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

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Kent Nakamura, Vice President and Deputy General Counsel - Regulatory
Anthony M. Alessi, Senior Counsel - Regulatory
Christopher R. Day, Counsel - Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

Laura H. Phillips
Laura S. Gallagher
Patrick R. McFadden
DRINKER BIDDLE & REATH LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005-1209
(202) 842-8800

Its Attorneys

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SUMMARY

Nextel Communications, Inc. ("Nextel") supports the concept of "bill and keep" intercarrier compensation as the means to achieve reform that is most suitable to address evolving technology and competitive changes in the telecommunications marketplace. As noted by its proponents, bill and keep intercarrier compensation has the potential to streamline the current intercarrier compensation regime by creating cost efficiencies, reducing the need for regulatory oversight, and allowing for a more competitive marketplace. Nevertheless, the transition will pose challenges, requiring flexibility and prudent judgment on the part of the Federal Communications Commission ("Commission").

As part of intercarrier compensation reform, it is particularly important for the Commission to maintain the obligation of the incumbent Local Exchange Carriers ("ILECs") to provide transit service in support of interconnection and to ensure that these services are provided under terms and conditions and at rates that are just, reasonable and not unreasonably discriminatory. In addition, the public interest would not be served if the Commission adopts an intercarrier compensation reform plan that relies to a significant degree on new support mechanisms that keep carriers whole by maintaining intercarrier revenue streams being lost as a result of technological change and the inroads of competition. This is important so as not to distort the functioning of future competitive markets or undermine the growth of intermodal competition. Similarly, any intercarrier compensation reform plan should avoid fundamentally altering or reconfiguring the basic network structure of Commercial Mobile Radio Service ("CMRS")-ILEC interconnection. At the same time, the intraMTA reciprocal compensation pricing rules should be maintained.

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Nextel Communications, Inc., ("Nextel"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Further Notice of Proposed Rulemaking on intercarrier compensation reform.[1] As a nationwide Commercial Mobile Radio Service ("CMRS") carrier, Nextel has a strong interest in interconnection and intercarrier compensation matters.

I. INTRODUCTION.

Nextel supports the concept of "bill and keep" intercarrier compensation as the means to achieve reform that is most suitable to address evolving technology and industry changes to the competitive telecommunications marketplace. Bill and keep intercarrier compensation has the potential to streamline the current intercarrier compensation regime by creating cost efficiencies, reducing the need for regulatory oversight, and allowing for a more competitive marketplace. Nextel is in general agreement with those within the industry, including CTIA – The Wireless Association ("CTIA"), on the benefits of bill and keep.[2] At the same time, the transition will

[1] Developing a Unified Intercarrier Compensation Regime, *Further Notice of Proposed Rulemaking,* 20 FCC Rcd 4685 (2005) ("*Further Notice*").

[2] *See* ex parte presentation of CTIA, Attachment at 4, CC Docket No. 01-92 (filed Feb. 4, 2005) ("Each carrier should be responsible for recovering its network costs from its own end-user

pose challenges, requiring flexibility and prudent judgment on the part of the Commission. It will be important for the Commission to take a balanced and forward-looking approach when considering how technological and competitive trends may affect progress towards achieving bill and keep intercarrier compensation.

When deliberating on what constitutes a workable bill and keep intercarrier compensation regime, the Commission needs to address and resolve issues necessary to ensure the growth of intermodal competition. Towards this end, it is particularly important for the Commission to reinforce the obligation of incumbent Local Exchange Carriers ("ILECs") to provide transit interconnection services. Nextel and many other carriers have relied on ILEC transit service for years to interconnect with other carriers. These carriers have no practical alternative to ILEC transit interconnection services. Regulation, therefore, is necessary to ensure that these services are provided under terms and conditions and at rates that are just, reasonable and not unreasonably discriminatory pursuant to Sections 201, 202 and other applicable Sections of the Communications Act of 1934, as amended ("the Act"). By regulating, the Commission will preserve the future vital role of indirect interconnection for competing interconnecting carriers and their end users under a new intercarrier compensation regime.[3]

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customers and, in a competitive market, should have flexibility in how those costs are recovered.")

