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## SUMMARY

In general, Nextel Communications, Inc. (“Nextel”), concurs with the Commission and a majority of commenters that Internet Protocol (“IP”)-enabled services will develop more rapidly by the application of a light-handed regulatory approach.

One area of potential concern, however, is that any light-handed regulatory framework not become an open invitation for entities to arbitrage technology simply for the purpose of avoiding perceived undesirable regulatory obligations.

Further, it is simply too soon for the Commission to conclude that there is or will be effective competition across all IP-enabled services platforms and that there will be no dominant providers in emerging markets. The Commission’s public interest obligation is to ensure that all technology platforms—wireline, wireless, power lines, satellite, cable—have a fair and unfettered opportunity to reach consumers with the package of service offerings they demand so there is a vibrantly competitive retail market for those services. As a number of commenters correctly observed, greater regulatory obligations may be needed for dominant providers of telecommunications transmission services that support the delivery of IP-enabled services to ensure that competitive alternatives remain available and that market power in one market is not leveraged into another.

Rather than trying to engage in a line-drawing and classification exercise to define markets for IP-enabled services, the Commission should instead invest its limited resources towards understanding the essential ingredients that will allow IP-enabled services to develop, grow and flourish. Nextel believes that the incumbent local exchange carriers (“ILECs”) are the most important players in this equation because of their unique position and historical circumstance. ILECs currently control transmission

facilities on which end users and other carriers depend for different kinds of connectivity, including connecting to the Internet. The ILECs are offering, and likely will continue to offer, IP-enabled services themselves, potentially in a bundle or package of end user services, along with other less regulated telecommunications services such as commercial mobile radio services (“CMRS”). Given their network dominance, the Commission cannot accept glib arguments that ILEC networks are really IP platforms entitled to regulatory treatment in the same way as any other information service. It is far too early in the evolution of IP-enabled services to draw this conclusion.

Notwithstanding the need for a light-handed regulatory touch with IP-enabled services in general and Voice over IP (“VoIP”) in particular, there are still some basic public interest obligations that all providers should fulfill and that cannot be left to the workings of the competitive marketplace. It simply is not the case that the marketplace will resolve all of the “social policy” obligations currently applicable to telecommunications providers. As many commenters acknowledge, in the areas of consumer access to emergency services and law enforcement access to communications, some type of regulation, taking into account current technology and its limitations and abilities, likely is necessary.

Finally, the Commission must reevaluate how new technologies affect the need for universal service support, as well as who should contribute to the universal service fund. As VoIP, in particular, makes it possible to provide service more cheaply than traditional circuit-switched technology, the Commission should reassess the continued necessity of universal service support.

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

In the Matter of )  
 )  
IP-Enabled Services ) WC Docket No. 04-36

**REPLY OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. (“Nextel”), hereby respectfully submits this reply in response to the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking (“*Notice*”) in the IP-Enabled Services proceeding.<sup>1</sup> The *Notice* seeks comment on the appropriate regulatory treatment for the wide range of current and emerging Internet Protocol (“IP”)-enabled services. The *Notice* also focuses questions on relevant differences between IP-enabled services and traditional telephony, as well as the differences among various types of IP-enabled services.

**I. INTRODUCTION**

Nextel concurs with the Commission’s observations—and numerous comments in support—that IP-enabled services in general should benefit from and will develop more rapidly by the application of a light-handed regulatory approach.<sup>2</sup> One area of potential concern, however, is that any light-handed regulatory framework not become an open invitation for entities to arbitrage technology simply for the purpose of avoiding

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<sup>1</sup> IP-Enabled Services, *Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28 (rel. March 10, 2004).

<sup>2</sup> See *Notice* at ¶ 5. See also, ALTS Comments at 2, ACN Communications Services Comments at 2, BT Americas Comments at 1-2, Cablevision Comments at 8-10, Callipso Comments at 4, Cisco Comments at 7, Cox Comments at 22, Federation for Economically Rational Utility Pricing (“FERUP”) Comments at 6-7, Independent Telephone & Telecommunications Alliance Comments at 8, MCI Comments at 10-11, 20-24, Microsoft Comments at 2, Net2Phone Comments at 7, Pac-West Comments at 5-7, pulver.com Comments at 10, United Telecom Council and the United Power Line Council Comments at 4, 7, USA Datanet Corporation Comments at 7, Virgin Mobile Comments at 4.

