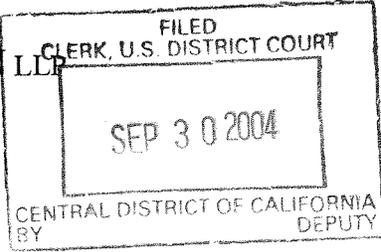


1 Robert S. Beall, Cal. Bar No. 132016  
John R. Pennington, Cal. Bar No. 77724  
2 Peter A. Krause, Cal. Bar No. 185098  
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
3 650 Town Center Drive, 4<sup>th</sup> Floor  
Costa Mesa, California 92626  
4 Telephone: (714) 513-5100  
Facsimile: (714) 513-5130



5 Earl Nicholas Selby, Cal. Bar No. 78096  
6 Law Offices of Earl Nicholas Selby  
418 Florence Street  
7 Palo Alto, CA 94301-1705  
Telephone: (650) 323-0990  
8 Facsimile: (650) 325-9041

9 Attorneys for Plaintiff  
NEXTTEL OF CALIFORNIA, INC.

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

NEXTEL OF CALIFORNIA, INC., a  
Delaware corporation,

Plaintiff,

v.

GEOFFREY F. BROWN, SUSAN P.  
KENNEDY, LORETTA M. LYNCH,  
MICHAEL R. PEEVEY, and CARL  
WOOD, in their official capacities as  
Commissioners of the California Public  
Utilities Commission,

Defendants.

Case No. CV04-8164 SVW (JWJx)

PLAINTIFF NEXTEL OF  
CALIFORNIA, INC.'S COMPLAINT  
FOR VIOLATION OF  
CONSTITUTIONAL AND  
STATUTORY RIGHTS AND FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

COPY

I.

INTRODUCTION

A. Overview of the Action.

1. Nextel of California, Inc. (“Nextel”), a provider of commercial mobile radio service (“CMRS” or “wireless service”), asks this Court to enjoin enforcement of California Public Utilities Commission (“CPUC”) General Order (“GO”) 168, “Rules Governing Telecommunications Consumer Protection” (the “Rules”), adopted by Decision (D.) 04-05-057 on May 27, 2004.<sup>1</sup> The Rules impermissibly exert *state* regulatory control over wireless services in direct contravention of *federal* law and policy. The Rules violate the United States Constitution and federal statutes and regulations, including: the Supremacy Clause (U.S. const. art. VI, cl. 2), the Commerce Clause (U.S. Const. art. I, § 8, cl. 3), the Contracts Clause (U.S. Const. art. I, § 10, cl. 1), the Free Speech Clause (U.S. Const. amend. I), and the Due Process Clause (U.S. Const. amend. XIV, § 1) of the United States Constitution, as well as the Federal Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), and 42 U.S.C. § 1983. Declaratory relief is proper pursuant to 28 U.S.C. §§ 2201-02. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1343(a).

2. The Rules are unlawful for at least eight reasons. *First*, taken as a whole, the Rules violate the Supremacy Clause (U.S. Const. art. VI, cl. 2) because they stand as an obstacle to the basic policies and objectives of the comprehensive

---

<sup>1</sup> *Order Instituting Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, R. 00-02-004, Interim Decision Issuing General Order 168, Rules Governing Telecommunications Consumer Protection [D.04-05-057] \_\_ CPUC 2d \_\_, 2004 Cal. PUC LEXIS 240 (May 27, 2004).

1 federal scheme established by Congress and the Federal Communications  
2 Commission (“FCC”) for regulation of CMRS service providers on a national basis.  
3

4           3.     *Second*, numerous specific Rules violate the Supremacy Clause  
5 and Section 332 of the Communications Act, as amended (47 U.S.C. § 332), by  
6 regulating Nextel’s and other wireless carriers’ rates. Congress has indisputably  
7 placed regulation of CMRS rates off-limits to state regulation.  
8

9           4.     *Third*, taken as a whole, the Rules violate the Commerce Clause  
10 (U.S. Const. art. 1, § 8, cl. 3) by subjecting Nextel and other wireless carriers to a  
11 complicated web of state regulation of wireless service that is fundamentally  
12 inconsistent with the national, deregulatory framework created by Congress and the  
13 FCC.  
14

15           5.     *Fourth*, the Rules violate the First Amendment (U.S. Const.  
16 amend. I) by compelling Nextel and other wireless carriers to engage in commercial  
17 speech without advancing any substantial governmental interest.  
18

19           6.     *Fifth*, numerous provisions in the Rules are unconstitutionally  
20 vague and ambiguous, placing Nextel and other wireless carriers at substantial risk  
21 that the Defendants will impose penalties for noncompliance.  
22

23           7.     *Sixth*, the Rules abrogate Nextel’s and other wireless carriers’  
24 contractual rights without advancing any significant and legitimate public purpose,  
25 in violation of the Contracts Clause (U.S. Const. art. I, § 10, cl. 1).  
26  
27  
28

1           8.     *Seventh*, the Rules were adopted without hearings or adequate  
2 opportunity for public comment in violation of the Due Process Clause (U.S. Const.  
3 amend. XIV, §1).

4  
5           9.     *Eighth*, for the foregoing reasons, enforcement of the Rules by  
6 Defendants under color of state law will violate Nextel's federal constitutional and  
7 statutory rights under 42 U.S.C. § 1983.

8  
9           10.    This Court should declare the Rules invalid to the extent they  
10 violate Nextel's and other wireless carriers' federal constitutional and statutory  
11 rights, and enjoin Defendants from enforcing the Rules against such carriers.

12  
13 B.     The Parties.

14  
15           11.    Plaintiff Nextel of California, Inc. is a Delaware corporation.  
16 Nextel is an indirect subsidiary of Nextel Communications, Inc., and provides  
17 CMRS and other telecommunications services in California.

18  
19           12.    Defendants Geoffrey F. Brown, Susan P. Kennedy, Loretta M.  
20 Lynch, Michael R. Peevey, and Carl Wood are Commissioners of the CPUC. All  
21 defendants are named herein in their official capacities only. In their official  
22 capacities, the Commissioners are authorized to regulate public utilities in the State  
23 of California pursuant to the provisions of the California Public Utilities Code.

1 C. Venue.

2  
3 13. Venue is proper in this district pursuant to 28 U.S.C. Section  
4 1391(b) in that all Defendants maintain offices and thus reside in this district, and  
5 Plaintiff's claims arose in substantial part in this district.

