item charges, without regard to the level of those charges, administrative costs that the carriers allegedly incur to collect and remit their contributions to the Universal Service Fund (USF).”<sup>8</sup>

As explained in Nextel’s Petition, however, CMRS carriers do not operate in a rate-regulated environment and consumers have benefited substantially from this regime. Pursuant to authority from Congress, the Commission in 1994 determined to forbear from regulating CMRS carrier rates. In making that determination, the Commission observed that: “in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.”<sup>9</sup>

Subsequent to its 1994 decision, the Commission time and again has rejected requests by state commissions to allow any form of rate regulation.<sup>10</sup> CMRS consumers have benefited demonstrably from a truly competitive environment free of regulatory restraint on the rates charged for service. Thus, whenever the Commission has had an opportunity to evaluate the state of the CMRS industry, it strongly concludes that the vibrantly competitive CMRS marketplace, not rate

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<sup>7</sup> Ad Hoc Petition for Limited Reconsideration at 2.

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

<sup>9</sup> Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994).

<sup>10</sup> The Commission rejected every state request – seven in all – to regulate the rates for CMRS service within its borders. *See, e.g.*, Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, *Report and Order*, 10 FCC Rcd 7486 (1995); Petition of the Connecticut Dept. of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd 7025 (1995), *aff’d sub nom. Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

regulation, accounts for the benefits being delivered to CMRS subscribers.<sup>11</sup> As a result of the Commission’s CMRS policies, the CMRS industry has flourished as a prime example of the success of the Commission’s rate deregulation and competition policies.

USF restrictions prohibiting CMRS carriers from recovering their administrative or other USF implementation costs through rate adjustments would undoubtedly dictate what CMRS carriers can charge their customers – which is rate regulation. “Rates . . . do not exist in isolation,” but are made up of the components of what it costs to provide the services to which they are attached.<sup>12</sup> Rate regulation, therefore, necessarily includes regulation of how and whether carriers choose to recover their costs through their rate structures, and any regulation of a carrier’s recoupment of its costs necessarily involves the regulation of that carrier’s rates for service.<sup>13</sup>

Ad Hoc simply provides no justification that would support a CMRS rate restriction wholly at odds with established Commission precedent. Indeed, Ad Hoc merely suggests that it is “concerned” that carriers will construe the Report and Order as “allowing the imposition of separate ‘administrative cost’ line items without limit.” *Speculation over such “limitless” cost recovery mechanisms, however, is not enough to warrant overturning nearly a decade’s worth of deregulatory policy, particularly to regulate a single aspect of otherwise unregulated CMRS rates.*

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<sup>11</sup> See, e.g., *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless, and New Par*, *Memorandum Opinion and Order*, 17 FCC Rcd 898, n.69 (2002), *appeal pending* (noting that with respect to CMRS, the Commission has relied on market forces, rather than regulation, except when there is a complete market failure).

<sup>12</sup> See, e.g., *AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998).

<sup>13</sup> *AG v. PSC*, 597 N.W.2d 264 (Mich. Ct. App. 1999) (“a utility’s future rates inevitably include the recoupment of certain costs already incurred.”); See also *Abrams v. Public Service Comm’n*, 136 A.D.2d 187 (N.Y. App. Div. 1988) (Under the entire scheme of statutory ratesetting, the determination of “just and reasonable charges” includes a the “cost recovery element thereof”).

## **II. AD HOC'S SALES TAX ANALOGY FAILS TO SUPPORT A CMRS RATE PRESCRIPTION.**

Ad Hoc would have the Commission believe that state sales tax regimes are entirely analogous to the USF cost recovery mechanisms under review by the Commission.<sup>14</sup> In particular, Ad Hoc urges the Commission to look to local sales tax regimes for guidance both as to the overall magnitude of USF administrative costs as well as to the extent to which entities that collect government-imposed charges are to be compensated for such costs.<sup>15</sup>

Local sales tax issues are not analogous to USF carrier-cost recovery and are wholly irrelevant to the issue. Indeed, the local sales tax comparison only underscores Ad Hoc's misunderstanding of the scope of deregulation of the CMRS industry. While rate deregulated, CMRS carriers shoulder the costly regulatory burdens that are not shared by retail points of purchase. For example, CMRS carriers must create systems to distinguish between local and long distance traffic to estimate a USF interstate revenue proxy. Further, retail establishments are not liable for implementing other costly unfunded mandates such as number pooling and portability, E-911 implementation and compliance with the Communications Assistance Law Enforcement Act. In reality, the local sales tax comparison sheds no light on the issue of permissible CMRS carrier mark-ups and should be disregarded.

## **III. THE NEW MARK-UP RESTRICTIONS ON CMRS CARRIERS USF COST RECOVERY VIOLATE THE FIRST AMENDMENT.**

Nextel, like Verizon Wireless, objects to the Commission's unexplained determination to modify the manner in which CMRS carriers recover the costs of USF. Nextel also agrees with Verizon Wireless that the "new universal service cost recovery restrictions also violate the First

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<sup>14</sup> Ad Hoc Petition for Limited Reconsideration at 2.

<sup>15</sup> *Id.*

Amendment of the U.S. Constitution by unlawfully restricting carriers legitimate commercial speech.”<sup>16</sup>

To pass muster under the First Amendment, the government faces a high hurdle. Indeed, to withstand a First Amendment challenge, the Commission must be able to demonstrate that the asserted governmental interest is substantial and that the regulation or restriction imposed on free speech directly advances that governmental interest. In addition, the restriction imposed on commercial speech must not be more extensive than is necessary to serve that interest.<sup>17</sup> The Commission’s prohibition of mark-ups cannot pass this test.