perceived undesirable regulatory obligations, particularly those obligations critical to ensuring a vibrant, competitive marketplace as well as enhanced consumer welfare. While the Commission cannot assume that *all* facilities-based broadband providers are dominant carriers, the Commission should recognize that the market for IP-enabled services is in an early, formative, state of development. Thus, it is too soon for the Commission simply to conclude that there is or will be effective competition across all platforms over which IP-enabled services are or will be provided or that there are or will be no dominant providers in these emerging markets. As many commenters observed, the Commission cannot simply assume that effective competition in these emerging markets will come to pass, and any such assumption would be unwarranted.<sup>3</sup>

The Commission's public interest obligation is to ensure that all technology platforms—wireline, wireless, power lines, satellite, cable—have a fair and unfettered opportunity to reach consumers with the package of service offerings they demand so there is a vibrantly competitive retail market for those services. Business users like Nextel rely heavily on communications services like special access to subscribe to the IP ports that enable a host of IP-enabled services. Thus, greater regulatory obligations, such as those proposed by a number of commenters,<sup>4</sup> may be needed for dominant providers of those telecommunications transmission services that support the delivery of IP-enabled services.

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<sup>3</sup> See, e.g., AT&T Comments at 49, Covad Comments at 8.

<sup>4</sup> See, e.g., ALTS Comments at 2, AT&T Comments at 48-52, BT Americas Comments at 2, MCI Comments at 16.

## II. BACKGROUND

Nextel is a leading provider of wireless communication services in the United States. Nextel provides a comprehensive suite of advanced wireless services that include digital wireless mobile telephone service, Nextel Nationwide Direct Connect<sup>®</sup> walkie-talkie service, as well as a number of wireless data applications including e-mail and access to the Internet. Nextel is devoting significant resources to the development of wireless broadband services and is currently conducting a trial in North Carolina, which is generating very positive results to date. In the trial, Nextel's service uses Flarion Technologies' FLASH-OFDM technology, which supplies highly secure broadband access in addition to fast network speeds. Typical downlink speeds are up to 1.5 megabits per second (Mbps) with burst rates of up to 3.0 Mbps. Typical uplink speeds are up to 375 kilobits per second (kbps) with burst rates of up to 750 kbps. The service is provided either through a personal computer ("PC") card, allowing mobile use of Nextel Wireless Broadband, or through a wireless modem, typically used in conjunction with a desktop computer, or with a Wi-Fi wireless access point.<sup>5</sup> Given the continuous nature of technological developments, however, Nextel continues to evaluate these and other technologies to provide broadband IP-enabled services to its customers and potential customers.

In addition to the Flarion trial, however, Nextel already offers a form of Voice over Internet Protocol ("VoIP") service with its Direct Connect walkie-talkie service. Direct Connect service allows Nextel customers to communicate with other Nextel

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<sup>5</sup> The Nextel Wireless Broadband PC Card is a Type-II PCMCIA card. The card easily interfaces with standard computing devices, including laptops and newer PDAs. The Nextel Wireless Broadband Modem is an external wireless desktop modem, and connects to computers or other devices via a standard Ethernet (RJ-45) port or USB port.

customers using a unique identifier assigned to each Nextel device. These “calls,” which are encoded using IP, do not traverse the PSTN or the public Internet, but allow a wide range of intra-network communication options.<sup>6</sup>

### **III. NEXTEL SUPPORTS THE GOALS OUTLINED IN THE IP-ENABLED SERVICES NOTICE.**

The underlying purpose of the *Notice* is the comprehensive examination and development of a framework for IP-enabled services delivered to consumers over a range of network platforms. While this is a daunting undertaking given the broad scope of the *Notice*, Nextel agrees with the general approach the *Notice* takes with regard to regulating IP-enabled services. Fundamentally, the public interest is best served by continuing and, to the degree possible, extending, the Commission’s established policy of minimal regulation of the Internet to IP-enabled services.<sup>7</sup> Nextel urges the Commission to largely maintain a policy of light regulation for IP-enabled services, as explained more fully below, to promote the widespread telecommunications competition Congress envisioned in the Telecommunications Act of 1996 (the “1996 Act”).<sup>8</sup>

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<sup>6</sup> Other carriers, including Sprint and Verizon Wireless, are also rolling out push-to-talk™ services using VoIP technology. See *Notice* at ¶ 14.

<sup>7</sup> See *Notice* at ¶ 2.

<sup>8</sup> See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673, ¶¶ 4, 23 (1999) (“We believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs’ bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers’ abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.”); see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, 15 FCC Rcd 3696, ¶ 110 (1999) (“A fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies. . . . [C]onsumers benefit when carriers invest in their own facilities because such carriers can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality.”).