[3] While the *Further Notice* concentrates on types of intercarrier compensation other than special access services, the reforms adopted in this proceeding could be thwarted by the continuation of unreasonable rates and practices in the provisions of special access by ILECs. A carrier such as Nextel is dependent upon these bottleneck facilities to interconnect with ILEC networks. Practical alternatives to ILEC services do not exist in certain product and geographic markets. The Commission's recent NPRM on special access price cap rules and pricing flexibility addresses some of the critical concerns of special access customers. *See* Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform

As a separate matter, the public interest is not served by an intercarrier compensation reform plan that relies to any significant degree on a "revenue neutral" approach that preserves the inefficiencies in the current intercarrier compensation system by maintaining intercarrier revenue streams being lost as a result of technological changes and competition. This is important for a number of reasons. First, there is no legal obligation to afford revenue neutrality to any carrier as part of intercarrier compensation reform. More importantly, "keep whole" revenue replacement, in particular that associated with access charges, would distort the functioning of a competitive marketplace and would most certainly undermine intermodal competition, putting carriers such as Nextel at a competitive disadvantage.

Nextel recognizes that carriers should be given a full opportunity to recover their costs from their end users or from existing Universal Service support mechanisms, as appropriate, under a bill and keep intercarrier compensation plan. However, "revenue replacement" should not come through new federal support mechanisms or from a further expansion of Universal Service funding ("USF") mechanisms. USF funding obligations have already increased dramatically in the last few years. Further USF growth – that is not narrowly targeted to serve the goals enunciated in Section 254 of the Act – will only serve to further destabilize the Universal Service program, and retard the growth of new, innovative telecommunications services.

Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Order and Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593 (rel. Jan. 31, 2005). The NPRM holds out the prospect of short-term interim relief from the current pattern of excessive earnings on special access services by price cap LECs and from problems with the Commission's predictive judgment on special access competition. It is critical that the Commission act swiftly, even before the resolution of this rulemaking, to implement measures to stem the exercise of market power in special access services.

In addition, any intercarrier compensation reform plan should avoid fundamentally altering or reconfiguring the basic network structure of CMRS-ILEC interconnection. At the same time, the intraMTA reciprocal compensation pricing rule should be maintained.

II. THE PUBLIC INTEREST IS SERVED BY OBLIGATING ILECS TO PROVIDE REGULATED COMMON CARRIER TRANSIT INTERCONNECTION SERVICE.

The *Further Notice* seeks comment on the policy and legal basis for Commission regulation of ILEC transit interconnection service. As the Commission recognizes, the availability of transit service is vital to establishing indirect interconnection among competitive carriers.[4] ILECs traditionally have provided this common carrier service to carriers such as Nextel. If transit interconnection service were unavailable, all carriers, especially wireless carriers such as Nextel, would be disadvantaged in terms of customer service coverage because cost inefficiencies and other limitations would be introduced into carrier networks. This would harm competition and the public interest. Additionally, ILEC transiting service is a bottleneck service necessary for indirect interconnection. As such, Commission regulation that ensures that ILEC transit service is made available under terms and conditions and at rates that are just, reasonable, and not unreasonably discriminatory furthers the public interest.[5] The two subsections below address the public interest policy basis for requiring ILECs to continue offering transit interconnection service under regulation.

[4] *Further Notice* at ¶¶ 125-26.

[5] *Id.* at ¶ 129.

A. Regulated ILEC-Provided Transit Service Is Necessary Under Intercarrier Compensation Reform.

ILEC-provided transit service serves as an efficient, economic, and essential interconnection alternative for many carriers, including CMRS providers, such as Nextel, allowing them to interconnect with each other for rapid, efficient, nationwide and worldwide communications. Often, it is the only interconnection alternative that will enable Nextel to provide services and widespread coverage to its subscribers. Although Nextel recognizes that direct interconnection between originating and terminating carriers can also be an economically efficient means of interconnecting with other carriers, the requisite alternative of indirect interconnection via transit is critical to the advancement of intermodal competition and the provision of efficient and cost-effective service to the public.

