

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act)	CC Docket No. 96-98
of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications)	
Capability)	

NEXTEL COMMUNICATIONS, INC. REPLY TO OPPOSITIONS

Nextel Communications, Inc. (“Nextel”), submits this reply to oppositions filed in response to the petitions for reconsideration or clarification of the Federal Communications Commission’s (“Commission”) *Triennial Review Order* in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY.

The Commission correctly determined in the TRO that Commercial Mobile Radio Service (“CMRS”) carriers are entitled to unbundled network elements (“UNEs”) as requesting telecommunications carriers providing qualifying services in competition with incumbent local exchange carriers (“ILECs”). The Commission must now provide additional clarification or reconsideration that critical non-competitive links ILECs provide to CMRS carriers between numerous wireless carrier cell sites and ILEC central offices are available, separately and in loop-transport combinations, on a non-discriminatory basis at UNE prices.

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, ¶ 1 (rel. Aug. 21, 2003), *appeal pending sub. nom., United States Telecom Association v. FCC*, Appeal No. 03-1310 (D.C. Cir.) (hereafter “TRO”).

Contrary to ILEC expectations, the Commission must stand fast against ILECs whose filed oppositions make quite plain that they would have the Commission impede intermodal competition by withholding UNE pricing for critical facilities. Moreover, the Commission should heed the strong support of Nextel and other CMRS carriers by the CLEC industry and clarify its rules to remove any needless uncertainties or limitations that would constrain the ability of CLECs to provide UNEs to CMRS carriers in the “last-mile” market that the ILECs have so dominated. On reconsideration, the Commission must clarify that CMRS carriers, as well as CLECs, are able to access the ILECs’ “last mile” facilities on an unbundled basis.

II. UNE ACCESS TO ILEC TRANSMISSION FACILITIES BETWEEN WIRELESS BASE STATIONS AND ILEC WIRE CENTERS IS CRITICAL TO INTERMODAL COMPETITION.

A. The “Last Mile” Link from the ILEC Central Office to the Wireless Carrier Cell Site Is the Equivalent of a UNE Loop.

The ILECs that oppose Nextel’s Petition fail to offer any reasonable explanation to refute that the last mile link from the ILEC serving wire center to the CMRS cell sites is the functional equivalent of a UNE loop. Nor could they. There is no basis to differentiate between UNE loops and ILEC facilities deployed to CMRS carrier cell sites. As many of the comments recognize, classifying ILEC facilities deployed to CMRS carrier cell sites as UNE loops is consistent with the TRO regime.² For one, CMRS carriers provide qualifying services – a prerequisite for UNE access.³ The Commission already determined that because “CMRS are used to compete against telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs services, CMRS providers also qualify for access to UNEs.”⁴ In addition, Commission rules require technological neutrality in the assessment of UNE eligibility. As stated

² See, e.g., Comments of El Paso Networks at 6.

³ To “gain access to UNEs, carriers must provide qualifying services using the UNE to which they seek access.” TRO at ¶ 135.

⁴ *Id.* at ¶ 140.

in a T1, DS1 or DS3 delivered to a cell site or T1, DS1 or DS3 delivered to a residence or business or any other point in the network where the ILEC deploys facilities from a central office to an address within a specific boundary that is not another central office.”⁸ In addition, the “facilities between a cellular base station and a switch are not used to ‘backhaul’ traffic from one switch to another but rather are used to haul originating and terminating traffic from a point of switching to a point of concentration within the functional equivalent of an ILEC’s loop network.”⁹ And, as noted in the joint comments of El Paso Networks, FPL Fibernet and McLeod USA, many cell sites are located at multi-tenant buildings and both UNE loop and cell site loops terminate at the same point in the building and are, as a technical matter, indistinguishable.¹⁰

Arguing from the perspective of a potential service supplier to CMRS carriers, these CLECs assert impairment in their continuing inability to obtain unbundled access to the ILEC transmission facilities connecting to their CMRS customers. ILECs consistently insist that CLECs and CMRS carriers pay exorbitant special access rates for cell site connections. As a consequence, without Commission clarification of UNE availability, no party, CMRS carrier or CLEC, will have the ability to access ILEC facilities that run to the cell site on an unbundled basis. CLECs that have deployed their own networks, provisioning systems, platforms, and transport mechanisms between CMRS carrier mobile switching centers and the ILEC central offices can offer the CMRS carriers an alternative and reliable transport option, *but only if they can use existing ILEC loop facilities to cell sites as a UNE.*

CLECs, acting as wholesale carriers providing service to CMRS carrier-customers, as well as CMRS carriers, need unbundled access to these essential ILEC facilities. The Commission’s

⁸ Comments of El Paso Networks at 6.

⁹ Comments of Cellular Mobile Systems of St. Cloud at 2.

¹⁰ Comments of El Paso Networks at 8.

goal of fostering intermodal competition for the benefit of American consumers would be advanced by providing UNE access to these facilities.

B. The FCC Can Alternatively Modify its Revised Definition of Dedicated Transport To Include the Last Mile Link from ILEC Central Office to the Cell Site.