6  
7 14. Pursuant to Central District General Order 349-A, venue is  
8 proper in the Southern Division because Plaintiff resides in Orange County and  
9 Plaintiff's claims arose in substantial part in the Southern Division.

10  
11 **II.**

12 **GENERAL ALLEGATIONS AND BACKGROUND OF THE DISPUTE**

13 A. Federal Regulation of Wireless Telecommunications Services.

14  
15 15. The Communications Act of 1934 ("the Act" or "the  
16 Communications Act") established a comprehensive federal regulatory framework  
17 "to make available, so far as possible, to all people of the United States . . . a rapid,  
18 efficient, Nation-wide, and world-wide wire and radio communications service." 47  
19 U.S.C. § 151. Under that federal framework, traditional wireline  
20 telecommunications services were subject to dual federal/state jurisdiction. States  
21 had jurisdiction over *intrastate* telephone services, while the FCC had jurisdiction  
22 over *interstate* services.

23  
24 16. Because "[n]o state lines divide the radio waves," however,  
25 Congress has long recognized that "national regulation is . . . essential to the  
26 efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Bond &*  
27 *Mortgage Co.*, 289 U.S. 266, 279 (1933). Title III of the Act accordingly imposes  
28 federal control on the licensing and operation of all radio communications systems.

1 See 47 U.S.C. §§ 301-399b. Under Title III, the FCC exercises “federal primacy”  
2 over the regulation of wireless service in order to avoid “state and local regulation  
3 [that] might conflict with and thereby frustrate” the federal goal of nationwide  
4 compatibility for CMRS. *An Inquiry Into the Use of the Bands 825-845 MHz &*  
5 *870-890 MHz for Cellular Communications Systems*, Report and Order, 86 F.C.C.2d  
6 469, 503 (1981).

7  
8 17. In 1993, Congress amended the Communications Act to  
9 underscore the need for a *uniform* federal regulatory framework governing the  
10 burgeoning wireless industry. To remove any doubt that the FCC had adequate  
11 authority to implement a unified, national framework, Congress amended Section  
12 2(b) of the Act to eliminate the traditional limitation on FCC authority over  
13 “charges, classifications, practices, services, facilities, or regulations for or in  
14 connection with *intrastate* communication service” insofar as they relate to the  
15 provision of CMRS. 47 U.S.C. § 152(b) (“Section 2(b)”) (emphasis added).

16  
17 18. While Section 2(b) makes clear the expansive nature of federal  
18 authority over the provision of wireless services, Section 332(c)(1) of the Act limits  
19 the extent to which that authority should be exercised. Specifically, in Section  
20 332(c)(1), Congress directed the FCC *not* to regulate where regulation is  
21 unnecessary on account of competition. See 47 U.S.C. § 332(c)(1). Implementing  
22 that directive, the FCC has concluded that the wireless industry is extremely  
23 competitive and therefore has largely deregulated the industry.<sup>2</sup>

24  
25  
26 <sup>2</sup> See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget*  
27 *Reconciliation Act of 1993, Annual Report and Analysis of Competitive*  
28 *Market Conditions with Respect to Commercial Mobile Services*, Seventh  
Report, 17 FCC Rcd. 12985, 12988 (2002) (“*Seventh Report*”) (stating that  
wireless industry has “continued to experience increased competition,

1           19. In 1993, Congress also amended Section 332 to expressly  
2 prohibit the states from regulating wireless carrier rates and entry into the market:  
3 “[N]o State or local government shall have any authority to regulate *the entry of or*  
4 *the rates charged* by any commercial mobile service or any private mobile service,  
5 except that this paragraph shall not prohibit a State from regulating the other terms  
6 and conditions of commercial mobile services.” 47 U.S.C. § 332(c)(3)(A)  
7 (emphasis added).

8  
9           20. The FCC has interpreted Section 332(c)(3)(A) broadly to  
10 prohibit state regulation of *any* aspect of the “rates charged by” wireless service  
11 providers, including “both rate levels and rate structures”:

12  
13           [W]e find that the term “rates charged” in Section 332(c)(3)(A) may  
14 include both rate levels and rate structures from CMRS [commercial  
15 mobile radio service] and that the states are precluded from regulating  
16 either of these. Accordingly, states not only may not prescribe how  
17 much may be charged for these services, but also may not prescribe the  
18 rate elements for CMRS or specify which among the CMRS services  
19 provided can be subject to charges by CMRS providers.

20 *Southwestern Bell Mobile Systems, Inc.*, Memorandum Opinion and Order, 14 FCC  
21 Rcd. 19898, 19907 (1999). Wireless carrier rates are thus regulated solely by  
22

23  
24 innovation, lower prices for consumers, and increased diversity of service  
25 offerings”); *Implementation of Sections 3(n) and 332 of the Communications*  
26 *Act: Regulatory Treatment of Mobile Services*, Second Report and Order, 9  
27 FCC Rcd. 1411, 1475 (1994) (forbearing from application of Sections 203,  
28 204, 205, 211, and 214 to wireless industry); *Forbearance from Applying*  
*Provisions of the Communications Act to Wireless Telecommunications*  
*Carriers*, First Report and Order, 15 FCC Rcd. 17414, 17416-17 (2000)  
(enumerating numerous other provisions of Title II that Commission has  
found inapplicable to wireless carriers).

1 federal law, which also prohibits unjust, unreasonable, or discriminatory rates. *See*  
2 47 U.S.C. §§ 201(b), 202(a).

3  
4 21. Section 332(c)(3)(A)'s prohibition on entry regulation has also  
5 been read broadly. It prohibits any state regulation that dictates "the modes and  
6 conditions" under which wireless carriers choose to enter a market. *See Bastien v.*  
7 *AT&T Wireless Services, Inc.*, 205 F.3d 983, 989 (7<sup>th</sup> Cir. 2000). Section 253(a) of  
8 the Communications Act similarly forbids state or local government from  
9 promulgating any rules that "may . . . have the effect" of preventing any entity from  
10 providing any interstate or intrastate telecommunications service. 47 U.S.C. §  
11 253(a).

12  
13 22. While Section 332 thus preempts all forms of rate and entry  
14 regulation, it provides that states retain limited jurisdiction over "other terms and  
15 conditions" of service. That preserved state authority includes the continuing ability  
16 of states to regulate wireless carriers through "the neutral application of state  
17 contractual or consumer fraud laws." *Southwestern Bell Mobile Systems*, 14 FCC  
18 Rcd. at 19903.

