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

In the Matter of	)	
	)	
Federal-State Joint Board	)	CC Docket No. 96-45
On Universal Service	)	
	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Like other telecommunications carriers that pay into the Universal Service Fund ("USF"), Nextel is concerned about the growth of the USF and, in particular, the recent growth in the High-Cost portion of the Fund. The increasing demand on USF Funds, combined with a failure to expand the contribution base to new sources, has led to a growing disproportionate financial burden on wireless consumers and providers, such as Nextel, who are called on to fund a larger and larger percentage of the USF. Should this USF funding burden continue to increase, it will undoubtedly dampen consumer demand for services and retard competition and innovation in the telecommunications marketplace. Accordingly, Nextel supports Federal Communications Commission ("FCC") efforts to ensure that USF Funds are distributed in a manner that meets statutory objectives and benefits consumers. Unfortunately, the Joint Board's proposals do neither.

First, the Joint Board's specific proposals for modifying the scope of High-Cost support violate basic provisions of the Communications Act and long-established Commission policy, particularly the obligation to establish policies that do not favor one provider or technology over another. Rather than focusing on reform solutions that create incentives for all eligible telecommunications carriers ("ETCs") to deliver supported services more efficiently and allow consumers to make their own choices regarding telecommunications services, the Joint Board recommendations focus almost exclusively on creating favored funding status for rural local exchange carriers ("rural LECs"). As even the Joint Board recognized in making one of its proposals, this favored rural LEC status "could be inconsistent with the principles of competitive neutrality."

Second, the Joint Board's support modification proposals would do little or nothing to control the rate at which High-Cost Funds are distributed. Given that rural LECs *currently account for approximately 96% of total High-Cost distributions* and their funding requirements are still growing, any reform of the High-Cost support mechanisms has to address High-Cost Fund growth from rural LECs – not just competitive ETCs ("CETCs"). Unfortunately, the Joint Board recommendations focus *only* on CETC demand, and completely ignore rural LEC demand.

Nextel urges the Commission to reject the Joint Board's legally-flawed proposals and instead consider a range of competitively and technologically neutral options that would address the trend of increasing demand on the High-Cost Fund. These measures, and perhaps others, are critical to achieving the goal of restraining High-Cost Fund growth without dampening the competition that rural consumers deserve, and that wireless ETCs, if given the opportunity, can provide.

The Joint Board's Recommended Decision also proposes the adoption of "permissive" guidelines for state commissions to use during the ETC designation process. The specific recommendations, however, go well beyond the Commission's own ETC designation guidelines laid out in the recent *Virginia Cellular* and *Highland Cellular* decisions. In fact, the Joint Board's recommendations essentially propose to allow state commissions to impose state certification and rate regulation requirements on wireless ETCs, in contravention of the Communications Act. Therefore, the proposed guidelines must be rejected.

Finally, the Joint Board recommendation contains two proposals that would allow state commissions to impose certain "equal access" requirements on CMRS providers

either seeking ETC status or receiving USF Funds. Section 332(c)(8) of the Act expressly states that CMRS providers "shall not" be required to provide equal access, and the Commission has already concluded that ETC designation is not an exception to the statute's CMRS equal access prohibition. Given that neither the statute nor principles of statutory construction have changed since Section 332(c)(8) was added to the Act, there is no reason to revisit this determination now.

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Nextel Communications, Inc. ("Nextel") hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM")[1] of the Federal Communications Commission ("Commission") requesting comment on the Federal-State Joint Board on Universal Service's ("Joint Board") February 27, 2004, Recommended Decision.[2] In the Recommended Decision, the Joint Board detailed possible changes to the Commission's policies regarding Eligible Telecommunications Carrier ("ETC") designations and its rules regarding High-Cost fund support.[3]

Nextel supports continued Commission efforts to study and reevaluate the policies governing ETC designations and the rules governing distribution of High-Cost funds. The Commission must take immediate action to control growth of the Universal Service Fund ("USF"), and ensure that funding demands do not continue to accelerate. In doing so, however, the Commission must ensure that narrowly tailored Universal Service support is made available in a technologically and competitively neutral manner to consumers – as mandated by Section 254 of the Communications Act. Therefore, Nextel

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[1] *Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 04-127 (rel June 8, 2004).

[2] *Federal-State Joint Board on Universal Service, Recommended Decision*, CC Docket No. 96-45, FCC 04J-1 (rel. Feb. 27, 2004).

[3] *See id.*

urges the Commission to reject the Joint Board's specific proposals to impose a "primary line restriction,"[4] as well as the particular state ETC designation guidelines highlighted in the Recommended Decision. Instead, the Commission should vigorously pursue High-Cost Fund reform measures that are truly technologically and competitively neutral. In addition, Nextel also urges the Commission to reject the Joint Board's proposal to allow state commissions to require wireless ETCs to provide equal access.

