

**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

**REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits this Reply to the oppositions filed in response to the Petition for Reconsideration filed by Nextel on the Federal Communications Commission’s (“Commission”) Report and Order modifying the current revenue-based universal service assessment methodology.<sup>1</sup>

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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 replies to those oppositions that support the Commission's new mark-up restriction.<sup>2</sup> As explained in Nextel's Petition for Reconsideration, the mark-up restriction as applied to CMRS is an impermissible rate prescription that contravenes years of wireless rate deregulation.<sup>3</sup> It also imposes pointless added administrative costs on an industry that is already overly burdened by the costs of implementing other costly Commission mandate programs. Nothing in the oppositions refutes this point or provides any new justification for the Commission's rate prescription.<sup>4</sup>

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<sup>2</sup> See NASUCA Opposition at 3 ("if regulatory fees are not built in to other rates, they should be explicit and uniform on customers' bills."); AOL Time Warner Comments at 3 ("AOL Time Warner urges the Commission . . . to reaffirm its decision imposing reasonable limits on carrier discretion to pass-through universal service contribution charges. These limitations were adopted to reduce the discriminatory practices and the customer confusion resulting from the flexibility permitted carriers under the previous rules."); EarthLink Comments in Opposition at 3 ("The Commission should maintain the reasonable limits adopted when the carrier chooses to pass through its universal service contribution obligations to its customers."). The mark-up restriction contained in new rule Section 54.712(a) provides that "Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a telecommunications carrier chooses to recover its federal universal service contribution costs through a line item on a customer's bill, as of April 1, 2003, the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor."

<sup>3</sup> Nextel Petition for Reconsideration at 7-17. The Commission claims that it provided flexibility for the recovery of USF administrative and other costs by directing these costs be recovered elsewhere. If, at the end of the day, carriers recover the same overall amount, then costs of the "no-markup" regulation far outweigh *any* identified benefit. If instead the intense competitiveness of a market segment precludes the ability of carriers to recover their full USF costs, then the Commission's claim that it has not constrained cost recovery non-rate regulated carriers is incorrect and the rule must be reconsidered.

<sup>4</sup> While certain commenters, like NASUCA, support the mark-up restriction because it provides customer transparency on their bills others, like AT&T Corp., object to eliminating the mark-up restriction for wireless carriers only. Instead, these carriers suggest that it should be eliminated for all industry segments. Nextel takes no position on the merits of extending the relief it seeks for CMRS carriers to other industry segments; Nextel maintains, however, that CMRS service structure and history demonstrate no pattern of USF cost recovery abuse.

In addition, Nextel replies to those oppositions that challenge Nextel's request to exempt state and local governments from USF recovery assessment.<sup>5</sup> This government exemption is necessary to prevent loss of revenue from those government customers who refuse to pay the USF line-item and eliminates the prospect of carriers being forced to either discriminate in favor of those state and local government customers or to absorb significant revenue shortfalls.<sup>6</sup>

**I. RESTRICTIONS ON CMRS FLEXIBILITY TO RECOVER USF FUNDING OBLIGATIONS CONTRAVENE WELL-ESTABLISHED COMMISSION POLICY AND RULES REJECTING CMRS RATE REGULATION.**

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. Specifically, 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. As CTIA and the wireless industry have demonstrated, the new "mark-up" restriction flies in the face of almost ten year's worth of law and Commission policy deliberately favoring competition and deregulation of wireless

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<sup>5</sup> WorldCom Comments at 4-5; SBC Comments at 7.

<sup>6</sup> Nextel also replies to SBC's contention that Nextel's requests to reconsider the newly imposed "all or nothing" election requirement for CMRS providers that avail themselves of the safe harbor is moot. According to SBC, the Commission has resolved the issue in the *Universal Service Contribution Reconsideration Order* by clarifying the definition of "affiliate" for purposes of CMRS providers making their election. See SBC Comments at 8. In the *Universal Service Contribution Reconsideration Order* the Commission adopted Section 1.2110(c)(5)'s affiliate definition to determine whether wireless carriers are "affiliated" for USF contribution purposes. Critically, however, the Commission did *not* consider Nextel's entire request on reconsideration that the Commission include a rebuttable presumption that separately traded public corporations should not be considered "affiliates" for this purpose. Nextel's petition for reconsideration is therefore still ripe for consideration on this issue and, contrary to SBC's assertion, the "justification for eliminating the 'all or nothing' safe harbor election requirement" has *not* been removed. SBC Comments at 8.

carrier rates.<sup>7</sup> The Commission’s stated purpose of restricting a USF line item mark-up was to prohibit the abusive pass through practices of some interexchange carriers. Extending the prohibition to CMRS carriers is plainly unjustified.