IP-enabled services, including VoIP services, hold the promise of increasing competition across a broad variety of providers as voice, data, video, and other information are all reduced to a single common denominator. Just as it did in setting the basic framework for mobile wireless competition, however, the Commission should demonstrate appropriate sensitivity to creating necessary conditions not just for competition to begin, but to be sustained over a meaningful period of time.<sup>9</sup> As other commenters have observed, the Commission should focus on ensuring the sustainability of multiple network platform providers over which a multiplicity of IP-enabled services and applications may run. Such a foresighted policy may require some competitive safeguards at the outset to ensure that competitive markets can develop on a sustainable basis.<sup>10</sup> In setting its framework, the Commission must avoid policies that have the “unintended consequence of embracing too quickly any one technology or service” over another or that entrench those network platform providers that have dominant reach, and thus adversely affect the opportunities of other parties.<sup>11</sup>

In making judgments about the markets emerging as a result of IP technology, the Commission must be careful that it does not too hastily or too narrowly define the

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<sup>9</sup> See, e.g., Amendment of the Commission’s Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd 4957, at ¶ 76 (1994) (noting that by providing PCS providers with larger initial service areas, the Commission hopes to alleviate the “cellular headstart advantage”); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, *First Report and Order*, 11 FCC Rcd 15499, at ¶ 1025 (1996) (applying Sections 251 and 252 of the 1996 Act to require LEC-CMRS interconnection).

<sup>10</sup> Similarly, the Commission should be cognizant of the dominance of ILECs in providing the special access services currently required to link various network providers and users to the Internet. See *infra* Section VI.

<sup>11</sup> See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Notice of Proposed Rulemaking*, CC Docket No. 02-33, 17 FCC Rcd. 3019, at ¶ 4 (2002) (“*Wireline Broadband NPRM*”).

relevant markets, which are in any case still developing. The coming proliferation of IP-enabled services likely will encompass new converged services (i.e., voice, video, and data in a single offering), establishing not intermodal *competition*, but intermodal *services*, such as seamless integrated wireline/wireless IP offerings.<sup>12</sup> As the CEO of Verizon Communications told the Consumer Electronics Show earlier this year, “[w]hat used to be separate domains—phone calls, photos, music, movies, games, work—are now united in a continuous stream of bits and bytes” and “[w]hat gives [the emerging electronic] devices their potential to transform daily life are communications networks that deliver high-speed, mobile connectivity to customers wherever they are—homes, offices, cars, hotels, sidewalks.”<sup>13</sup>

Nextel agrees with the Verizon CEO’s comments and believes that consumers will continue to demand, for example, the “always on” reliability of at-home landline services while also insisting on the mobility of feature rich wireless services that can provide a plethora of applications anywhere, anytime. The difference may be that in the future, consumers will want these services to be combined seamlessly in a single device or offering that moves from home to office to automobile and which employs both wireless and wireline technology. Thus, the Commission’s goal for IP-enabled services most fundamentally must be to ensure that there are a wide and sustainable diversity of networks capable of providing customers the wide array of services they are and will be demanding from all types of communications and information services providers.

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<sup>12</sup> Although there is some evidence of substitution of wireline voice with wireless voice, and there could be some amount of similar substitution of wireline broadband with wireless broadband, “the higher order value proposition is *intermodal service*.” Remarks of Atish Gude, Vice President – Strategic Planning, Nextel, at the Federal Communications Commission’s Wireless Broadband Forum, May 19, 2004.

<sup>13</sup> Ivan Seidenberg, Consumer Electronics Show, January 8, 2004, Remarks As Prepared for Delivery, <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=83236>.

It is in the context of these developing and converging markets for intermodal services that the Commission should remain cognizant of the continuing need for competitive safeguards on incumbent local exchange carriers (“ILECs”) that offer in-region broadband IP transmission services as well as special access services that facilitate other carriers’ provision of IP services. Such safeguards may be necessary to ensure that ILECs do not discriminate in the access they provide potentially competitive stand-alone applications like VoIP. Likewise, safeguards are necessary to ensure that ILECs do not degrade services like special access that are currently essential to connecting cell sites, fixed broadband wireless transmitters, or to businesses who need to connect to one of the Internet backbones. The current in-region dominance of ILEC facilities could easily translate into a dominance of IP applications and intermodal markets tomorrow. Thus, the Commission must pay adequate attention to the potential for leveraging market power in one market into still developing new markets.