I. INTRODUCTION

Like other telecommunications carriers that pay into the USF, Nextel is concerned about the growth of the USF and, in particular, the High-Cost portion of the Fund.[5] The increasing demand on USF funds, combined with the failure to expand the contribution base to new sources – such as broadband – has led to a growing disproportionate burden on wireless consumers and providers, such as Nextel, that operate in highly competitive markets. Should this burden continue to increase, the costs associated with the USF assessment will only dampen consumer demand for services, and retard innovation and competition in the telecommunications marketplace.[6] Therefore, Nextel strongly

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[4] As further detailed below, the Joint Board's "primary line" proposals claim to limit USF funding to just a single line per location. In fact, the Joint Board's proposals would merely re-characterize current levels of rural LEC funding, while restricting funding to competitive ETCs in a discriminatory and non-competitively neutral manner.

[5] *See, e.g.*, Comments of Sprint Corporation, CC Docket No. 96-45, at 4 (filed May 5, 2003) ("The high-cost fund has been growing at a sizable pace. . . . The Joint Board and FCC need to address this problem promptly. Clearly, the solution is not to award de facto monopoly status to incumbent carriers but to adopt a solution that is competitively neutral."); Comments of United States Cellular Corporation, CC Docket No. 96-45, at 13 (filed May 5, 2003) ("We submit that if the wireless segment were deprived of access to USF subsidies while contributing an ever larger amount to the USF that the distortions in the system would render it both unmanageable and unfair.").

[6] As Nextel has discussed previously during the course of this proceeding, the elasticity of demand for wireless services is such that continued increases in the USF

supports efforts by the Commission to ensure that USF funds are distributed responsibly, in a manner that both meets statutory directives and benefits consumers.

Any efforts to reform the High-Cost Fund distribution process, however, must conform to the requirements of Section 254 and established Commission policy. This means "reforms" cannot single out any technology or group of competitors for disparate or favored treatment. As the Rural Task Force noted during the course of its deliberations, "Section 254(b) and 214(e) of the 1996 Act provide the statutory framework for a system that encourages competition while preserving and advancing universal service."[7] The Commission is also well aware of Section 254's statutory mandate, as reflected by its statement in the *First Report and Order* that "universal service mechanisms and rules" should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[8] This concept was reiterated in the *Ninth Report and Order*, where the

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contribution factor could detrimentally impact consumer demand for these services – particularly in comparison to wireline services. *See, e.g.*, Comments of Nextel Communications, CC Docket No. 96-45, at 7 (filed May 5, 2003) (noting that "continual increases in USF assessments on all telecommunications providers on the same basis are not equitable or competitively neutral"); Reply Comments of Nextel Communications, Inc., CC Docket No. 96-45, at 12-13 (filed April 18, 2003) (providing the Commission with the results of its analysis concerning the relative elasticity of demand for various telecommunications services and noting that demand for interexchange and CMRS services are far more elastic than for traditional landline local exchange service).

[7] Rural Task Force, White Paper 5: Competition and Universal Service, at 8 (rel. Sept. 2000) (available at http://www.wutc.wa.gov/rtf) (hereinafter "White Paper 5").

[8] *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8801 (1997) (hereinafter "First Report and Order").

Commission stated that "the same amount of support . . . received by an incumbent LEC should be fully portable to competitive providers."[9]

The courts also have held that portability and technological neutrality are compelled by the language of Section 254 as well as the overall purpose of the 1996 Act. In *Allenco Communications, Inc. v. FCC*, the U.S. Court of Appeals for the Fifth Circuit stated that the Universal Service "program must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal regulators, determines who shall compete for and deliver services to customers."[10] Furthermore, the Fifth Circuit also noted that the most critical aspect of the Universal Service program in a competitive environment is "to benefit the customer, not the carrier" receiving the subsidy.[11]

Unfortunately, the Joint Board's recommendations violate this basic requirement of Section 254 and long-standing Commission policy, while doing little or nothing to restrain the growth of the High-Cost Fund. Rather than focusing on reform solutions that create incentives for all ETCs to deliver supported services more efficiently and allow consumers to make their own choices regarding the best telecommunications provider and technology for their needs, the Joint Board recommendations focus almost exclusively on creating a favored status for rural local exchange carriers ("RLECs or rural LECs"). The Commission has no choice but to reject these proposals.

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[9] *Federal-State Board on Universal Service, Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432, 20479 (1999) (hereinafter "Ninth Report and Order").

[10] 201 F.3d 608, 616 (5th Cir. 2000).

[11] *Id*. at 621.