First, the Commission has failed to show that its stated interest, *i.e.*, “to protect consumers” by eliminating a significant portion of the consumer frustration and confusion pertaining to universal service line item due to interexchange carrier line item mark-ups well above the contribution factor, is directly advanced by restricting CMRS carriers from passing through their actual universal service costs via a line item.<sup>18</sup> As stated in Nextel’s Petition for Reconsideration, ***the new mark-up restriction “does not serve its stated purpose” because there is no showing whatsoever that CMRS carriers have perpetrated any offensive systemic USF mark-up on their subscriber’s bills.*** Indeed, just the opposite is true, since over-recovery of regulatory program costs by wireless carriers only reduces consumer demand for their services.<sup>19</sup>

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<sup>16</sup> Verizon Wireless Petition for Reconsideration at 10.

<sup>17</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 557 (1980).

<sup>18</sup> See Report and Order at ¶¶ 49-50.

<sup>19</sup> In the Truth-in-Billing docket, for instance, the Commission stated the “record does not, however, reflect the same high volume of customer complaints in the CMRS context, nor does the record indicate that CMRS billing practices fail to provide consumers with the clear and non-misleading information they need to make informed choices.” See Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492, 7501-02 (1999).

Absent a genuine record of complaints against CMRS providers regarding misleading USF billing practices, the Commission’s mark-up restriction cannot survive a First Amendment analysis. Indeed, the courts have made plain that the burden of demonstrating that a speech restriction directly and materially advances the asserted governmental interest “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms recited are real, and that its the restriction will in fact alleviate such harms to a material degree.”<sup>20</sup>

Critically, in this case, the Commission cannot demonstrate that there is consumer harm in the CMRS context that necessitates the adopted restrictions on commercial speech. According to the Report and Order, the major motivating factor for elimination of the mark-up is the fact that IXC line items for USF costs significantly exceed the amount of the contribution factor. The Commission itself acknowledged this point: “The contribution factor for the fourth quarter of 2002 is approximately 7.28 percent, but the federal universal service line items assessed on residential customers by the three largest interexchange carriers significantly exceed this amount.”<sup>21</sup>

In addition to failing to show that the mark-up restriction “directly advances” the stated governmental interest, the Commission also fails to demonstrate that the new line item restriction is narrowly tailored to advance the governmental interest. As Verizon Wireless correctly notes, the Commission merely states that the mark-up restriction “*should* eliminate a significant portion of the consumer frustration and confusion pertaining to universal service line items. . . . [and] *should* foster a more competitive market by better enabling customers to comparison shop among

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<sup>20</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (citations omitted).

<sup>21</sup> Report and Order at ¶ 46.

carriers.”<sup>22</sup> This “wishful thinking” is simply not enough to pass the “narrowly tailored” portion of the First Amendment test.

According to the Supreme Court, “a regulation of commercial speech must be narrowly tailored to achieving the government’s interests.” As such, there must be a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends, – a fit . . . that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”<sup>23</sup> There is no “fit” in this case. ***The Commission is seeking to redress a practice observed in the interexchange industry, yet it imposes a sweeping restriction on USF line-item cost recovery on all carriers.*** As previously noted, the CMRS industry is a highly competitive industry that is governed by market forces alone. The Commission effectively overturned a decade’s old forbearance policy without first showing how the public will in any way benefit from the new USF mark-up restriction. As such, the restriction cannot be said to be “narrowly tailored” to achieve the Commission’s objective as to the CMRS industry.

Furthermore, the Commission cannot demonstrate that the benefits of the recovery requirement will outweigh the costs to carriers to implement the new mark-up restriction. As Nextel and other carriers have stated, the new mark-up rule will require carriers to modify drastically their billing practices, and to incur additional administrative costs associated with customer notification and USF collection from end users that cannot be recovered through the newly-constrained USF line item.<sup>24</sup> Absent a public benefit to wireless consumers, these

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<sup>22</sup> Verizon Wireless Petition for Reconsideration at 12 (citing Report and Order at ¶ 50) (emphasis added).

<sup>23</sup> *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 501-02 (1997) (citations omitted).

<sup>24</sup> *See, e.g.*, Nextel Petition for Reconsideration at 16; Verizon Petition for Reconsideration at 13. The Commission has recognized these added costs: “these changes may require modifications in billing practices for certain carriers . . . [and] we acknowledge that contributors may continue to incur some administrative  
(continued...) ”

expenditures are not justified, and the mark-up restriction as applied to CMRS carriers must fail under the First Amendment.

#### IV. CONCLUSION

Ad Hoc disregards the CMRS rate forbearance policy that has been in place for nearly a decade in suggesting, incorrectly, that the Commission has provided carriers with unlimited discretion to exploit their customers. In the context of CMRS, the Commission has put its faith in the intensely competitive marketplace to control rates. The Commission must confirm this determination on reconsideration and reject Ad Hoc's petition. Nextel supports Verizon Wireless' petition for reconsideration, which correctly raised the Constitutional infirmity of the Commission's new limitation on CMRS carrier mark-ups.

Respectfully submitted,

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costs associated with the collection of the universal service charges from end users that may not be recovered through a federal universal service line item." Report and Order at ¶¶ 52-54.

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 27<sup>th</sup> day of February, 2003, a copy of the foregoing “**OPPOSITION TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION**” was mailed to the following:

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