Transiting is simply the routing of traffic via one or more carriers to reach another carrier. Variously described as "jointly provided service" or "through routes," it is fundamental to efficient common carriage. Absent transiting arrangements, carriers would be required to interconnect directly with every other carrier, an inefficient and costly network architecture. The *Further Notice* observes that the availability of transit interconnection service is critical to establishing indirect interconnection among CMRS carriers, CLECs and ILECs. The Commission states that "without the continued availability of transit service, carriers that are indirectly connected may have no efficient means by which to route traffic between their respective networks."[6] The *Further Notice* also characterizes transit service as "an efficient way to interconnect when carriers do not exchange significant amounts of traffic."[7]

The preservation of the requisite alternative of indirect interconnection will remain important. Under bill and keep intercarrier compensation reform, there may be less inclination on the part of certain ILECs, but continued need on the part of other carriers to maintain vital ILEC non-competitive bottleneck transit interconnection services. It is therefore essential to promote the public interest by ensuring the continued availability of transit interconnection service on reasonable terms in the future under any intercarrier compensation regime.

The importance of the continued availability of transit in the public interest policy is reflected in past Commission orders and its rules. In the 1996 *Local Competition Order* the Commission stated that the "duty to interconnect directly or *indirectly* is central to the 1996 Act and achieves important policy objectives," in particular, promoting intermodal competition.[8] The Commission's rules that confirm the importance of indirect interconnection to the proper functioning of intermodal competition also reflect the public interest benefits of transit. Commission Rule 20.11(a) provides that a local exchange carrier "must provide the type of interconnection reasonably requested by a mobile service licensee or carrier."[9] The purpose

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[6] *Id.* at ¶ 125.

[7] *Id.* at ¶ 126.

[8] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499, ¶ 997 (1996) ("*Local Competition Order*") (emphasis added, subsequent history omitted). The Commission also noted that allowing direct or indirect interconnection allowed carriers to select the most cost-efficient interconnection method based on their technical and economic choices. *Id.*

[9] 47 C.F.R.§ 20.11(a).

underlying 20.11 plainly is "to promote competition in the telecommunications market by ensuring that all LECs and CMRS providers provide reasonable interconnection to one another subject to reasonable rates, terms, and conditions."[10] According to the Commission, the rule "is particularly directed to regulating the conduct of LECs with market power in their interconnection relationships with CMRS providers."[11]

The Wireline Competition Bureau's action in the Virginia interconnection arbitration also recognizes the public benefits of transit via dominant ILECs for the cost-effective provision of service to the public. There the Bureau upheld a carriers' right to reasonable access to ILEC tandem transit, stating, "We reject Verizon's proposed language . . . requiring the establishment of direct end office trunks when traffic to a particular Verizon end office exceeds a DS-1 level . . . [C]ompetitive LECs have the incentive to move their traffic onto direct end office trunks when it will be more cost-effective than routing traffic through the Verizon tandems."[12] The Bureau additionally rejected Verizon's attempts to force direct interconnection based on the level of transit traffic flows.

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[10] *See, e.g.*, Biennial Review 2000 Staff Report Released, 15 FCC Rcd 21084, 21203 (2000).

[11] *Id.*

[12] *See* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 27039, ¶ 88 (2002).

State commissions too recognize that ILEC-provided transit service is necessary for the provision of rapid, efficient, nationwide and worldwide communication today.[13] Without ILEC transit service to support indirect interconnection, competitors such as Nextel lack the ability to interconnect with other providers as expansion occurs in other markets. The public interest is best served by a requirement that ILECs provide transit service on reasonable request "based upon [the requesting carrier's] most efficient technical and economic choices."[14] Whatever intercarrier compensation reform the Commission chooses to pursue, sound public policy requires the continued availability of transit interconnection service to all carriers on reasonable terms.[15]