19  
20 23. The limited state authority preserved by Section 332 does not  
21 permit state regulators to exert control over CMRS rates or market entry under the  
22 guise of "consumer protection." Indeed, the imposition in each of the 50 states of  
23 "consumer protection" rules like those challenged here would threaten the very  
24 existence of national wireless carriers. At a minimum, such an array of intrusive  
25 and potentially inconsistent regulatory requirements would obstruct and frustrate  
26  
27  
28

1 Congress' and the FCC's goals for the seamless provision of wireless services on a  
2 national basis by national carriers.<sup>3</sup>

3  
4 24. Those over-arching goals of the federal regulatory framework  
5 include enabling wireless carriers to function nationwide, free from the costly and  
6 inefficient influences of state regulation; ensuring national uniformity in the rates,  
7 terms, and conditions of wireless service through the use of national operating and  
8 billing systems; and maintaining a stable regulatory environment to encourage  
9 investment in the wireless industry and in new wireless technologies.<sup>4</sup> D.04-05-057  
10 obstructs and frustrates the achievement of these goals and thereby threatens the  
11 very harm to consumers and the public that Congress and the FCC sought to  
12 prevent.

13  
14  
15  
16 <sup>3</sup> It bears emphasis that Nextel is not seeking to avoid any regulatory oversight  
17 of its rates, rate structures, and practices. In recent comments to the FCC,  
18 Nextel argued that the FCC "should be the agency that interprets and enforces  
19 its own guidelines as to wireless carrier rate practices, without any delegation  
20 of authority to state commissions" and proposed a model for establishment of  
21 uniform *national* rules governing certain wireless carrier practices. See  
22 Comments of Nextel Communications, Inc. and Nextel Partners, Inc., CG  
23 Docket No. 04-208 (filed July 14, 2004).

24 <sup>4</sup> See, e.g., *An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz*  
25 *for Cellular Communications Systems; and Amendment of Parts 2 and 22 of*  
26 *the Commission's Rules Relative to Cellular Communications Systems*, 89  
27 F.C.C.2d 58, 96 (1982) ("In addition, the federal plan for provision of cellular  
28 service set forth in our Order, principally the goal of introducing nationwide  
compatible cellular service without undue delay... provides a further basis for  
this Commission asserting federal primacy over licensing of cellular  
facilities."); *Implementation of Sections 3(n) and 332 of the Communications*  
*Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9  
FCC Rcd. 1411, 1418 (1994) ("[E]stablish[ing], as a principal objective, the  
goal of ensuring that unwarranted regulatory burdens are not imposed upon  
any... CMRS providers."); *Implementation of Section 6002(b) of the Omnibus*  
*Budget Reconciliation Act of 1993*, Eighth Report, 18 FCC Rcd. 14783 (2003)  
("Eighth Report") (finding that Congress established the promotion of  
competition as a fundamental goal of CMRS policy formation and  
regulation).

1 B. FCC Preemption of the CPUC.

2  
3 25. Following the 1993 amendments, the CPUC sought to retain its  
4 then virtually absolute control over the wireless industry in California. On August  
5 8, 1994, the CPUC filed a petition with the FCC asking for permission to continue  
6 to apply California's onerous regulatory regime to wireless carriers. That regime  
7 included rate "guidelines," tariffing and customer notification requirements, and  
8 rules governing termination penalties, term limits, and written consumer consent.  
9 *Petition of the People of the State of California and the Public Utilities Commission*  
10 *of the State of California to Retain Regulatory Authority over Interstate Cellular*  
11 *Service Rates*, Report and Order, 10 FCC Rcd. 7486 (1995) ("*State of California*").  
12

13 26. The FCC denied the CPUC's petition, emphasizing that Section  
14 332 reflects "an unambiguous congressional intent to foreclose state regulation in  
15 the first instance." *Id.* at 7495. The FCC also explained that Congress intended the  
16 1993 amendments to "establish a national regulatory policy for CMRS, not a policy  
17 that is balkanized state-by-state." *Id.* at 7499. Because "State regulations can be a  
18 barrier to the development of competition in [the wireless] market," the FCC found  
19 that "uniform national policy is necessary and in the public interest." *Id.* at 7499  
20 n.70 (*citing* H.R. Rep. No. 103-213 at 480-81 (1993)).  
21

22 27. The CPUC's new Rules seek to reverse the FCC's 1995 *State of*  
23 *California* decision. In the guise of "consumer protection" rules, the CPUC seeks to  
24 re-impose a thoroughgoing tariff-style regulatory regime. As alleged above, that  
25 effort is fundamentally inconsistent with federal regulatory policy for the wireless  
26 industry.  
27  
28

1 C. The Structure of the Wireless Industry.

2  
3 28. The market for wireless service is vigorously competitive. There  
4 are now six nationwide carriers, including Nextel's parent, Nextel Communications,  
5 Inc., that compete with each other to provide national service and pricing plans. In  
6 addition, there are a number of large regional providers with multi-state operations.  
7 *See Seventh Report*, 17 FCC Rcd. at 12997.

8  
9  
10  
11 29. Wireless carriers such as Nextel must change their rate plans and  
12 service offerings frequently to remain competitive. Customers change service plans  
13 primarily to take advantage of newly offered rates, service plans, and promotions.

14  
15 30. Wireless service is inherently national in scope. Customers  
16 desire services covering the entire country so that they can take their wireless  
17 phones with them as they travel nationwide. Customers are able to purchase  
18 national services from vendors located throughout the country. Together with other  
19 affiliates of Nextel Communications, Inc., Nextel makes it possible for its California  
20 subscribers to obtain wireless services throughout the United States through a single,  
21 uniform set of systems for the initiation, provision, and billing and collection for  
22 such services.

23  
24 31. National wireless carriers generally offer a nationwide rate plan  
25 that includes some combination of the following: "bundles" of large quantities of  
26 minutes for a fixed monthly rate that translate into a low per-minute price; no long-  
27 distance charges when using the operator's network; and reduced (or eliminated)  
28 roaming charges when off the operator's network. All nationwide operators also

1 offer plans permitting the customer to purchase a certain quantity of minutes of use  
2 on a nationwide, or nearly nationwide, network without incurring roaming or long  
3 distance charges. *See Seventh Report*, 17 FCC Rcd. at 12998.

4  
5 32. Since the late 1990s, wireless carriers have worked to develop  
6 national networks with economies of scale necessary to improve service and  
7 decrease pricing nationwide. These national networks – including the network of  
8 Nextel and its affiliates elsewhere in the United States – take advantage of uniform  
9 systems and processes to provide service nationwide.