II. THE JOINT BOARD'S "PRIMARY LINE RESTRICTION" PROPOSALS MUST BE REJECTED BECAUSE EACH VIOLATES SECTION 254 REQUIREMENTS AND WILL DO LITTLE OR NOTHING TO STOP HIGH-COST FUND GROWTH

The centerpiece of the Joint Board's proposal for modifying the scope of High-Cost support consists of a recommendation to limit High-Cost funding to a "single connection that provides access to the public telephone network."[12] A key component of this proposal, however, involves combining the "primary line restriction" with one of three mechanisms that would preserve rural LEC High-Cost funding at current levels.[13] Under each of these mechanisms – alternately described as the "restatement proposal,"[14] the "lump sum proposal"[15] and the "hold harmless proposal"[16] – rural LEC support would be maintained at current levels to ensure that they would not lose support for any existing lines. In contrast, funding for competitive ETCs ("CETCs") would be reduced in a discriminatory and non-competitively neutral manner. There is no stated basis for this proposed disparity in treatment.

Nextel does not object in principle to the concept of High-Cost funding on a "primary line" basis, particularly if such proposals effectively limit the Fund's growth. Each of Joint Board proposals, however, violates Section 254 and Commission precedent because they plainly favor incumbent rural LECs (and their technology) over other

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[12] Recommended Decision at 34.

[13] *See i*d. at 42 (recommending that the "Commission take steps to avoid or mitigate reductions in the amount of high-cost support flowing to rural areas as a result of implementing the primary line restriction").

[14] *See id.*

[15] *See id*. at 42-43.

[16] *See id*. at 43-44.

competitors. Furthermore, the Joint Board recommendation does little or nothing to control the outflow of High-Cost Funds – over 90% of which currently flow to rural LECs. Any reform of High-Cost Fund disbursement policies must address growth from all parties that receive High-Cost Funds – including rural LECs – and not just focus on CETCs, which account for a small portion of Fund disbursements.

A. The Joint Board's Proposals Violate Section 254

As noted previously, one of the key requirements of Section 254 is that all competitors in a market that have ETC status should be treated equally so that competition and consumer choice dictates where the High-Cost subsidy flows. On the surface, the Joint Board "primary line restriction" proposal appears to be a neutral mechanism because it claims to restrict funding to only one primary line per household, regardless of carrier. Any claimed competitive neutrality, however, is destroyed by the second prong of the plan, which ties the primary line restriction to one of three options to "avoid or mitigate reductions in the amount of high-cost support flowing to rural areas as a result of implementing a primary line restriction."

1. The "Restatement Proposal"

The first option presented by the Joint Board to "mitigate" the impact of a primary line restriction on rural LECs is entitled the "restatement proposal."[17] Under the restatement proposal, high-cost support flowing to an area "served by a rural carrier" would be restated "in terms of support per first line, rather than support per line, without any effect on the amount of support received by the rural carrier at the time support is

[17] *See id*. at 42.

restated."[18] In other words, current support received by rural LECs for all lines would be "restated" on a "first line" basis under this plan. However, the restatement proposal – like the overall primary line restriction component of the plan – contains no explanation or details on how the "first lines" would be tracked or, perhaps more importantly, how funding would be affected or allocated when a CETC signs up a new customer without existing service or converts an existing rural LEC customer.

The restatement proposal plainly is geared more towards preserving existing levels of rural LEC funding, rather than ensuring that both rural LECs and CETCs are treated fairly. Such disparate treatment, and the difficulties that customers may face in moving support from a rural LEC to a CETC under this proposal, violates Section 254 because it imposes barriers on the portability of support. The Commission cannot endorse the restatement proposal as a maneuver to avoid backing out rural LEC primary line support from existing High-Cost funding programs if a primary line restriction is implemented. In other words, it is not a "primary line" restriction if it fails to limit funding of all rural LEC lines.

2. The "Lump Sum Payment" Proposal

The Joint Board's second option would not "restate" the level of support from a per line basis to a "first line" basis, but instead would provide primary line funding to ETCs, with additional "supplemental lump sum payments" to rural LECs in order "to avoid any immediate effects on rural carriers as a result of limiting the scope of support."[19] This proposal is discriminatory and blatantly violates Section 254 by

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[18] *Id.*

[19] *Id.*

providing a higher level of support to rural LECs than to CETCs. Ironically, the Joint Board recognizes this fact, stating that "we recognize that making lump-sum payments to incumbents, but not to competitive ETCs, could be inconsistent with the principle of competitive neutrality."[20] For these reasons, as the Joint Board itself recognizes, a lump sum payment to rural LECs would violate the letter of Section 254, as well as the core principles the Commission embraced in its implementation of Section 254.

3. The "Hold Harmless" Proposal

The third option presented by the Joint Board is described as the "hold harmless" proposal.[21] A more appropriate name, however, might be the "hold rural LECs harmless" or the "make-whole" proposal. Under this option, per line support available to CETCs would freeze upon entry of one or more competitors in a study area.[22] Rural LECs, however, would be unaffected by this "freeze" on per line support, and would continue to receive funding based on current embedded cost formulas.[23] Like the lump sum payment proposal, this option blatantly discriminates against CETCs by allowing rural LECs to receive more High-Cost funding, on a per line basis, than other ETCs in the same market. The Commission cannot endorse a proposal so deeply at odds with Section 254.