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[13] Courts and state PUCs that have considered the issue have recognized that continued availability of transit is consistent with federal and state law and the public interest. *Michigan Bell Tel. Co. v. Chappelle*, 222 F. Supp. 2d 905, 918 (S.D. Mich. 2002) ("federal law does not preclude mandatory transiting"). The North Carolina Utilities Commission also determined that "Verizon is obligated to provide the transit service as a matter of law." According to the North Carolina Commission, a transit obligation is "well supported under both state and federal law." And, "[i]f there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired." Petition of Verizon South, Inc. for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph to Adopt Alternative Transport Method, *Order Denying Petition*, Docket No. P-19, Sub 454 (Sept. 22, 2003).

[14] *Local Competition Order* at ¶ 997.

[15] It is important that transit service be viewed broadly by the Commission to include more than ILEC tandem switching to exchange traffic with subtending and downstream ILEC switches. Transit service encompasses other forms of ILEC connections, such as digital cross-connect services, which are critical to CMRS carriers, CLECs and other carriers who exchange traffic with one another.

B. Intercarrier Compensation Reform Needs to Address the Reasonableness of Transit Rates.

ILEC transit service is a bottleneck service, *i.e.*, essentially a gateway to subtending ILEC, CLEC and CMRS switches. As such, the ILECs have the ability – limited only by the statute and the Commission's rules – to unreasonably discriminate and impose unjust and unreasonable transit service rates upon competitors and other interconnecting carriers. As important as it is to maintain ILEC-provided transit service, *it is equally important that the Commission ensure that the ILECs do not use interconnection bottlenecks such as transit to raise competitors' rates, adversely affecting the development of intermodal competition, or denying transit on reasonable terms to other carriers.*. Therefore, under any bill and keep intercarrier compensation reform, it is incumbent upon the Commission to ensure that rates for bottleneck transit services are cost-based and comply with Sections 201 and 202 of the Act.[16]

Under current ILEC interconnection agreements, Nextel pays per minute rates for transit services that are unreasonably high in comparison with the rates ILECs charge others for comparable services. Given the lack of competitive alternatives, continued supervision is necessary to ensure the continued availability of transit service under any intercarrier compensation reform. Furthermore, the Commission should not make any predictive judgments on how long the ILECs must offer transit services on a regulated common carrier basis.

[16] Only one recent market entrant is in the process of establishing a competitive transiting service alternative. It is available in just a few cities and provides only limited geographic coverage. Thus, adequate alternatives do not currently exist in the transit supply market to ILEC-provided transit. *See* http://www.neutraltandem.com/ (noting that "Neutral Tandem is the industry's only independent tandem service provider.")

Most of today's ILEC transit rates contained in interconnection agreements were set in the late 1990's based on the tandem switching rate element pricing at that particular time. These per minute rates have gone largely unchanged since then, except where a few state commissions performed rate investigations. Nextel's experience shows that there can be tremendous disparities in transit rates charged by the ILECs, including within a single ILEC. For example, there is a substantial difference in state-specific transit rates charged by SBC under Nextel's current interconnection agreement covering the former Ameritech states. In four of the five states covered by this interconnection agreement, Illinois, Indiana, Ohio and Wisconsin, SBC transiting rates charged Nextel range from a high of $.005966 per minute to a low of $.004537. This disparity is even greater when compared to the $.000454 per minute rate in Michigan under the same interconnection agreement for the same SBC transit function.[17]

In contrast to the static transit rates found in interconnection agreements, there have been substantial reductions in the tandem switching rates filed in tariffs with the Commission. As a benchmark, tandem switching rates in Ameritech's FCC tariff are the same for each state, ranging from a low in Zone 1 of $.001 per minute to a high in Zone 5 of $.0018 per minute. These rates are far lower than the rates Nextel is paying for equivalent service under its