10  
11 33. Wireless service providers thus conduct their business operations  
12 on an interstate basis. Because wireless service operates on spectrum, it does not  
13 and cannot recognize political boundaries. Hence, wireless services are designed,  
14 marketed, sold, and provisioned without regard to state borders. This reflects an  
15 important attribute of wireless telephony that is attractive to subscribers: the ability  
16 to make and receive calls irrespective of the subscriber's physical location.

17  
18 34. Wireless service is very different than traditional wireline  
19 service, which has always been regulated principally at the state level. That  
20 difference is reflected in federal law by Section 2(b) of the Communications Act,  
21 which prohibits federal regulation of intrastate wireline service, *see, e.g., Louisiana*  
22 *Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), while authorizing FCC regulation  
23 of both intrastate and interstate wireless services to accomplish federal regulatory  
24 objectives.

25  
26 35. In contrast to wireless service, wireline service was long  
27 provided by state-franchised monopolies. Despite recent attempts to open local  
28 telephone markets to competition, the former monopolists continue to serve 84% of

1 lines nationwide (85% in California), and a higher percentage of residential and  
2 small business lines. *See* “Local Telephone Competition: Status as of December 31,  
3 2003,” Federal Communications Commission, Wireline Competition Bureau,  
4 Industry Analysis and Technology Division at Table 6 (June 2004) (*available at*  
5 [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf)  
6 [State\\_Link/IAD/lcom0604.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf)). In contrast, wireless service is vigorously  
7 competitive: more than 95% of the population lives in a county with three or more  
8 wireless providers. *See Eighth Report*, 18 FCC Rcd. at 14823.

9  
10 D. The CPUC’s Unlawful Regulation of Wireless Carriers.

11  
12 1. The CPUC Rulemaking Process.

13  
14 36. The CPUC decided in R.00-02-004 to regulate wireless carriers  
15 as if they were dominant wireline carriers. The CPUC defined “carrier” as “[a]ny  
16 telecommunications provider ... including wireless carriers.” GO 168, Part 2.B  
17 (Definitions). Because wireless service is now highly competitive, *see Eighth*  
18 *Report*, 18 FCC Rcd. at 14823, it was both irrational and unlawful for the CPUC to  
19 impose on Nextel and other competitive wireless carriers comprehensive new rules  
20 of the sort that, if warranted at all, would be warranted only for regulated  
21 monopolies. Congress and the FCC have found that wireless customers are better  
22 protected by the competitive market than by rules of the sort the CPUC adopted.

23  
24 37. The CPUC initiated the rulemaking leading to the Rules in 2000.  
25 On May 27, 2004, the CPUC adopted the Rules by a 3-2 vote. As adopted,  
26 however, the Rules differ substantially from previous drafts presented for public  
27 comment.

28

1           38. The Rules adopted stem from an “alternate version” released by  
2 the CPUC on May 13, 2004, as to which the Commission provided interested parties  
3 only one week for comments. The minimal period for submission of comments  
4 effectively deprived Nextel and other carriers of a meaningful opportunity to  
5 conduct and submit a proper economic analysis of the Rules, and thereby deprived  
6 them of their due process right to be heard.

7  
8           39. Nextel and others did have a limited opportunity to request an  
9 evidentiary hearing concerning a narrow set of rules proposed in 2000, which bore  
10 little relation to the thoroughgoing final Rules adopted in 2004. The window for  
11 requesting an evidentiary hearing closed in 2000, however, before the CPUC  
12 disclosed the true breadth of Docket R.00-02-004. By failing to allow an  
13 opportunity for an evidentiary hearing concerning the revised Rules, the CPUC  
14 deprived Nextel and other wireless carriers of any meaningful opportunity to be  
15 heard and to present factual evidence and economic analysis pertinent to the Rules  
16 that the CPUC finally adopted.

17  
18           40. Over Nextel’s objections, Defendants also adopted a 180-day  
19 implementation period for carriers to implement the vast majority of the Rules. The  
20 record before the agency contained no evidence that this implementation period  
21 would be adequate, and it plainly is not. The CPUC failed to make any findings of  
22 fact or conclusions of law regarding the implementation period in its decision  
23 adopting the Rules.

24  
25           41. The 180-day implementation deadline is unrealistically short,  
26 was unfairly determined, and is not supported by information in the record of the  
27 proceeding.

28

1           42. On July 7, 2004, Nextel filed a timely Application for Rehearing  
2 pursuant to Public Utilities Code § 1731. The CPUC has not acted on Nextel's  
3 Application for Rehearing as of this filing. Pursuant to California Public Utilities  
4 Code § 1733(b), Nextel has deemed its Application for Rehearing denied by the  
5 CPUC.

6  
7           43. On July 7, 2004, Nextel filed a Motion for Stay of D.04-05-057  
8 while the CPUC considered Nextel's Application for Rehearing of D.04-05-057.  
9 The CPUC denied Plaintiff's Motion on August 19, 2004.<sup>5</sup>

10  
11           44. On September 27, 2004, Nextel filed with the CPUC a Request  
12 for Extension of Time to implement certain of the Rules. That Request was based  
13 upon Nextel's conclusion, following thorough analysis of its systems for initiation,  
14 provision, and billing and collection for service, that it was unable to comply with  
15 those Rules within the 180-day timeframe mandated by the CPUC. That Request  
16 addresses only the time period allowed for implementation, as opposed to the  
17 fundamental unlawfulness of the Rules challenged herein.

18  
19           2. The Rules.

20  
21           45. As noted above, the Rules comprehensively regulate essentially  
22 all aspects of the wireless industry. As a whole, they are accordingly inconsistent  
23 with the deregulatory goals and policies that govern the federal regulatory scheme  
24 applicable to the wireless industry, as well as certain provisions of the United States

25 \_\_\_\_\_  
26 <sup>5</sup> *Order Instituting Rulemaking on the Commission's Own Motion to Establish*  
27 *Consumer Rights and Consumer Protection Rules Applicable to All*  
28 *Telecommunications Utilities, Order Denying Motions for Stay of Decision*  
*04-05-057, R.00-02-004 [D.04-08-056] \_\_ CPUC 2d \_\_, 2004 Cal. PUC*  
*LEXIS \_\_ (dated Aug. 19, 2004).*

1 Constitution. In addition, many of the Rules are individually objectionable, as  
2 alleged below.

3  
4           **46. Rules 1(b) and 6.** Rule 1(b) compels commercial speech by  
5 requiring carriers to publish on their Web sites “key rates, terms and conditions” of  
6 all “non-tariffed” offerings being provided to subscribers. As a practical matter,  
7 Rule 1(b) essentially requires Nextel to post carrier-maintained tariffs. To comply  
8 with this Rule, Nextel will need to post on its Web site rate plan information for  
9 hundreds of rate plans that are currently in use by Nextel subscribers with 20 lines  
10 or less in California. Many of these rate plans are “legacy” plans no longer  
11 available to the general public. Nextel will also need to develop a process through  
12 which California customers are given access to this outdated information when they  
13 provide a California zip code on the Web site. These Rules force Nextel to expend  
14 substantial resources to reconfigure its Web site in a manner that is bound to create  
15 rather than eliminate customer confusion.