As many commenters observed, if the Commission uses a “layers” theory of analysis, the IP “applications” layer is competitive today, but that may not continue if the ILECs are free to leverage the market power they currently maintain over essential network facilities—the physical layer—into the applications market (assuming applications turn out to be a viable stand alone market.)<sup>14</sup> Therefore, before rushing to any conclusion that all providers of IP-enabled services or IP transmission services are “equal” and thus subject to little or no regulation (or intercarrier obligations, *e.g.*, access

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<sup>14</sup> See, *e.g.*, Covad Comments at 8, Level 3 Comments at 27-28, MCI Comments at 11, PointOne Comments at 25, pulver.com Comments at 18.

to bottleneck facilities), the Commission should be reasonably confident of its predictive abilities to justify its deregulatory decisions, particularly as applied to ILEC facilities.<sup>15</sup>

**IV. THE COMMISSION SHOULD MAINTAIN A LIGHT REGULATORY TOUCH FOR IP-ENABLED SERVICES, GIVEN THE POTENTIAL BENEFITS OF A COMPETITIVE MARKET.**

As the Commission recognizes in the *Notice*, the growth of the Internet, and IP-enabled services generally, has been nothing short of phenomenal.<sup>16</sup> To maintain and promote the continued pace of development of these new services, the Commission should preserve its light touch when addressing the question of potential regulation.

**A. IP-enabled services are information services outside the typical regulatory framework applied to telecommunications services.**

As the Commission recognizes, the fundamental legal framework it works with is one in which different forms of electronic communication (cable, broadcast, telephone, CMRS) offer distinct services over distinctly engineered and optimized networks regulated under different titles of the Communications Act.<sup>17</sup> The rise of IP challenges these traditional regulatory classifications. In the new world, two-way voice communication and numerous other applications are not synonymous with the medium used to provide that service (*e.g.*, the circuit-switched telephone network). Rather, these IP applications ride over any number of IP-enabled pipes and devices provided by carriers or other entities traditionally regulated to varying degrees.

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<sup>15</sup> Sprint Corporation has launched a long-term project to transform its entire Local Telephone Division's networks from circuit switched to IP technology. See [http://www.nortelnetworks.com/corporate/success/ss\\_stories/voip/collateral/nm100300-052703.pdf](http://www.nortelnetworks.com/corporate/success/ss_stories/voip/collateral/nm100300-052703.pdf). Sprint's action is undoubtedly a harbinger of similar actions by other providers given the cost advantages and flexibility of packet switched networks. If the deployment of facilities-based IP technology was the touchstone for deregulation, the Commission might unintentionally deregulate without first ensuring that the marketplace dynamics truly support such deregulation.

<sup>16</sup> See *Notice* at ¶ 4, n.13.

<sup>17</sup> See *Notice* at ¶ 46.

The Act provides the Commission with some flexibility to avoid the rigid application of various disparate titles of the Act to similar IP-enabled services. The Act defines “information services” as distinct from “telecommunications services,” and the Commission has interpreted these statutory definitions as mutually exclusive.<sup>18</sup> Telecommunications services, on the one hand, “offer[] telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used.”<sup>19</sup> Information services, on the other hand, “offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .”<sup>20</sup> The Communications Act, moreover, imposes greater regulatory burdens on telecommunications services than on information services, while at the same time providing greater rights of access and interconnection to telecommunications carriers to ILEC networks than those of information service providers.

For purposes of analyzing the regulatory status of IP-enabled services, Nextel believes that the Commission cannot simply view the transmission *facilities* or the IP transmission on which other IP applications such as VoIP rely as part and parcel of an information service. As the Ninth Circuit Court of Appeals in the Brand X ruling determined, the transmission element of an information service “constitutes a

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<sup>18</sup> See Federal-State Joint Board on Universal Service, *Report to Congress*, CC Docket No. 96-45, 13 FCC Rcd 11501, at ¶¶ 83-93 (1998); Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, *Report and Order and Further Notice of Inquiry*, WT Docket No. 96-198, 16 FCC Rcd 6417, at ¶¶ 173-185 (1999).

<sup>19</sup> 47 U.S.C. § 153(46).

<sup>20</sup> 47 U.S.C. § 153(20).

telecommunications service under the terms of the Communications Act.”<sup>21</sup> At the very least this conclusion calls into question the Commission’s tentative conclusions in its *Wireline Broadband NPRM* with regard to classification of ILEC-provisioned broadband Internet access through digital subscriber line (“DSL”), where the Commission “tentatively conclude[d] that providers of wireline broadband Internet access service that provision the service over their own facilities do not offer ‘telecommunications for a fee directly to the public.’”<sup>22</sup>

In this proceeding the Commission should differentiate between the appropriate regulation of essential facilities and transmission services, and the appropriate regulation of IP applications that ride on those facilities and services. The IP applications, the essential facilities, and transmission services each require their own independent analysis.