Significantly, the TRO confirmed that CMRS carriers always were entitled to “access to UNEs.”¹¹ However, the Commission revised the definition of dedicated transport, concluding that “no requesting carrier shall have access to unbundled inter-network transmission facilities under Section 251(c)(3).”¹² The Commission then stated *arguendo*, that “CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network,” assuming that the cell site is like an entrance facility switch.¹³ Although Nextel believes under the current set of rules it is best to consider the MSC as the only entrance facility switch and the last mile ILEC-cell site link as a UNE loop, if the Commission chooses to view the cell site as an entrance facility, it must include the ILEC-cell site last mile link in the revised definition of dedicated transport.

Plainly, CMRS networks are quite different from traditional wireline networks. Direct application of wireline architecture to wireless networks is not possible. It is noteworthy that the Commission narrowed dedicated transport UNE availability based on the ability of *CLECs* to self-deploy or obtain non-ILEC alternatives for their entrance facilities. The TRO states: “[t]hese backhaul facilities from incumbent LEC networks to competitors’ networks are distinguished from other transport facilities because competing carriers have some control over the location of their network facilities.”¹⁴ The TRO also states that: “transmission facilities used for backhaul from an incumbent LEC office to a competitive LEC network often represents the point of greatest

¹¹ TRO at ¶ 140.

¹² *Id.* at ¶ 368.

¹³ *Id.*

¹⁴ *Id.* at ¶ 367.

aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of cost savings such aggregation permits."¹⁵ In contrast, "the cell site-ILEC link is not subject to any significant competition and it does not represent the greatest aggregation point in a wireless network. Nor do CMRS carriers have the ability to minimize transport costs through the location of cell sites in the way CLECs do when locating their main switches."¹⁶

The cost saving and self-provisioning justifications for the elimination of CLEC entrance facilities simply do not apply in the context of the last mile cell site link provided by ILECs. The Commission must independently examine the characteristics of CMRS networks and reach a conclusion about UNE access to ILEC last mile links based upon CMRS network characteristics. ILECs cannot have it both ways: CMRS carriers have been denied UNE access because they are not CLECs, but ILECs appear ready and able to apply wireline network constructs to refuse CMRS carriers access to UNEs.¹⁷ If the Commission is not inclined to characterize this cell site link portion of the ILEC network as a "loop" equivalent, then it must clarify that the revised definition of dedicated transport includes the last mile link that ILECs provide to wireless carrier cell sites.¹⁸

¹⁵ *Id.*

¹⁶ AT&T Wireless Petition for Clarification or Reconsideration at 5.

¹⁷ *Id.* at 7. The Commission recently stated in an order addressing wireless reciprocal compensation that it does "not require that wireless network components be reviewed on the basis of their relationship to wireline network components." The Commission should now clarify that this proposition is equally applicable in the UNE context. Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Calling Party Pays Service Offering in the Commercial Mobile Radio Services, *Order*, CC Docket Nos. 95-185, 96-98, WT Docket No. 97-207, FCC 03-215, ¶ 4 (rel. Sept. 3, 2003) ("*CMRS Reciprocal Compensation Order*").

¹⁸ Verizon suggests that Nextel's position on this issue is "incoherent" but it is plain Verizon chose to ignore altogether the point Nextel was making – that making some elements of a loop-transport combination available as a UNE, but withholding others makes no sense as a legal or a competitive matter.

C. CMRS Carriers Are Entitled to Use Loop-Transport Combinations Without Restriction.

Several ILECs question the need for clarification of the TRO's eligibility restrictions placed on loop-transport combinations. Thus, the Commission must "clarify that CMRS carriers may combine last mile facilities with dedicated interoffice transport without having to meet the service eligibility criteria applicable to wireline carriers utilizing high capacity enhanced extended links ("EELs")."¹⁹

The EELs service eligibility criteria presuppose a typical wireline CLEC network and are meant to ensure that carriers do not arbitrage access with local wireline traffic served over the same ILEC UNE facilities. The ILEC oppositions make plain that ILECs intend to reject any CMRS carrier's request for EELs on the basis that CMRS carriers do not meet the TRO's three conditions for EELs access.²⁰ The reason for requiring that CMRS carriers meet each condition is not at all apparent. A collocation requirement in particular appears to be aimed at creating needless inefficiency and expense for CMRS carriers to access EELs.²¹ That is, of course, the ILEC's result-oriented agenda and the Commission should reject it.

III. CMRS CARRIERS ARE "IMPAIRED" WITHOUT UNBUNDLED ACCESS TO THE LINK BETWEEN CMRS BASE STATIONS AND ILEC WIRE CENTERS.

A. The FCC Already Has Determined that Competitors are Impaired Without Unbundled Access to UNE Loops.

The ILECs claim there is a need to make a separate finding of "impairment" for CMRS carriers before UNE access can be granted.²² Of course, that finding of impairment has already been made in the TRO. Indeed, the Commission determined that "on a national basis . . . requesting

¹⁹ Comments of Cellular Mobile Systems of St. Cloud at 2.