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[20] *Id*. at 42-43.

[21] *See id*. at 43.

[22] *See id.*

[23] *See id.*

B. The Joint Board's Proposals Do Not Control High-Cost Fund Growth

The Joint Board claims that its primary line proposal "is necessary to preserve the sustainability of the universal service fund."[24] While Nextel agrees USF sustainability is critical, that sustainability can be accomplished only by controlling Fund growth. At their most basic level, none of the Joint Board proposals do anything significant to limit Fund growth. On the contrary, the Joint Board proposals make every effort to preserve current levels of rural LEC support, *which account for almost 96% of current High-Cost fund disbursements.*[25] As Nextel has stated previously in this proceeding, policies to control Fund growth must focus on areas where the most efficiencies can be achieved, i.e., those areas where the vast majority of High-Cost funding is being disbursed. Unfortunately, the Joint Board continues to focus on measures a much more limited solution that features discrimination against CETCs as a key ingredient.

Rural LEC High-Cost funding reform should be the Commission's priority. Statistics show that rural LEC disbursements from the High-Cost Fund are responsible for the bulk of the Fund's growth in the last few years. Although wireless CETC funding has grown – from $47 million in 2002[26] to approximately $131 million in 2003[27]

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[24] *See id*. at 34.

[25] In 2003, rural LECs received $3,141,344,000 in High-Cost support, compared to the $126,234,000 received by wireless ETCs. See Universal Service Administrative Company, 2003 Annual Report, at Appendix B "Support by Service Provider Type," *available at* http://www.universalservice.org/download/pdf/2003AnnualReport.pdf (hereinafter "2003 USAC Report").

[26] *See* Universal Service Administrative Company, 2002 Annual Report, at Appendix B "Disbursements by Service Provider Type, 2002," *available at* http://www.universalservice.org/download/pdf/2002AnnualReport.pdf (hereinafter "2002 USAC Report").

[27] *See* 2003 UASC Report, at Appendix B.

– it is critical to note that rural LEC funding actually increased, in terms of dollars, by a larger amount during that timeframe. In 2002, rural LECs received over $2.93 billion in High-Cost support,[28] and in 2003 rural LECs collectively received approximately $3.15 billion[29] – *an increase of over $200 million during this period*.

Given that rural LECs continue to account for approximately 96% of total High-Cost Fund disbursements and their funding requirements are still growing, any reform of the High-Cost support mechanisms has to address High-Cost Fund growth from *all* entities that receive support – not just CETCs. Unfortunately, the Joint Board's recommendations focus only on CETC High-Cost Fund demand, and completely ignore escalating rural LEC demand – which actually accounts for the vast majority of High-Cost funding, and contributes substantially to High-Cost Fund growth. Accordingly, Nextel urges the Commission to reject the Joint Board's specific "primary line" restriction proposals, and instead adopt one or more of the following High-Cost Fund stabilization proposals, which address the challenges of Fund growth in a technologically and competitively neutral manner.

III. THERE ARE A NUMBER OF TECHNOLOGICALLY AND COMPETITIVELY NEUTRAL ALTERNATIVES TO THE JOINT BOARD'S PRIMARY LINE RESTRICTION PROPOSALS

Rather than focusing solely on the Joint Board's primary line restriction proposals – which discriminate against CETCs and fail to achieve any real cost savings – Nextel urges the Commission to consider a range of technologically and competitively neutral options that would address the trend of increasing demand on the High-Cost Fund. For example, the Commission could adopt a study-area cap freeze – like the one discussed in

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[28] *See* 2002 USAC Report, at Appendix B.

[29] *See* 2003 USAC Report, at Appendix B.

the overall context of the Joint Board's primary line proposal – as an independent measure. The Commission could also modify Section 36.621 of the Commission's rules to eliminate or reduce substantially recovery of "corporate operations expenses," as well as begin an immediate transition to a forward-looking cost methodology for all ETCs with more than 50,000 lines in a study area. Further, the Commission could initiate a proceeding to collapse the current ETC study areas into statewide study areas. Each of these measures focuses on altering existing policies that may prove difficult to alter. However, these measures, and perhaps others, are critical to restraining High-Cost Fund growth without dampening the competition that rural consumers deserve and that wireless CETCs, if given a fair opportunity, can provide.

A. The Commission Should Implement an Independent Study-Area Cap Freeze Upon Competitive Entry

In its comments to the Joint Board in this proceeding, Nextel urged the Joint Board to recommend a study area cap freeze upon CETC entry, whereby per line High-Cost support would be frozen upon "competitive entry into a rural study area."[30] In the Recommended Decision, the Joint Board proposes a "modified version" of a "study area cap. Critically, however, the proposed cap would function only in conjunction with the other measures designed to "hold harmless" rural LECs by ensuring their current funding formulas at the expense of CETCs.[31] Thus, the study area cap the Joint Board proposes is critically flawed.