For network facilities, the history and use of those facilities are quite relevant. The history and uses of regulated ILEC facilities are quite different from those of CMRS or cable television facilities, for example, and an examination of these circumstances would permit different conclusions to be drawn about whether there is a reason, such as dominant position in a relevant market, to compel the owner of a particular facility to hold itself out as a common carrier.

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<sup>21</sup> *Brand X Internet Services v. FCC*, 345 F.3d 1120, (9th Cir. 2003), reh. denied 2004 U.S. App. LEXIS 8023 (9<sup>th</sup> Cir., Mar. 31, 2004) (“*Brand X*”).

<sup>22</sup> “Indeed, it seems as if a provider offering the service over its own facilities does not offer ‘telecommunications’ to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services, which, for the reasons we discuss above, we believe is an information service.” *Wireline Broadband NPRM* at ¶ 25.

**B. Certain public safety and other obligations, even in the highly competitive area of IP-enabled services, are necessary to protect the public interest.**

If the Commission sets the right conditions for access to essential facilities and transmission services, the provision of IP-based services likely will be competitive. However, there are basic public interest obligations that all VoIP providers should fulfill that should not be left to the workings of the competitive marketplace. In contrast to approach taken by commenters such as BT Americas, it simply is not the case that the marketplace will resolve all of the “social policy” obligations currently applicable to telecommunications providers.<sup>23</sup>

For example, there must be some form of Enhanced 911 (“E911”) capability and law enforcement access to IP-enabled services to meet the demands of the public and public safety officials. The increasingly pervasive nature of IP-enabled devices will continue to blur the line between what is a “phone,” and therefore subject to some type of E911 obligation, and what is not, and, at least currently, likely not subject to E911 obligations. The Commission’s general presumption should be that designated IP-enabled services, such as VoIP applications, should provide the functional equivalent of circuit switched voice services today.

Rather than rushing to dictate standards and rules for IP-enabled access to emergency services, however, the Commission should avoid pushing costly technologies on providers and public safety answering points (PSAPs) before the technology is ready for “prime time” and before PSAPs are capable of handling the expense of upgrading their own facilities. In other words, the experiences of the wireless industry in E911

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<sup>23</sup> See BT Americas Comments at 6-7.

Phase I and II implementation should be considered and when the capabilities required can realistically be met by all parties, carriers and public safety alike.<sup>24</sup>

Similarly, as provided for telecommunications carriers in the Communications Assistant for Law Enforcement Act (“CALEA”), law enforcement demands some type of ability to engage in legal “wiretaps” of broadband communications. Without this ability, criminals will engage in their own form of regulatory arbitrage: by using VoIP, rather than the PSTN, they will likely avoid possible detection by law enforcement. The Commission has indicated its intent to initiate a rulemaking in the CALEA docket soon,<sup>25</sup> and Nextel welcomes that opportunity to provide input regarding assuring appropriate access by law enforcement personnel to IP-enabled communication.

While Nextel supports access for persons with disabilities, the Commission should tread carefully in this area. IP-enabled services, by their nature, already provide significant flexibility to tailor solutions for specialized populations.<sup>26</sup> IP-enabled services today offer forms of access that were difficult—if not impossible in some instances—for circuit switched voice communications. For example, broadband Internet access allows low-cost video conferencing, allowing the deaf and hard-of-hearing to communicate via sign language. Wireless devices today, such as Nextel’s BlackBerry<sup>®</sup>, allow text-based communication in the form of e-mail and instant messaging. The Commission should

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<sup>24</sup> Specifically, the Commission should avoid repeating its “build it and they will come” approach used in wireless E911 deployment. The wireless industry, after hundreds of millions of dollars of investment, is getting ready to provide Phase II E911; yet, according to a study commissioned by the National Emergency Numbering Association, less than 50% of the PSAPs in the country are likely to be ready to receive Phase II service by the end of 2005. *Analysis of the E911 Challenge*, Prepared by Monitor Group and sponsored by the National Emergency Number Association (Dec. 2003) (“SWAT Research Paper”) at p. 36.

<sup>25</sup> See Notice at n.158.

<sup>26</sup> See MCI Comments at 43-44 (citing numerous examples of IP-enabled applications enabling greater access to communications for people with disabilities, without any need for “regulatory interference”).

first analyze whether applications and devices generally available—or soon to be generally available—provide adequate access to IP-enabled services to people with disabilities before it takes any prescriptive steps in this area.