[17] *See* Commission's Own Motion to Review the Costs of Telecommunications Services Provided by SBC Michigan, *Opinion and Order*, Case No. U-13531 at 1-2 (MPSC Sept. 21, 2004). The MPSC initially rejected SBC's proposed cost studies because they were incomplete and in violation of a prior MPSC decision requiring the filing of extended total service long run incremental cost studies rather than merely piecemeal and selective changes to cost studies or their components. *See* Application of SBC Ameritech Michigan for Approval of Revised Cost Studies Related to Certain Telecommunications Services, *Order*, Case No. U-13518; Case No. 13531 at 3-5 (MPSC Sept. 16, 2002) (citations omitted). Cost studies upon which the revised transit rate is based were thus only submitted and approved following MPSC intervention and a proceeding initiated on the MPSC's own motion.

interconnection agreement with SBC in the former Ameritech states, with the exception of Michigan, which is the lowest.

Plainly, the Commission must address not only the availability of ILEC transit interconnection service, but also the reasonableness of transit service rate levels before revamping current interconnection arrangements on a wholesale basis. There are no significant marketplace alternatives to this bottleneck service and other carriers do not have the leverage to bring transit rates to reasonable levels under interconnection agreements. As the Commission moves forward to address intercarrier compensation reform, the Commission must exercise its authority under the Act to ensure that transit rates are just and reasonable and not unreasonably discriminatory.

Sound policy requires that the rates for transit be reasonable and cost-based. The rules implementing Section 252(d)(1), for instance, require ILEC interconnection be priced based on forward-looking costs.[18] In addition, tandem transit is necessarily part a function of the ILECs' overall interconnection obligation under Section 251(c) when interconnection is provided to CMRS carriers, because the scope of CMRS calling is an entire MTA.[19] The Commission's rules, including Rule 51.701(b)(2), define the geographic scope of local traffic for CMRS-ILEC interconnection as intraMTA. Furthermore, as part of "interconnection," the Commission can set uniform national guidelines on availability and pricing, with federal preemption of state ratemaking authority by invoking Sections 201 and 251, or Sections 2(b) and 332 as an

[18] *See* 47 C.F.R. §§ 51.501, 51.503(b)(1).

[19] 47 C.F.R. § 51.701(b)(2). Because MTAs are geographically large, CMRS traffic must often traverse ILEC's tandem switching to reach other networks, necessitating transit.

appropriate alternative, to address the pricing of any ILEC transit service that can be characterized as intrastate.

III. THE COMMUNICATIONS ACT REQUIRES ILECS TO PROVIDE TRANSIT SERVICE TO INTERCONNECTING CARRIERS.

The Communications Act provides ample authority for the Commission to impose transit service obligations on ILECs, and any reasonable reading of the Act's provisions compels this conclusion. Indeed, without the availability of ILEC transit service in support of indirect interconnection, the statutory option to engage in indirect interconnection is rendered meaningless.

A. ILECs Are Required to Provide Transit Service Under Sections 201 and 202 of the Act.

The Commission traditionally has ordered carriers to interconnect pursuant to Section 201.[20] Section 201(a) specifically empowers the Commission, after an opportunity for hearing, to find it is necessary or desirable in the public interest "to establish physical connections with other carriers, to establish through routes and charges applicable thereto . . . and to establish and provide facilities and regulations for operating such through routes."[21] Physical connections and

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[20] 47 U.S.C. § 201. *See, e.g.*, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, ¶ 230 (1994); Bell System Tariff Offering of Local Distribution Facilities For Use by Other Common Carriers, *Decision*, 46 FCC 2d 413 (1974), *aff'd.*, *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F. 2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[21] 47 U.S.C. § 201(a). *See, also*, MTS and WATS Market Structure, Third Report and Order, 93 F.C.C.2d 241, 255 n. 16 (1983) ("The reports of the House and Senate Commerce Committees on bills that became the Communications Act of 1934 describe Section 201(a) as requiring carriers 'to establish with other carriers physical connections, through routes, through rates, and divisions of through rates.'"), citing Committee on Interstate Commerce, S. Rep. No. 781, 73rd Cong., 2d Sess., p. 4 (1934); Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5 (1934).

through routes commonly involve multiple carriers.[22] There can be no doubt that the Commission's authority to order the interconnection of carrier networks extends to intermediate links furnished by the carrier providing transit.