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[30] *See* Comments of Nextel Communications, Inc., CC Docket No. 96-45, at 16-17 (filed May 5, 2003).

[31] Recommended Decision at 44-45.

A free-standing study area "freeze" upon competitive entry into a study area continues to represent one of the most effective and competitively neutral options to reduce demand on the High-Cost Fund. A study area "freeze" would cap the total level of support flowing to a rural carrier (and, by extension, to a CETC) once a CETC enters that study area. Thereafter, per-line support would be adjusted based on certain index factors (such as teledensity), rather than changes in the rural carrier's embedded costs. During the course of its deliberations, the Rural Task Force recognized these advantages and recommended this approach,[32] but the Commission ultimately rejected the "freeze" proposal because of rural LECs opposition to anything that would sever the link between embedded costs and their direct recovery of those costs through the High-Cost Fund.[33] Instead, the rural LECs continue to urge "cost-savings" measures that target only CETCs – despite the reality that any solution to High-Cost growth *must* come from a competitively neutral solution that deals with Fund growth *caused by both rural LECs and CETCs*. Accordingly, Nextel again urges the Commission to consider a study area

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[32] *See Federal-State Joint Board on Universal Service, Recommended Decision*, 16 FCC Rcd 6153, 6161 (2000) (recommending that the "Commission 'freeze' per-line high-cost loop support directed to a rural study area if a competitive eligible telecommunications carrier has been designated and begins providing service in the study area"). Under the Rural Task Force Proposal, "both the incumbent LEC and the competitive eligible telecommunications carrier would receive fixed per-line support." *See id*. In addition, such fixed per-line support would be adjusted based on a proposal "Rural Growth Factor," as well as through a mechanism to allow recovery of "costs associated with catastrophic events affecting the carrier's ability to provide supported services." *See id*.

[33] *See Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, 16 FCC Rcd 11244, 11294 (2001) (hereinafter "Rural Task Force Order") (stating that the study area "freeze" proposal had "significant drawbacks, including administrative complexity and disincentives to infrastructure investment by rural carriers").

per-line High-Cost support "freeze" as one primary solution to control High-Cost Fund growth.

B. The Commission Should Modify Section 36.621 of the Rules to Eliminate or Substantially Limit Recovery of "Corporate Operations Expenses" In the Calculation of Study Area Loop Costs

Another way to realize cost-savings in the High-Cost program is to eliminate disbursements for costs that are not directly related to the actual provision of service in rural and high-cost areas. Pursuant to Section 214(e)(1)(A) of the Act and Section 54.101(a) of the Commission's rules, carriers are required to use Universal Service Funds for the provision of the nine core services designated for support by the Commission.[34] However, section 36.621 of the Commission's rules, which governs the methodology for calculation of rural LEC study area loop costs, currently allows rural LECs to include "corporate operations expenses" in the calculation of those loop costs.[35] Unlike the other factors included in the study area loop cost calculations – such as "equipment" and "maintenance expenses" – the "corporate operations expenses" category appears to be aimed at recovery of general expenses that are not related to the provision of the nine core services for which Universal Service support is intended.[36] Accordingly, Nextel urges the Commission to review Section 36.621 of the Rules, and either delete the provision that allows recovery of corporate operations expenses in the calculation of

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[34] *See* 47 U.S.C. § 214(e)(1)(A) ("ETCs shall "offer the services that are supported by Federal universal service support mechanisms under Section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services"); 47 C.F.R. § 54.101(a) (listing the nine core services that are supported with Universal Service Funds).

[35] 47 C.F.R. § 36.621(a)(4).

[36] *See id.*

study area loop costs, or substantially reduce "corporate operations expense" recovery to levels that are economically justifiable.[37]

C. The Commission Should Immediately Take Steps to Transition Carriers With More Than 50,000 Lines in a Study Area to a Forward-Looking Cost Methodology

During the course of the Rural Task Force proceeding, the Commission explored a number of ways to transition from High-Cost support based on rural LEC embedded costs to a support methodology that is based on forward-looking costs.[38] As Nextel and others have previously demonstrated, such a shift would substantially reduce the drain on High-Cost Funds.[39] In addition, it would also create economically rational price signals for competitors seeking ETC designation in rural and high-cost areas. Unfortunately, despite its enormous potential for controlling Fund growth, and the Commission's prior recognition of the need to move in this direction, the Joint Board's Recommended Decision did not even mention this proposal.

Previously in this proceeding, much of the concern over shifting from an embedded cost methodology to a forward –looking cost methodology focused on the potential "harm" to very small rural LECs. While Nextel continues to believe that such

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[37] Other parties in this proceeding have also urged the Commission to closely examine waste in the "corporate operations expenses" category during the course of this proceeding. See, e.g., Western Wireless Reply Comments, RM-10822, CC Docket No. 96-45, at 5 (filed Feb. 14, 2004) (noting that "many rural ILECs appear to be incurring excessively high Corporate Operations Expenses and are operating with management employees far in excess of the number employed by comparably sized companies").