**V. A LIGHT REGULATORY TOUCH, UNFETTERED BY STATE REGULATION, IS NECESSARY TO PROMOTE AND ENHANCE THE PROMISE OF COMPETITIVE IP-ENABLED SERVICES.**

The 1996 Act says it is the Congress’s policy that the market for Internet and other interactive computer services remain “unfettered by Federal or State regulation.”<sup>27</sup> Congress’s pronouncement of the need to keep IP-enabled services “unfettered” by regulation stemmed from the recognition that the success and new opportunities of the Internet have depended on the free wheeling, and largely unregulated, sphere in which it operates.<sup>28</sup> As discussed above, IP-enabled services in general fall within the definition of “information services” and should, therefore, operate largely unfettered by state regulation.

Of critical importance in promoting the viability of multiple providers of IP-enabled services is preempting states from regulating information services. A patchwork of state regulation—even those regulations ostensibly directed towards the “terms and conditions” of information service provision—would unduly burden these inherently interstate IP-based services. State regulation would create unnecessary impediments to providing competitive services and would unnecessarily add costs to consumers. Once the Commission determines that IP-enabled services are information services, the legal

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<sup>27</sup> 47 U.S.C. § 230(b)(2).

<sup>28</sup> See Leonard J. Kennedy and Lori A. Zallaps, *If it Ain't Broke ... The FCC and Internet Regulation*, 7 COMM'LAW CONSP'CTUS 17 (1999).

conclusion that follows is IP-enabled services are not subject to the jurisdiction of state commissions or to the application of regulation by state public utility commissions.

As the Commission recognized in *pulver.com*, a traditional jurisdictional analysis of IP-enabled services also leads to a conclusion that such services are interstate services.<sup>29</sup> As a result, even to the extent such a service might be classified as a telecommunications service, it is a jurisdictionally interstate service. An end-to-end analysis for each telephone call may be a practical frame of analysis for circuit-switched communications, where it is at least theoretically possible to trace the “continuous path of communications” between end-users of a communication. Communications taking place over IP networks are not only virtually impossible to trace, but will unpredictably cross state or national boundaries as the routing of the packets does not follow a particular route.<sup>30</sup> Moreover, the various packets carrying interstate and intrastate communications are so intermixed as to be inseverable.<sup>31</sup> Thus, the Commission also has an alternative basis for its assertion of plenary jurisdiction.

Unwilling perhaps to await the results of the Commission’s deliberations, a number of states are eager to regulate IP-enabled services, particularly those VoIP services that increasingly are available and offered to end users over DSL or cable

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<sup>29</sup> Although the Commission took pains to limit its ruling specifically to the Free World Dialup service offered by *pulver.com*, the logic employed in paragraphs 15 through 25 of the order applies with equal strength to the more general class of IP-enabled services. Petition for Declaratory Ruling that *pulver.com*’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, WC Docket No. 03-45, 19 FCC Red 3307, at ¶¶ 15-25 (2004).

<sup>30</sup> Rather, the various routers in carriers’ networks and the Internet dynamically determine the most efficient route on a packet-by-packet basis. Except for those services that remain wholly within an individual carrier’s network, the route that a packet takes will almost certainly cross state boundaries, even if ultimately the packet originates and terminates within a given state.

<sup>31</sup> See *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787 (4<sup>th</sup> Cir. 1976), *cert. den.* 429 U.S. 1027 (1976).

modems.<sup>32</sup> This is a particularly unfortunate result when no one can reliably predict what IP-enabled products and applications will prove successful as these markets develop.

Even limited state regulation of services, such as the so-called regulation of “other terms and conditions” of service, or “consumer protection” regulations can have the effect of regulating the rates or the rate structures and rate elements that are charged for service. In the wireless context, where Section 332 (c)(3) expressly prohibits rate and entry regulation, even a state regulation not *directly* addressing the rates a CMRS provider may charge for its service can have the effect of forcing a provider to raise its rates to comply with the regulation.

#### **VI. IT IS TOO EARLY TO DEFINE THE RELEVANT MARKETS FOR IP ENABLED SERVICES.**

The *Notice* seeks comment on ways of categorizing and classifying IP-enabled services, suggesting functional equivalence tests, substitutability with traditional voice services, interconnection with the PSTN, etc.<sup>33</sup> In Nextel’s view, the Commission is attempting to define new product markets at a time when these markets are still developing and ill-defined at best, making the Commission’s task difficult and perhaps impossible. For example, ILECs will over time transform their existing circuit switched networks into IP packet networks, subsuming applications like VoIP which today appear to be stand-alone products: the telephone company (or cable company, for that matter) of the future’s basic offering is likely to be a fast IP service with multiple applications, only one of which is voice. Similarly, dedicated special access services could conceivably be

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<sup>32</sup> See *Vonage Holdings Co. v. Minnesota Pub. Utils. Comm’n*, 290 F.Supp.2d 993, 995 (D. Minn. 2003).