Despite this *undisputed* fact, however, certain carriers argue that the Commission should deny Nextel’s request for reconsideration of the new mark-up restriction because deregulated carriers, like CMRS carriers, “retain the ability to recover the total cost of their participation in the universal service program, including administrative costs and unbillable amounts, for their customers.”<sup>8</sup> The theoretical ability of CMRS carrier to raise their overall rates, however, is irrelevant to the fact that the Commission’s new USF mark-up restriction is an unjustified rate regulation as applied to CMRS carriers. Wireless providers have always been 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, however, was instituted without any consideration of the Commission’s previous decisions to forbear from regulating any aspect of CMRS rates, including their method of cost recovery.<sup>9</sup> Indeed, as the Cellular Telecommunications and Internet Association (“CTIA”) noted, the “prohibition on flexibility in the recovery of USF assessments contravenes long-standing and well-

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<sup>7</sup> See, e.g., Nextel Petition for Reconsideration at 9-11; Verizon Wireless Petition for Reconsideration at 5-6; CTIA Comments at 3-4.

<sup>8</sup> See SBC Comments at ¶ 7.

<sup>9</sup> It is well understood that rate regulation 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. See, e.g., *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”).

established Commission policy and rules regarding CMRS rate regulation.”<sup>10</sup> Nothing new has been offered in the oppositions or comments that alter this or justify applying the mark-up restriction on wireless carriers.

Moreover, contrary to NASUCA’s contention, the ILECs’ practice of passing through a 3% federal excise tax (without markups) for over one hundred years, does not prevail over or weaken Nextel’s claim that the “mark-up” restriction is an impractical, if not impossible rate regulation for CMRS carriers to implement.<sup>11</sup> CMRS carriers are not ILECs and obviously do not operate in the same regulatory environment. Indeed, CMRS carriers, unlike landline service providers, do not file state or federal tariffs establishing charges for services and recovery of government-imposed taxes, assessments and surcharges. Instead, CMRS carriers establish contractual terms with their customers governing the rates and fees for service. Under the Commission’s USF assessment recovery restrictions, however, CMRS carriers would be adjusting the USF line item assessment every time the quarterly USF assessment factor changes. Such system would undoubtedly lead to increased costs to wireless carriers and the potential for customer confusion as these USF assessment recovery charges change.<sup>12</sup>

Finally, contrary to assertions of AOL Time Warner and EarthLink, the USF mark-up restriction does not serve its stated purpose to reduce excessive IXC line item USF mark ups.<sup>13</sup>

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<sup>10</sup> CTIA Comments at 3.

<sup>11</sup> NASUCA Opposition at 5.

<sup>12</sup> See CTIA Comments at 4.

<sup>13</sup> See AOL Time Warner Comments at 3 (noting that the mark-up restriction was “adopted to reduce the discriminatory practices and the customer confusion resulting from the flexibility permitted carriers under the previous rules.); EarthLink Comments in Opposition at 3. See Report and Order at ¶ 46. The major motivating factor for elimination of the mark-up is the fact that IXC  
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According to EarthLink, “while carriers enjoyed under prior Commission orders, a high degree of flexibility to implement a fair and equitable USF pass through, many carriers squandered that freedom with unreasonable abusive practices. . . .”<sup>14</sup> ***Not surprisingly, however, neither EarthLink nor any other commenter point to a single instance of a CMRS carrier participating in this alleged abuse.***

As explained in its Petition for Reconsideration, Nextel does not now and has never treated its universal service funding obligation as an occasion to make money. Nextel recovers its USF funding costs from the only source available to it: its customers. As further explained in the Nextel December 4, 2002 *Ex Parte*, however, USF fees, like any other fee, assessment or tax, no matter whether they are listed as a line item or as part of some other rate element, depress demand for wireless services.<sup>15</sup> Wireless carriers thus have no economic incentive to over-recover because it could reduce demand for their services. In the intensively competitive CMRS market and in a climate where investors and Wall Street punish carriers that fail to meet projected growth estimates, this is a very serious matter. No commenter was able to demonstrate otherwise or to provide any

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line items for USF costs significantly exceed the amount of the contribution factor: “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>14</sup> EarthLink Comments in Opposition at 3.