[38] *See* Rural Task Force Order at 11259 (stating that "we will continue to consider a forward-looking methodology for rural carriers").

[39] *See, e.g.*, Comments of Nextel Communications, Inc., CC Docket No. 96-45, at 17 (filed May 5, 2003); Western Wireless Corporation, Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers, RM-10822, CC Docket No. 96-45 (filed Oct. 30, 2003).

potential harms are overstated, there are ways to accommodate instances of potential harm while still moving towards this very necessary reform. One possible approach could be to immediately transition all ETCs with over 50,000 supported lines in a study area to a forward-looking cost methodology, while establishing a phased-in approach for those rural LECs with less than 50,000 supported lines. Such an approach would slowly transition the smallest carriers, allowing them to plan and prepare accordingly, while gradually easing the financial impact on the High-Cost Fund.[40]

D. The Commission Should Study the Creation of Statewide Study Areas

The Commission also should consider consolidating rural LEC study areas under common ownership within a given state as an additional avenue of ensuring that High-Cost Funds are more equitably distributed. Under the Commission's current rules, local switching support is provided for ETCs with less than 50,000 lines in a study area.[41] A number of rural LECs have more than a single study area in a particular state, mostly due to the fact that they acquired exchanges from other incumbent LECs and did not consolidate the disparate study areas into a single state study area. Many appear to have engaged in regulatory arbitrage by ensuring that their access lines within a state are divided among numerous study areas so that the local switching support for study areas where a carrier has less than 50,000 supported lines can be maintained in as many study areas as possible. Accordingly, to ensure that local switching support is provided only to

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[40] *See, e.g.*, Rural Task Force, White Paper 2: "The Rural Difference," at 31 (rel. Jan. 2000), available at http://www.wutc.wa.gov/rtf (". . . [Rural Telephone Companies] are not a homogenous group, but differ greatly from each other.").

[41] *See* 47 C.F.R. § 54.301(a)(1) (stating that " an incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall receive support for local switching costs").

small rural LECs that truly require such support, Nextel urges the Commission to look for ways to consolidate multiple study areas under common ownership within a state into one "statewide" study area. Alternatively, the Commission could lower the threshold for receiving local switching support (e.g., from 50,000 lines to 25,000 lines) as a way of limiting these arbitrage opportunities, while still providing support to very small rural LECs.

IV. ANY "PERMISSIVE" STATE ETC DESIGNATION GUIDELINES THE COMMISSION ADOPTS SHOULD NOT EXCEED THOSE DELINEATED IN THE *VIRGINIA CELLULAR* AND *HIGHLAND CELLULAR* ORDERS

The Joint Board also recommends that the Commission adopt "permissive guidelines for minimum ETC qualifications," in order to "increase the opportunities for state commissions to conduct rigorous proceedings."[42] Nextel objects to the specific Joint Board recommendations, which go well beyond the Commission's own ETC designation guidelines laid out in the *Virginia Cellular* and *Highland Cellular* decisions, and essentially proposes allowing state commissions to impose state certification and rate regulation on wireless ETCs. In addition, the recommendations contravene the Commission's bedrock determinations about the nature of CMRS services and violate Section 332(c)(3) of the Act. Accordingly, they must be rejected.

In the *Virginia Cellular Order*[43] and the *Highland Cellular Order*,[44] the Commission established a set of national guidelines to follow for the Commission's own

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[42] Recommended Decision at 14.

[43] *Virginia Cellular , LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order*, 19 FCC Rcd 1563 (2004).

ETC designations. Pursuant to these guidelines and in addition to the plain requirements of the statute for ETC certification, petitioners for ETC status must generally provide the Commission with: 1) annual reports of progress towards "buildout plans, unfulfilled service requests, and complaints per 1,000 handsets;" 2) "commitments to provide service to requesting customers" within the designated ETC area; 3) commitments to construct new cell sites in areas within the ETC area that lack coverage; and 4) service quality commitments, such as a pledge to abide by the principles of CTIA – The Wireless Association's Voluntary Consumer Code.[45] In adopting these guidelines, the Commission realized that the criteria for ETC designation should be national, and not subject to 50 different state interpretations. This is particularly important for CMRS carriers seeking ETC designation since CMRS carriers are licensed by the Commission, and often operate in service areas that cross state boundaries. Furthermore, the Commission did not seek to modify the very competitive nature of CMRS service offerings, nor require CMRS carriers to submit to direct or indirect forms of rate regulation as a *quid pro quo* of ETC designation.

The Joint Board recommendations, on the other hand, would allow state commissions to fashion very broad and amorphous requirements for wireless carriers seeking ETC status, resulting in potentially numerous sets of ETC rules. In fact, the Joint

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[44] *Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order*, 19 FCC Rcd 6442 (2004).