16  
17           **47.** Likewise, Rule 6 also compels commercial speech by imposing  
18 sweeping requirements on the format of Nextel’s bills, including requirements  
19 governing how the bills are organized and information that must be included.  
20 Moreover, because Nextel, like most wireless carriers, operates on a nationwide  
21 basis, and generally uses a single bill format nationwide, the Rules will effectively  
22 either impose California’s unique speech requirements on customers in other states  
23 or require Nextel to revamp its billing system to create different bills in California  
24 than in the rest of the country.

25  
26           **48. Rules 1(h) and 3(f)** unlawfully regulate rates. Rule 1(h)  
27 provides that a formula used to “establish a rate in a term contract” may not change  
28 during the term of the contract. Rule 3(f) allows subscribers to terminate their

1 service “without termination fees or penalties” within “30 days after the new service  
2 is initiated.” Rate changes are proscribed even when Nextel offered a discounted  
3 rate to the customer in exchange for rate flexibility over the life of the contract. The  
4 Rules thereby purport to regulate wireless carrier rates in violation of federal law.

5  
6           **49. Rules 5(c), 7(a), 7(b), and 7(d)** unlawfully regulate additional  
7 aspects of carriers’ rate structures, including deposits, penalties, and back-billing.  
8 Rule 5(c) mandates that carriers pay interest on deposits at not less than the  
9 commercial paper rate published by the Federal Reserve Board. Rule 7(a) prohibits  
10 the imposition of late payment charges if payment is received within 22 days after  
11 the date the bill was mailed, and limits late payment charges to 1.5 percent per  
12 month on the overdue balance. Rule 7(b) bars carriers from charging at all for  
13 services provided more than three months before the bill date, or four months in the  
14 case of roaming charges. Rule 7(d) indicates that delays in billing may not result in  
15 higher total charges than if the usage were posted during the billing cycle in which  
16 the call was made.

17  
18           **50. Rules 8(a) and 8(b)** expressly prohibit rate increases. Rule 8(a)  
19 requires “at least 25 days” advance notice of all changes to “subscribers’ service  
20 agreements or non-term contracts” that could result in higher rates. To comply with  
21 Rule 8(a), Nextel will need to make substantial system modifications so that it can  
22 target messages within its billing system to California subscribers who are not on a  
23 term contract. To the extent that Rule 8(a) applies on its face to both term and non-  
24 term contracts, it is impossible to comply both with it and with Rule 8(b) (discussed  
25 directly below).

26  
27           **51.** Rule 8(b) altogether prohibits rate increases during the term of  
28 term contracts. Rule 8(b) will require Nextel to make the same system changes

1 required by Rule 8(a) to target messages to the appropriate group of California  
2 subscribers. More importantly, however, Rule 8(b) will also prevent carrier  
3 recovery of costs incurred in compliance with federally mandated programs, which  
4 require contributions to universal service and support of other federal  
5 telecommunications programs. Congress has expressly mandated that carriers  
6 contribute to a "Universal Service Fund" to support telecommunications services to  
7 all Americans. *See* 47 U.S.C. § 254(b). The FCC sets mandatory universal service  
8 contributions quarterly, and expressly authorizes carriers to recover those costs from  
9 their customers. *See* 47 C.F.R. § 54.712(a). Rule 8(b) would prevent carriers from  
10 changing customer charges to recoup additional contributions imposed by the FCC  
11 during the term of term contracts. Similarly, Rule 8(b) would prevent carriers from  
12 recovering expenses incurred for provision of "enhanced 911," "local number  
13 portability," "telecommunications relay service" for the deaf, and a variety of other  
14 federally mandated services. Thus, Rule 8(b) directly obstructs and frustrates  
15 federal policy goals and consumer interests protected by the Congress and the FCC.  
16 Rule 8(b) will also unlawfully prevent carriers from recovering state and local fees  
17 imposed during the term of term contracts.

18  
19           **52. Rules 9(a) and 11(b)** prohibit carriers from terminating service  
20 to customers for non-payment absent seven calendar days' notice, and place  
21 additional limitations on the manner in which termination may be accomplished.  
22 The Rules thereby purport to regulate wireless carrier rates in violation of federal  
23 law. Nextel will need to substantially overhaul its systems so that it can implement  
24 procedures for informing customers that amounts are overdue and service  
25 termination may result that comply with these Rules.

26  
27  
28

1           3.     Burdens of Implementation.

2  
3           53.    Implementation of the Rules will require extensive changes to  
4 Nextel's business systems and procedures. In fact, Nextel will be obliged to  
5 completely revamp the way its wireless services are promoted, sold, and billed in  
6 California. Nextel provides national wireless services using uniform national  
7 systems and procedures. The many changes that the Rules would impose on Nextel  
8 in California will conflict with its national systems and procedures, and will harm  
9 Nextel's customers not only in California but also across Nextel's entire national  
10 network.

11  
12           54.    Among the most time-consuming and costly of the changes  
13 required by the Rules will be those to Nextel's billing system, which is used for all  
14 service initiation, billing and collection, and Customer Care functions provided by  
15 Nextel on a nationwide basis. The fundamental changes to Nextel's billing system  
16 required by the Rules will not only cost Nextel millions of dollars, but will result in  
17 systems that are at odds with Nextel's systems in other states, thereby imposing  
18 substantial extra-territorial burdens and destroying national economies of scale and  
19 scope in the provision of wireless services that Congress sought to promote in its  
20 1993 amendments of the Communications Act. Ultimately, all of Nextel's  
21 customers – both those residing in California and in other states – will pay higher  
22 rates for wireless service.