<sup>33</sup> See *Notice* at ¶ 37.

replaced by offerings of IP ports at various speeds with associated service level agreements that promise the same level of performance as dedicated private lines.

In Nextel's view, rather than trying to define markets for IP-enabled services, the Commission should instead invest its limited resources towards understanding the essential ingredients that will allow IP enabled services to develop, grow and flourish. Nextel believes that the ILECs are the most important players in this equation because of their unique position and historical circumstance. ILECs currently control transmission facilities on which end users and other carriers depend for different kinds of connectivity, including connecting to the Internet. The ILECs are offering and likely will continue to offer IP enabled services themselves, potentially in a bundle or package of end user services along with other less regulated telecommunications services, such as CMRS.

Verizon Communications' CEO explains best why ILECs are unique:  
“[Verizon's] broadband networks will be uniquely capable of unleashing the full potential of convergence to the marketplace. Unlike cable networks designed for broadcasting [but also capable of IP-enabled services], Verizon's networks are designed for communicating.”<sup>34</sup> Verizon's CEO is correct. Enterprise customers (including CMRS carriers like Nextel) generally would not entrust the special access circuits they rely on for Internet connectivity to a cable television company even if this service were generally available from the cable company, which it is not. Thus, ILEC broadband access is not “equal” to cable broadband access,<sup>35</sup> and therefore, upon careful Commission analysis, each may be appropriately subject to differing regulation.

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<sup>34</sup> Remarks of Ivan Seidenberg, *supra* at note 13.

<sup>35</sup> *See id.*

As Nextel does herein, a number of commenters distinguished between the physical facilities used for access to IP-enabled services and the IP applications that are delivered to end users over those facilities. They expressed concern that the Commission not simply determine that the promise of facilities-based broadband competition allows the Commission to withdraw prematurely from its traditional role of safeguarding developing markets.<sup>36</sup> Most common in these arguments was the recognition that traditional market power analysis over facilities cannot simply be abandoned by assuming the existence of a “new” IP market where Vonage is the competitive equal of Verizon, and where every competitor is a “new entrant” with no history and no potential to leverage pre-existing market power into this new market.<sup>37</sup>

The principal policy question for the Commission becomes how to encourage a vibrantly competitive market for the delivery of IP applications (and the intermodal service offering they enable) across various networks. If the CMRS market experience can serve as any predictor, the Commission’s policies in this area should strive to encourage a broad diversity of broadband network access providers fairly positioned to compete in the emerging market. This framework would better insure that services can be provided competitively. But such a framework can only develop if the Commission recognizes that it must engage in granular market analysis, gather the evidence and take the right steps.

The situation the Commission faces with the emergence of IP-enabled services is not unlike the situation it faced years ago when it created the cellular services

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<sup>36</sup> See, e.g., Covad Comments at 17.

<sup>37</sup> See SBC Comments at 62 (“There is no basis for regulation of any entity’s IP services or IP networks because no provider is dominant at any layer.”), MCI Comments at 13-16.

marketplace. Although cellular was a “new” market with “new” players, the Commission recognized that some players, *i.e.*, ILECs, had unique positions in the landline market that could be inappropriately leveraged to dominate the cellular market. Specifically, to protect against ILEC dominance of the cellular marketplace, the Commission required that ILECs provide cellular services through a structurally separate affiliate and imposed a series of restrictions on those separate affiliates (*e.g.*, independent operation, separate books of account, all transactions between ILEC and affiliate to be reduced to writing and be available for Commission inspection). The Commission also required that all ILEC interconnection contracts with their cellular affiliates be filed with the Commission, and ILECs were prohibited from engaging in the sale or promotion of cellular service on the behalf of the cellular affiliate.<sup>38</sup>

Later, the Commission expanded some of these affiliate restrictions to in-region ILEC operations competing in the broader CMRS marketplace because, according to the Commission, “[a]lthough [the structural separation rule] was intended to apply only to cellular service, the anticompetitive practices it was meant to address are by their nature not unique to cellular service, but can occur any time a competing service provider requests interconnection with a local exchange network. That is because LECs that own CMRS subsidiaries have the incentive to engage in such anticompetitive practices [improper cost allocation, interconnection abuses, unfair price squeezes] in order to benefit their own CMRS subsidiaries and to protect their local exchange monopolies from wireless competition. At the same time, LEC control of bottleneck local exchange

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<sup>38</sup> See In Amendment of the Commission’s rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, *Report and Order*, WT Docket No. 96-162, FCC Rcd 15668 (1997).