[45] *See, e.g., Guam Cellular and Paging, Inc. d/b/a Saipancell, Petition for Designation as an Eligible Telecommunications Carrier on the Islands of Saipan, Tinian, and Rota in the Commonwealth of the Northern Mariana Islands, Order*, CC Docket No. 96-45, DA 04-2268, at 3, ¶ 6 (rel. July 23, 2004) (noting the new guidelines enunciated in the *Virginia Cellular* and *Highland Cellular Orders*).

Board proposal encourages state commissions to require petitioners to submit, among other things, extensive information regarding the applicant's "financial resources,"[46] future "build-out plans,"[47] and plans for complying with state "consumer protection requirements."[48] In doing so, the Joint Board claims that its proposal will "allow for a more predictable application process among states." On the contrary, it is highly likely that the opposite will happen due to the wide range of options highlighted in the "permissive" guidelines, which would likely be applied by state commissions in very different manners.

Furthermore, the Joint Board proposals would create a series of state regulatory barriers imposed squarely upon wireless carriers in violation of Section 332 of the Act. For instance, the Joint Board recommends that "the Commission adopt a guideline indicating that state commissions may properly impose consumer protection requirements as part of the ETC designation process."[49] The Joint Board, however, never clearly defines what it considers to be acceptable parameters of such "consumer protection" proposals, leaving open the possibility that states could regulate CMRS carrier rates or the manner in which they display charges on customer billing statements. Such state regulation is prohibited under Section 332, which forbids state regulation of rates, rate elements and rate structures.[50]

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[46] Recommended Decision at 20-21.

[47] *Id*. at 21.

[48] *Id*. at 24-25.

[49] *Id.*

[50] See 47 U.S.C. § 332(c)(3)(A); *see also Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and*

The Commission's guidelines as articulated in the *Virginia Cellular* and *Highland Cellular* Orders represent a positive first step towards fashioning national ETC designation standards. In addition, they represent a national model for states to follow. Accordingly, the Commission should give the *Virginia Cellular* and *Highland Cellular* guidelines time to work as both federal and permissive state guidelines, rather than discarding them and moving to an untested set of principles that will only lead to a Balkanized set of ETC designation standards.

V. THE COMMISSION MUST REJECT THE JOINT BOARD'S PROPOSALS TO IMPOSE UNLAWFUL AND UNNECESSARY EQUAL ACCESS REQUIREMENTS ON WIRELESS CARRIERS

The Recommended Decision contains two proposals that would allow state commissions to impose certain "equal access" requirements on CMRS providers either seeking ETC status or receiving Universal Service Funds. The first proposal calls on the "Commission [to] adopt guidelines encouraging states, as a condition of ETC designation, to require competitive ETCs to be prepared to provide equal access if all other ETCs in that service area exercise their rights to relinquish their designations pursuant to section 214(e)(4)."[51] The second proposal closely resembles the first, and

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State Challenges to, Rates Charged By CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907 (1999).

> [T]he term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, *but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers*.
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> *Id*. (emphasis added).

[51] Recommended Decision at 23.

calls on the Commission to essentially reverse the *Western Wireless CMRS Order*,[52] and allow states to impose equal access obligations on wireless ETCs.[53] Both requests are unnecessary, unlawful and fail to serve the public interest. Therefore, the Commission must reject them.

A. Section 332(c)(8) Prohibits the Imposition of Equal Access on CMRS Providers

Section 332(c)(8) of the Act states that providers of CMRS services "*shall not* be required to provide equal access to common carriers for the provision of telephone toll services."[54] The only possible exception to this requirement is where the Commission makes a determination "that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, *and* that such denial is "contrary to the public interest, convenience and necessity." If it were to ever reach these public interest conclusions, the Commission then could order unblocked access "through the use of a carrier identification code assigned to such provider or other mechanism."[55]

In the Recommended Decision, the Joint Board claims that Section 332(c)(8) "may be interpreted differently" and, suggests therefore, that the Commission should revisit the *Western Wireless CMRS Order* to "clarify" that section 332(c)(8) "only prevents the Commission from requiring CMRS carriers to provide equal access as a

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[52] *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as a Local Exchange Service, Memorandum Opinion and Order*, 17 FCC Rcd 14802 (2002) (hereinafter "Western Wireless CMRS Order").

[53] Recommended Decision at 23.

[54] 47 U.S.C. § 332(c)(8).

[55] *Id.*

general condition of mobile service."[56] This analysis ignores the plain language of Section 332(c)(8), and should again be rejected by the Commission.

As an initial matter, it is critical to note that Section 332(c)(8) states that only the *Commission* has the authority to allow "unblocked access" if it determines that the denial of such is "contrary to the public interest, convenience and necessity." In this case, the Joint Board asks the Commission to devolve the authority to make this determination to state commissions. The statute, however, does not allow such devolution of authority to state commissions.[57] Accordingly, on that basis alone, the Joint Board's proposals must be rejected.