23  
24           55.    Billing system changes cannot be made on a blank slate. Several  
25 successive system "releases" are constantly under development at any given time.  
26 The deadline for changes to an upcoming release is months before the release  
27 occurs. Accordingly, the implementation of regulations requiring massive system  
28 changes is extremely complicated. Nextel cannot abandon an upcoming release in

1 midstream without creating massive disruption to its systems. No matter how the  
2 system changes required by the Rules are effectuated, those revisions will  
3 substantially disrupt long-planned updates, increasing the risk of problems and  
4 errors in Nextel's systems and threatening harm to consumer interests protected by  
5 Congress and the FCC.

6  
7           56. Information storage and retrieval systems will also need to be  
8 changed, and their capabilities expanded. Carrier infrastructure will need to be  
9 improved, to provide more call center space, more telephone lines, and so forth, to  
10 handle vast volumes of additional calls that the Rules will generate. Additional  
11 employees will need to be hired and trained. Far-reaching retraining of existing  
12 personnel will be required. In short, as alleged above, the Rules require Nextel and  
13 other wireless carriers to substantially overhaul the way their business operations  
14 work and to do so on a state-by-state basis.

15  
16           57. The CPUC's irrationally short 180-day deadline for  
17 implementation dramatically increases the problems posed by implementation.  
18 Wide-ranging changes to carrier systems and procedures should be made, if at all,  
19 through a series of deliberate, incremental changes. For example, making changes  
20 in operations and billing software through an incremental, step-by-step process –  
21 where each step can be verified before moving on to the next step – is far more  
22 reliable than attempting simultaneous revisions of multiple operations and billing  
23 systems.

24  
25           58. The rushed implementation schedule will likely result in system  
26 errors, which will generate a much higher chance of consumer confusion and  
27 dissatisfaction, both within and outside of California. The 180-day deadline will  
28 also result in costs significantly greater than a more deliberate implementation.

1           59. Moreover, public safety personnel in California vitally depend  
2 on Nextel's services for provision of emergency and disaster relief services, and  
3 Nextel therefore cannot risk service disruptions resulting from the irrational deadline  
4 for implementation of the Rules. The CPUC's threatened disruption of services that  
5 Nextel provides to public safety providers in California is also inconsistent with  
6 protection of consumers and the public through national systems for the provision of  
7 wireless service envisioned by Congress and the FCC.

8  
9           60. Although precise estimates are difficult, implementing these  
10 Rules will cost Nextel millions of dollars. Any pecuniary losses from implementing  
11 the Rules will be unrecoverable should the Rules be overturned, due to California's  
12 sovereign immunity from retrospective damages. Ultimately, it is consumers who  
13 will bear these wasted costs through higher rates.

14  
15           61. Because Nextel provides service using uniform systems and  
16 procedures throughout its national footprint, all of its customers – both those  
17 residing in California and elsewhere – will be harmed by the implementation issues  
18 and substantial costs required by the change in business practices mandated by the  
19 CPUC. Hence, the Rules are inconsistent with the 1993 amendments to the  
20 Communications Act, which sought to foster the efficient provision of wireless  
21 services on a nationwide basis.

22  
23           62. By contrast, consumers will not be harmed if the Rules are not  
24 implemented because existing consumer protection laws already protect consumers.  
25 Today, public officials, including the FCC, CPUC, the California Attorney General,  
26 and local district attorneys can undertake actions they deem are needed to protect  
27 the public interest against actual fraud or misleading billing, the ostensible targets of  
28 the Rules.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

(Taken as a Whole, the Rules are Inconsistent with the  
Comprehensive Federal Regulatory Scheme)

63. Plaintiff realleges and incorporates herein by reference the allegations set forth in Paragraphs 1 through 63.

64. The CPUC’s Rules stand as an obstacle to the basic policies and objectives of the comprehensive federal regulatory regime governing the wireless industry. Those over-arching federal goals include enabling wireless carriers to function nationwide, free from the costly and inefficient influences of state regulation; ensuring national uniformity in the rates, terms, and conditions of wireless service through the use of national operating and billing systems; and maintaining a stable regulatory environment to encourage investment in the wireless industry and in new wireless technologies. D.04-05-057 obstructs and frustrates the achievement of these goals and thereby threatens the very harm to consumers and the public that Congress and the FCC sought to prevent.

65. Congress’s recent amendments to Sections 2(b) and 332 of the Communications Act reflect its commitment to a wireless industry free from the balkanizing influences of state-by-state regulation. Congress amended Section 2(b) to give the FCC – not state commissions – broad authority over wireless services. Section 332(c)(1) specifically directs that even the FCC should stay its hand from regulation where regulation is unnecessary on account of competition, as the FCC has found to be the case for the wireless industry. And in Section 332(c)(3)(A) of the Communications Act – captioned “State Preemption” – Congress provided that

1 “no State or local government shall have any authority to regulate the entry of or the  
2 rates charged by any commercial mobile radio service or any private mobile  
3 service.” 47 U.S.C. § 332(c)(3)(A). California’s overbearing regulation of nearly  
4 every aspect of the wireless industry, including but not limited to its attempt to  
5 regulate wireless carrier rates and market entry, is inconsistent with these  
6 congressional determinations to favor a national deregulatory framework governing  
7 the provision of wireless services.

8  
9           66. Moreover, taken as a whole, the Rules regulate wireless carrier  
10 activity in California so thoroughly as to constitute impermissible entry regulation  
11 under Section 332(c)(3)(A). To serve the California market, carriers must, *inter*  
12 *alia*: post detailed information akin to tariffs on their Web sites (Rule 1(b)); comply  
13 with limitations on the ways in which they may present customer contracts (Rules  
14 1(h), 2(c), 3(b), 3(e)); respond to various inquiries within specified time frames  
15 (Rules 1(c), 1(d), and 1(e)); comply with conditions placed on their marketing  
16 practices and materials (Rule 2); allow the customer a substantially longer period for  
17 early termination of a contract without charge, even where the customer receives a  
18 discount based on acceptance of a shorter period for early termination without  
19 charge (Rule 3(f)); forego requiring a deposit for services (Rule 5); conform to  
20 severe restrictions placed on the formatting of their bills (Rule 6); restrict the use of  
21 roaming charges (Rule 7); conform to limits placed on their ability to change service  
22 offerings to meet competition (Rules 8(a), 8(b)); comply with restrictions placed on  
23 their ability to transfer subscribers or withdraw service (Rules 8(c), 8(d)); comply  
24 with restrictions placed on their ability to terminate service (Rules 9(a), 11(a),  
25 11(b)); face limitations on choice of law or venue (Rule 11(d)); and comply with  
26 E911 obligations (Rule 15). Such detailed regulation of the wireless industry is  
27 inconsistent with Section 332’s ban on entry regulation by the states and the FCC’s  
28 implementing rules and regulations.