<sup>15</sup> Indeed, wireless services are extremely susceptible to changes in demand as the total price of the service increases with increasing taxes, fees and assessments, or TFAs. In contrast, very few customers of local wireline service disconnect service when TFAs increase. *See* Letter to Michael K. Powell, Chairman of the Federal Communications Commission, from Leonard J. Kennedy, Senior Vice President and General Counsel for Nextel Communications, Inc., and Lawrence R. Krevor, Vice President of Government Affairs for Nextel Communications, Inc., at 2 (filed December 4, 2002).

evidence of CMRS carrier USF pass-through misconduct. Therefore, absent any showing *whatsoever* that CMRS carriers have been responsible for misleading USF billing practices, the Commission's decision to make its mark-up restriction applicable to *all* carriers, is nothing more than an over-reaching rate prescription that warrants reconsideration.

## **II. CMRS CARRIERS MUST BE PROVIDED FLEXIBILITY IN RECOVERING USF ASSESSMENTS FROM DIFFERENT END USER CLASSES.**

The record demonstrates that carriers should be given sufficient flexibility to create new classes of customers exempt from USF cost recovery fees. As Nextel demonstrated in its Petition, an increasing number of state and local government customers are disputing their obligations to pay federal USF charges either by stating it is a tax from which they are exempt or that it is a fee that they should not have to pay.<sup>16</sup> Nextel is not alone in its experience with these customer refusals. According to Sprint, for example, it “has also experienced refusals by certain government agencies – Federal as well as state and local – to pay their share of universal service costs and believes that this problem is sufficiently widespread that explicit Commission action is necessary.”<sup>17</sup> Nextel agrees that this refusal to pay a share of USF costs by these customers is not insignificant and raises the prospect of carriers discriminating in favor of government customers or having to absorb substantial revenue shortfalls.

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<sup>16</sup> See Nextel Petition for Reconsideration at 21; *see also* Comments of Nextel Communications Inc., in CC Docket No. 96-45, *et al.* at 28 (filed on April 22, 2002).

<sup>17</sup> Sprint Corp. Comments at 6. Sprint suggests that the Commission “should make quite clear that all customers have an obligation to pay the USF line item charges. Failing such solution, the next best solution is Nextel’s proposal. . . .” *Id.* Nextel agrees that all customers should have an obligation to pay USF charges. The Commission, however, has already determined that all subscribers have such an obligation. As a practical and legal matter, this has proven to be insufficient and the Commission simply does not have jurisdiction over end user customers to force them to pay these fees.

WorldCom suggests in its opposition that Nextel is free to invoke the “fresh look” provisions in its contract negotiations to make up for the governments’ refusal to pay the USF fee.<sup>18</sup> As a practical matter, however, this type of contract renegotiation is simply not possible. Individual CMRS providers simply do not have the market power to compel state and local governments to reopen each and every procurement process. Even assuming that CMRS providers could require any of their government customers to engage in this type of contract renegotiation, the additional time and resources that would be necessary to reopen and renegotiate *all* such agreements would be prohibitive.

Plainly, the refusal by some government customers to pay their USF pass through fees is a considerable obstacle faced by wireless carriers in recovering their USF assessments that, if left unchecked, will lead to sizeable wireless cost increases. The Commission must therefore recognize certain customer exemptions from USF charges and eliminate the prospect of carriers being forced to discriminate in favor of state and local government customers. No commenter has demonstrated that such an exemption is in any way contrary to Commission policy or precedent and, to the contrary, the record shows that such an exemption is consistent with the current public policy exemption made to USF contributions for Lifeline telephone subscribers. Moreover, permitting carriers to exempt certain customer classes from USF contribution fees would also create a more neutral competitive environment and eliminate the administrative burdens on carriers.

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<sup>18</sup> WorldCom Comments at 5; *see also* SBC Comments at 3-4 (“SBC, however, does not agree with Nextel that the Commission should enlarge the exemption from universal service recovery charges for Lifeline customers to include state and local governments.”).

### III. CONCLUSION

Based on the foregoing, Nextel requests that the Commission, on reconsideration, act in accordance with this Reply and its Petition for Reconsideration.

Respectfully submitted,

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March 10, 2003

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 10<sup>th</sup> day of March, 2003, a copy of the foregoing “**REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**” was mailed to the following:

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