Furthermore, as the Commission correctly determined in 1997, Section 332(c)(8) does not distinguish between CMRS carriers that have been designated as ETCs, or for any other purpose.[58] Given that neither the statute nor principles of statutory construction

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[56] *Id*. at 23-24.

[57] In its decision on the *Triennial Review Order*, the U.S. Court of Appeals for the District of Columbia recently stated that the Commission may not subdelegate authority to outside entities absent affirmative evidence of Congressional authority to do so. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) (vacating "as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portion of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements"). Critically, the Court also specifically stated that its "conclusion would be unchanged if no provision of the Act mentioned any role for state commissions, *because the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties*. *See id*. (emphasis added).

[58] First Report and Order, 12 FCC Rcd at 8819.

> . . . [I]ncluding equal access to interexchange service among the services supported by universal service mechanisms would require a Commercial Mobile Radio Service (CMRS) provider to provide equal access in order to receive universal service support. We find that such an outcome would be contrary to the mandate of section 332(c)(8), which prohibits any requirement that CMRS providers offer "equal access to common carriers for the provision of toll services.

have changed since 1997, there is no reason to revisit this determination now.[59] Therefore, the Commission must once again conclude, as mandated in the first sentence of Section 332(c)(8), that CMRS providers "*shall not* be required to provide equal access."

B. The Imposition of Any Equal Access Requirement Would Be Inconsistent With Settled Law and Policy and Would Undermine the Commission's Integrated Service Approach to CMRS

In addition to the specific legal infirmities associated with the Joint Board's proposal to allow states to impose equal access obligations on CMRS ETCs, the proposal also fails to recognize that CMRS is a unified, national service. In 1994, the Commission found that CMRS carriers' provision of interstate interexchange service was part of an integrated CMRS package when it ordered the de-tariffing of interstate services offered by CMRS carriers.[60] The rationale for the de-tariffing order would not have made sense if the Commission had considered interstate interexchange services provided by CMRS

Id.

[59] Even assuming, *arguendo*, that the Commission could make some sort of "blanket" determination that would allow state commissions to impose a form of landline interexchange equal access, it is important to note that the Joint Board did not even attempt to show that CMRS subscribers are being denied access to competitively priced telecommunications services, or that the imposition of equal access would in any way serve the public interest.

[60] *Implementation of §§ 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1417 (1994) (hereinafter "CMRS Detariffing Order") (noting that in enacting the applicable provisions of the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"), "Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace").

carriers as a separate offering because all other providers of interstate interexchange services were still subject to tarriffing requirements for those services at that time.[61]

The Commission also identified CMRS as a complete, end-to-end service offering in the Customer Proprietary Network Information ("CPNI") proceeding.[62] In that proceeding, the Commission divided telecommunications offerings into three categories – local, interexchange and CMRS – for the purpose of determining carriers' rights to use CPNI derived from the provision of one service in order to market another service to that same customer.[63] In doing so, the Commission recognized that CMRS does not fit into either the local or interexchange category, but actually encompasses a distinct product, offering integrated services.[64] This approach was fleshed out further on Reconsideration,

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[61] Prior to passage of the 1993 Budget Act, the Commission did not have the authority to forbear from requiring common carriers, including CMRS carriers, to file the tariffs required under Section 203 of the Act. Under the 1993 Budget Act, however, the Commission was given authority to forbear from some aspects of Title II regulation of CMRS services. The Commission later exercised this authority in the CMRS Detariffing Order, which would not have been possible has CMRS services been classified under the traditional landline components of "local" and "exchange" services.

[62] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998).

[63] *Id*. at 8081-85.

[64] *See id*. at 8091.

> We also reject US WEST's claims, in support of the two category approach, that Congress's failure to mention CMRS in the legislative history suggests that it did not view CMRS as a separate service offering, but rather that CMRS is more appropriately treated as a technology or functionality of both local and long distance telecommunications service. We do not find Congress' silence in connection with CMRS as dispositive, *and reject the notion that CMRS is not a separate service offering*.
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> *Id*. (emphasis added).

where the Commission further defined CMRS to include "information services and CPE."[65] Allowing state commissions to impose equal access requirements and, in effect, split CMRS into separate components would undermine years of Commission precedent treating the provision of CMRS as a single, integrated national service offering. Accordingly, the Commission must reject both of the Joint Board's back-door efforts to allow the imposition of equal access requirements on CMRS providers.

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[65] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14433 (1999).

CONCLUSION

For the aforementioned reasons, Nextel urges the Joint Board to reject the Joint Board's specific proposals, and instead focus on High-Cost Fund reforms and ETC designation criteria that are competitively neutral and nondiscriminatory, and that will effectively limit growth of the USF.

Respectfully submitted,

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