²⁰ *See id.* at 3.

²¹ Moreover, any concern about whether a competitive carrier meets the qualifications to convert special access circuits to EELs is misplaced in the CMRS context. CMRS carriers, are providing vigorous, facilities-based *local* service in competition with the ILECs.

²² *See, e.g.*, Verizon Response at 30.

carriers are impaired without access to . . . loops, including copper subloops, because their absence is likely to make entry ‘uneconomic.’”²³ Because, as stated above, the “last mile” link from the ILEC central office to the wireless carrier cell site is the equivalent of a UNE loop, the impairment analysis has been satisfied. Moreover, ILEC claims that CMRS carriers are not “impaired” without access to UNEs are nothing more than untimely, thinly veiled attempts to seek reconsideration of the Commission’s “impairment” finding.²⁴

B. CMRS Competition is not Synonymous with “No Impairment.”

A carrier is impaired if lack of access to the ILEC facility at cost-based pricing “poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”²⁵ Despite ILEC assertions to the contrary, especially those of BellSouth, the existence of wireless marketplace competition proves nothing about CMRS carrier impairment without unbundled access to ILEC facilities linking wireless base stations and ILEC wire centers.²⁶

The continual ILEC attempts to shift Commission focus from the relevant market for analysis are unavailing. The relevant market for impairment is wireless competition to wireline ILECs, and there is no question in other contexts that the Commission is doing what it can to encourage intermodal, facilities-based competition. The Commission plainly recognizes that full intermodal competition between wireless and wireline carriers has not yet been achieved.²⁷ ILECs

²³ TRO at ¶ 236.

²⁴ The Commission has found that, on a national basis, carriers are most impaired without last-mile DS1 transmission facilities because there are few if any alternative providers and competitive carriers lack the ability to self-deploy economically at this capacity level. *Id.* at ¶ 327.

²⁵ *Id.* at ¶ 84.

²⁶ As the Commission stated, it “will not determine impairment based on a certain level of retail competition because section 251(d)(2) requires us to ask whether requesting carriers are “impaired,” not whether certain thresholds of retail competition have been met.” *Id.* at ¶ 114.

²⁷ *Id.* at ¶ 245 (“Neither wireless nor cable has blossomed into a full substitute for wireline telephony.”).

arguments about wireless subscriber growth and revenue misdirect the analysis and cannot be considered.

Without access to ILEC facilities to link cell sites to ILEC wire centers, competitive carriers will be unable to reach their customers or to transport traffic. The record shows that CMRS carriers are dependent on ILEC facilities to provide transport between cell base stations and MSCs.²⁸ Indeed, as one commenter notes, “Wireless carrier networks rely extensively on wireline facilities to transport their telecommunications traffic because, for various economic and technical reasons, most CMRS networks are only wireless in the last mile connection to the mobile phone.”²⁹ And, given that the architecture of a wireless network is estimated to be 90 percent wireline, and there are hundreds of cell sites in each major metropolitan CMRS network, neither CLECs nor CMRS providers are able to self-deploy their own transmission facilities to cell sites -- the cost is prohibitive.³⁰ The Commission must not be distracted -- the simple fact is that CMRS providers and other competitive carriers are impaired without unbundled access to ILEC network elements.

IV. THE COMMISSION SHOULD GRANT “FRESH LOOK” RELIEF FOR CMRS CARRIERS.

According to certain commenters, “Nextel’s ‘fresh look’ argument . . . raises no new facts or arguments and is an insufficient basis for a petition for reconsideration of the Commission’s determination of this issue in the *Triennial Review Order*.”³¹ This ignores that wireless carriers have had to continually fight, without any success, with ILECs to receive access to dedicated transport as a UNE. The TRO confirms that CMRS carriers have been entitled to UNEs for years.

²⁸ CTIA Petition for Reconsideration or Clarification at 2.

²⁹ Comments of El Paso Networks at 6.

³⁰ *See id.* at 12.

³¹ BellSouth Opposition and Comments at 19; Sprint Corp. Comments at 6.

To deprive CMRS carriers now from making their rights meaningful by allowing a fresh look effectively rewards ILECs for ignoring their legal obligations.

The Commission must not force CMRS carriers to face termination penalties associated with facilities conversion when wireless carriers should have had full UNE access all along. As Nextel stated in its petition, "ILECs should not be given the latitude to insist upon termination penalties that essentially freeze special access circuits in place and deprive wireless carriers to any reasonable ability to convert circuits. A fresh look at ILEC early termination penalties in the case of wireless provider circuits is justified and appropriate."³²

V. CONCLUSION

Based on the foregoing, Nextel requests the Commission to act in accordance with its Petition for Reconsideration or Clarification and this Reply to Oppositions.

Respectfully submitted,

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³² Nextel Petition at 17.

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 17th day of November, 2003, a copy of “**Nextel Communications, Inc. Reply to Oppositions**” was mailed via first class mail to the following:

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