1           72. On their face, the Rules directly regulate the rates that wireless  
2 carriers charge their customers in California. Specifically, and without limitation,  
3 Rules 1(b), 1(h), 3(f), 5(c), 7(a), 7(b), 7(d), 8(a), 8(b), 9(a), and 11(b) represent  
4 efforts by the Defendants to regulate wireless carriers' rates and rate structures.  
5

6           73. Rules 8(a), 8(b), 1(b), and 1(h) all expressly prohibit rate  
7 increases in various circumstances: Rule 8(a) requires "at least 25 days" advance  
8 notice of all changes to "subscribers' service agreements or non-term contracts" that  
9 could result in higher rates; Rule 8(b) altogether prohibits rate increases during the  
10 term of term contracts; Rule 1(b) essentially forbids carriers from charging rates  
11 different from those required to be posted on their Web sites; and Rule 1(h) provides  
12 that a formula used to "establish a rate in a term contract" may not change during  
13 the term of the contract. These express prohibitions obviously regulate carrier rates  
14 in violation of Section 332.  
15

16           74. Significantly, by their terms, Rule 1(h) and Rule 8(b) prohibit  
17 wireless carriers from increasing term contract rates even when the increase is  
18 warranted due to increases or passage of new state and local taxes, fees and  
19 assessments imposed on carriers and to FCC-mandated increases in wireless  
20 carriers' obligations under federal law to contribute to federal telecommunications  
21 programs, such as USF, E911, LNP, number pooling, TRS and NANPA.  
22 Preventing wireless carriers from exercising their right under federal law to recover  
23 their contributions to federal programs regulates rates in violation of Section 332.  
24

25           75. Rule 3(f) purports to allow subscribers to terminate their service  
26 "without termination fees or penalties" within "30 days after the new service is  
27 initiated." "[T]ermination *fees*" fall within the Rules' own definition of "rates" –  
28 *i.e.*, "amounts requested to be paid by the user of a telecommunications service by

1 whatever name, including . . . *fees*,” see Part 2.B (Definitions) of GO 168 (emphasis  
2 added) – and are clearly a component of carriers’ rate structures. See *Southwestern*  
3 *Bell*, 14 F.C.C.R. at 19,907. Accordingly, termination fees are part of a carrier’s  
4 “rate” within the meaning of Section 332(c)(3)(A), and proscribing such fees  
5 constitutes forbidden “rate regulation.”  
6

7           76. Rule 5(c) and Rule 7 regulate carriers’ rate structures by limiting  
8 the use of charges, surcharges and fees, all of which fall within the definition of  
9 “rates” in Part 2.B (Definitions) of GO 168. Rule 5(c) improperly mandates that  
10 carriers pay interest on deposits at not less than the commercial paper rate published  
11 by the Federal Reserve Board. Rule 7(a) prohibits the imposition of late payment  
12 charges if payment is received within 22 days after the date the bill was mailed, and  
13 limits late payment charges to 1.5% per month on the overdue balance. Rule 7(b)  
14 bars carriers from charging at all for services provided more than three months  
15 before the bill date, or four months in the case of roaming charges. Rule 7(d)  
16 indicates that delays in billing may not result in higher total charges than if the  
17 usage were posted during the billing cycle in which the call was made. Each of  
18 these Rules directly regulates wireless carrier rates in a manner forbidden by federal  
19 law.  
20

21           77. Rules 9(a) and 11(b) prohibit carriers from terminating service to  
22 customers for non-payment absent seven calendar days’ notice, and place additional  
23 limitations on the manner in which termination may be accomplished. These Rules  
24 constitute regulation of wireless carrier rates in violation of Section 332.  
25

26           78. For the foregoing reasons, Plaintiff is entitled to a declaration,  
27 pursuant to 28 U.S.C. § 2201, that the Rules conflict with, and hence are preempted  
28

1 by Section 332(c)(3)(A) of the Communications Act and the FCC's implementing  
2 rules and regulations.

3  
4 79. Plaintiff is further entitled to preliminary and permanent  
5 injunctive relief, pursuant to 28 U.S.C. § 2201, prohibiting Defendants from  
6 violating Section 332(c)(3)(A) through their enforcement or threatened enforcement  
7 of the Rules.

8  
9 THIRD CLAIM FOR RELIEF

10 (The Rules Violate the Commerce Clause)

11  
12 80. Plaintiff realleges and incorporates herein by reference the  
13 allegations set forth in Paragraphs 1 through 80.

14  
15 81. The Commerce Clause of the United States Constitution grants  
16 Congress the power to regulate interstate commerce. U.S. Const. art. 1, sec. 8, cl. 3.  
17 The Commerce Clause "encompasses an implicit or 'dormant' limitation on the  
18 authority of the States to enact legislation affecting interstate commerce." *Healy v.*  
19 *The Beer Inst.*, 491 U.S. 324, 326 n.1 (1989).

20  
21 82. State regulations with the effect of regulating commerce  
22 occurring wholly out-of-state are inconsistent with the "dormant" aspect of the  
23 Commerce Clause. The CPUC's Rules have that forbidden effect because, in  
24 practice, they will oblige Nextel and other wireless carriers to impose many of  
25 California's requirements nationwide. The Rules were adopted by Defendants  
26 without any care or concern for their substantial extra-territorial effects and the  
27 burdens they impose on the national operations of wireless carriers operating  
28 pursuant to a federal regulatory scheme.

1           83. The Rules also violate the Commerce Clause because they  
2 subject carriers to multiple inconsistent state regulatory schemes. Interstate wireless  
3 networks, like railroads, interstate highways, and the Internet, constitute an area of  
4 the economy that demands uniform rules and regulations at the federal level.  
5 Indeed, Congress has concluded that “mobile services . . . by their nature, operate  
6 without regard to state lines as an integral part of the national telecommunications  
7 infrastructure.” H.R. Rep. No. 103-111, pt. 3, at 260 (1993), *reprinted in* 1993  
8 U.S.C.C.A.N. 378, 587. The Rules unlawfully ignore the fundamentally interstate  
9 nature of the wireless industry in favor of untenable state-by-state regulation.