facilities—upon which competing CMRS providers must rely—gives the LECs the opportunity to engage in anticompetitive behavior.”<sup>39</sup>

ILECs are also unique because they are the dominant providers of special access service. Today, special access is the gateway to the Internet for enterprise customers, including Nextel, and this will remain so until the potentially far off day when high-capacity IP networks are as ubiquitously available as special access is today. ILECs dominate the market for special access service. In the vast majority of cases, there simply is no competition for the provision of special access; the ILEC is the only game in town.<sup>40</sup>

Nextel, for example, relies on ILECs for over 90% of its dedicated transport and termination services (i.e., special access), which connect its approximately 17,000 radio towers to its mobile switching centers. This ILEC dominance of an essential input to Nextel’s—as well as other enterprise customers’—telecommunications and information services requires close Commission attention. ILECs that would have the Commission unleash them from any regulatory responsibilities for their network platforms, based on the simple (and simple-minded) idea that one or more of the services provided to end users is an information service ask, for too much at present. The dominance of ILECs in the provision of special access requires the Commission to consider the importance of special access not only to end users but to wireless carriers like Nextel who may one day provide a competitive alternative to the ILEC’s IP offerings. The ILECs assert that the IP-enabled services market—to the extent it can be defined—is highly competitive, and

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<sup>39</sup> *Id.* at ¶ 27.

<sup>40</sup> *See* BT Americas Comments at 2-3, Z-Tel Comments at 14-17.

therefore all providers ought to be treated the same.<sup>41</sup> As explained above, this is a false regulatory parity argument that wrongly suggests that all IP service providers are the same. They plainly are not. Further, it ignores the fact that that the Commission has to protect the public interest by promulgating policies in areas of concern (*i.e.*, concentrated control of end-user access modalities for IP-enabled services and control of the facilities other providers require to link their networks to the Internet) to ensure that the benefits of a vibrant, competitive market are available to all Americans. While the Commission seeks a uniform regulatory framework for IP platforms, not every IP access provider has the advantaged position that the ILEC has, particularly those ILECs with wireless affiliates.<sup>42</sup>

**VII. THE COMMISSION MUST REFORM THE UNIVERSAL SERVICE SYSTEM IN THE FACE OF THE RAPID DEPLOYMENT OF IP-ENABLED SERVICES.**

Nextel agrees with CTIA that the Commission must reevaluate how new technologies affect the need for universal service support, as well as who should contribute to the universal service fund (“USF”).<sup>43</sup> As VoIP, in particular, makes it possible to provide service in a more cheaply than traditional circuit-switched

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<sup>41</sup> See SBC Comments at 62, Verizon Comments at 20-21.

<sup>42</sup> The Commission has recognized that the public interest is not served by allowing companies to leverage a significant head start, or pre-existing legacy regulatory or competitive advantage, into new markets. In the AOL-Time Warner merger, the Commission determined that AOL, when combined with Time Warner, would have a commanding lead in the Instant Messaging market as a result of AOL’s dominance in the field. Combined with the broad reach of Time Warner’s cable facilities, the Commission determined that without appropriate conditions preventing foreclosure of competition, this arrangement would not be in the public interest. See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, CS Docket No. 00-30, 16 FCC Rcd 7547, at ¶¶ 190-191 (2001).

<sup>43</sup> See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Comments of Nextel Communications Inc., and Nextel Partners, Inc. (filed May 5, 2003); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Reply Comments of Nextel Communications, Inc. (filed April 18, 2003).

technology, the Commission should reassess the continued necessity of universal service support.<sup>44</sup>

The Commission should also take this long-awaited opportunity to expand the base of contributors to the USF. Currently, providers of cable modem broadband Internet access pay nothing into the USF for the broadband cable modem services they provide to end users.<sup>45</sup> The Commission should end this illogical disparity, and require all companies providing IP transmission services to contribute equitably to the fund. As CTIA notes, as networks migrate in favor IP-based architectures over circuit-switched ones, the Commission must ensure that carriers do not create unreasonable advantages for themselves, and disadvantages for others, solely through regulatory arbitrage.<sup>46</sup>

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<sup>44</sup> See CTIA Comments at 13. As an example, CTIA cites the possibility of deploying wireless LANs in classrooms, thereby saving on the costs of internal wiring. *Id.*

<sup>45</sup> See Covad comments at 28-29.

<sup>46</sup> See CTIA comments at 17.

## VIII. CONCLUSION

In view of the foregoing, Nextel respectfully requests that the Commission take action consistent with the views expressed herein.

Respectfully submitted,  
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