10  
11           84. In addition, the Rules impose an undue burden on interstate  
12 commerce in violation of the Commerce Clause. The wireless industry is  
13 continually lowering prices and improving service. These improvements have  
14 resulted largely from the economies of scale and increased efficiencies enabled by  
15 the offering of uniform, nationwide service over national networks, as envisioned by  
16 Congress in its 1993 amendments of the Communications Act. *See, e.g., Eighth*  
17 *Report*, 18 FCC Rcd. at 14805, 14812. The Rules would substantially reduce these  
18 efficiencies by forcing wireless carriers to either implement an entirely separate  
19 business plan for the state of California or to adopt California’s Rules nationwide.  
20 Either option would impose millions of dollars of costs on wireless carriers and their  
21 customers, while doing little to advance California’s purported interest in consumer  
22 protection beyond what is already provided by vigorous competition in the wireless  
23 marketplace.

24  
25           85. For the foregoing reasons, Plaintiff is entitled to a declaration,  
26 pursuant to 28 U.S.C. § 2201, that the Rules, as applied to Plaintiff, violate the  
27 Commerce Clause of the United States Constitution.

28



1 are no longer available to new subscribers. Once carriers have posted such  
2 information, it must be “updated” and remain on their Web sites until there are no  
3 longer any subscribers for the service plan in question.

4  
5 90. Complying with Rule 1(b)’s requirements will obviously be  
6 extremely burdensome for Nextel and other wireless carriers, without advancing any  
7 substantial government interest. As a practical matter, mandating consumer access  
8 to a sea of information about defunct plans serves no legitimate governmental  
9 purpose. At most, it merely satisfies consumer curiosity about defunct plans – but  
10 as *Amestoy* illustrates, satisfying consumer curiosity does not advance a government  
11 interest substantial enough to justify burdening protected speech.

12  
13 91. Nor can the CPUC demonstrate that Rule 1(b)’s Web posting  
14 requirements will materially alleviate specific, cognizable harms, or that it is no  
15 broader than necessary to serve any purported governmental interests. In fact, no  
16 conceivable harm could result from a carrier’s decision not to advertise on its Web  
17 site services and rate plans that are no longer available to new subscribers, and the  
18 CPUC failed even to allow Nextel and other wireless carriers to present evidence  
19 showing that Rule 1(b) is unnecessarily broad. Instead, Rule 1(b) forces Nextel to  
20 expend substantial resources to reconfigure its Web site in a manner that is bound to  
21 create rather than eliminate customer confusion. Therefore, in the absence of  
22 cognizable harm and narrow tailoring, Rule 1(b) violates the First Amendment.

23  
24 92. In addition, Rule 6(k) also forces Nextel to engage in  
25 commercial speech. It requires specific information to be included in bills, and even  
26 goes so far as to dictate the specific words wireless carriers must use to convey  
27 certain information. For example, Nextel must include the contact information for  
28 the CPUC’s Consumer Affairs Bureau on each customer bill. Complying with Rule





1           102. The Contracts Clause of the United States Constitution prohibits  
2 Defendants from adopting a measure that substantially impairs Plaintiff’s existing  
3 contracts with its subscribers unless the measure is based on “reasonable conditions”  
4 and is “of a character appropriate to the public purpose justifying [the legislation’s]  
5 adoption.” *Energy Res. Group. Inc. v. Kansas Power & Light Co.*, 459 U.S. 400,  
6 410-12 (1983).

7  
8           103. The Commission’s new Rules substantially impair contracts  
9 between wireless carriers and their subscribers. Indeed, the new Rules redefine  
10 numerous aspects of such contracts, from the size of the type in which contract  
11 documents can be printed, *see* Rules 1(h), 2(c), 3(e), and 8(e), to the manner in  
12 which the contracts can be terminated, *see, e.g.*, Rules 9, 11. By redefining (*inter*  
13 *alia*) the rescission period (Rule 3(f)), deposit requirements (Rule 5), late payment  
14 charges (Rule 7(a)), service termination provisions (Rules 8(b), 9), and dispute  
15 resolution provisions (Rule 11) of contracts between wireless carriers and their  
16 subscribers, the new Rules substantially alter the costs to perform those contracts.

17  
18           104. The Rules are not designed to advance any “public purpose” as  
19 to which the Commission can reasonably exercise jurisdiction over wireless carriers.  
20 Rather, the Rules target the contractual rights and obligations of Nextel and other  
21 wireless carriers in California for no other reason than to adjust those rights and  
22 obligations more to the liking of the Defendants – essentially, to confer on  
23 customers greater rights and benefits than they now have and pay for under current  
24 agreements for wireless service. But the bare desire to offer perceived benefits to  
25 consumers at the expense of carriers cannot save intrusive state regulation from  
26 invalidation under the Contracts Clause. *Exxon Corp. v. Eagerton*, 462 U.S. 176,  
27 192 (1983).

28







1 (iv) For a declaratory judgment on Count 4 that the Rules violate the  
2 Free Speech Clause of the United States Constitution;

3  
4 (v) For a declaratory judgment on Count 5 that the Rules are  
5 impermissibly vague, and hence violate the Due Process Clause of the Fourteenth  
6 Amendment to the United States Constitution;

7  
8 (vi) For a declaratory judgment on Count 6 that the Rules violate the  
9 Contracts Clause of the United States Constitution;

10  
11 (vii) For a declaratory judgment on Count 7 that the Rules were  
12 adopted in violation of the Due Process Clause of the United States Constitution;

13  
14 (viii) For a declaratory judgment on Count 8 that Defendants' putative  
15 authority to enforce, threatened enforcement, and actual enforcement of the Rules  
16 while acting under color of state law violates and will violate Plaintiff's  
17 constitutional and federal statutory rights in violation of 42 U.S.C. § 1983;

18  
19 (ix) For permanent injunctive relief on all counts enjoining  
20 Defendants and any officers or employees of the State of California from taking any  
21 action to enforce or attempt to enforce any and all provisions of the Rules declared  
22 to be unlawful;

23  
24 (x) For reasonable attorneys' fees on all counts to be awarded  
25 pursuant to 42 U.S.C. § 1988 and any other applicable law or doctrine and for all  
26 other costs of this action to be taxed against Defendants;

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(xi) For such other and further relief on all counts as the Court may  
deem just and proper.

DATED: September 30, 2004

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By   
ROBERT S. BEALL

Attorneys for Plaintiff  
NEXTEL OF CALIFORNIA, INC.