The Commission has broad authority to require interconnection to promote competition.[23] In the 1970s, the D.C. Circuit concluded that the Commission's action requiring AT&T to provide MCI with interconnections was justified by an earlier Commission order favoring competitive entry into the telecommunications field, where the Commission found "the local exchange facilities of the Bell System and independent telephone companies presently constitute almost the sole means for local distribution of interstate common carrier services."[24] Over the

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[22] As the Supreme Court has explained, "[a] through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *St. Louis Southwestern R.R. Co. v. United States*, 245 U.S. 136, 139 n. 2 (1917). The purpose of a through route is thus to allow the smooth flow of traffic from one carrier to another, and through routes plainly necessitate the cooperation of multiple carriers.

[23] *See, e.g.*, Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, *First Report and Order*, 29 FCC 2d 870, ¶ 157 (rel. June 3, 1971), *aff'd sub nom. Wash. Utilities and Transp. Comm'n. v. FCC*, 513 F.2d 1142 (9th Cir. 1975) (directing "established carriers with exchange facilities [to] permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers").

[24] *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1101 n.43, 1104 n. 61 (D.C. Cir. 1981), *citing Bell Tel. Co.*, 503 F.2d 1250 and Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, *Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking and Order*, 24 FCC 2d 318, ¶ 67 (rel. July 17, 1970), *aff'd First Report and Order*, 29 FCC 2d 870, ¶ 157.

years, the "Commission has frequently ordered common carriers to provide access to bottleneck facilities in order to increase competition and facilitate the development of new services."[25]

Section 201(b) further provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[26] This provision grants the Commission broad authority. For example, as the Supreme Court has found, Section 201(b) obviates the need for specific congressional authorization for the Commission to implement provisions of the 1996 Act addressing intrastate telecommunications.[27] The Supreme Court also rejected the argument that the Commission's Section 201(b) rulemaking authority was limited to provisions dealing purely with interstate and foreign matters, instead finding: "[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out 'the provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."[28] The Commission itself properly characterized the Court's interpretation "not as a limitation on the Commission's authority, but a confirmation of it."[29]

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[25] Expanded Interconnection with Local Telephone Company Facilities, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶ 29 (rel. July 25, 1994). *See also, e.g.*, *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590 (D.C. Cir. 1978); *Bell Tel. Co. of Pennsylvania*, 503 F.2d 1250; Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, ¶ 29 (rel. Aug. 14, 1992) (requiring carriers to provide a common carrier platform to serve multiple programmers and holding this requirement critical to its public interest determination).

[26] 47 U.S.C. § 201(b).

[27] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 374 (1999).

[28] *Id.* at 378.

[29] 2002 Biennial Regulatory Review, *Report*, 18 FCC Rcd. 4726, ¶ 18, n. 31 (2003).

B. Section 251 Requires ILECs to Interconnect Directly or Indirectly with the Facilities and Equipment of Other Carriers.

Section 251 additionally imposes on "[e]ach telecommunications carrier...the duty to interconnect directly *or indirectly* with the facilities and equipment of other telecommunications carriers."[30] Transit – where a CMRS carrier sends traffic over the network of an ILEC to terminate at the network of another carrier (e.g. a CLEC, an ILEC or another CMRS carrier) – is the function that is essential for the indirect interconnection undeniably contemplated by Section 251(a). The Commission's rules define the term "interconnection" to mean "the linking of two networks for the mutual exchange of traffic."[31] Applying this interconnection definition in the context of Section 251(a)'s obligation to interconnect directly or indirectly, the "linking" of networks plainly can be indirect as well as direct. Transiting naturally involves the "linking" of CMRS and ILEC networks through the tandem switch of the transiting ILEC for the mutual exchange of local traffic within an MTA.[32] In looking at the range of obligations imposed on ILECs by Section 251(a), (b) and (c), the Ninth Circuit concluded that Section 251(a) by its own terms "imposes a duty on [the ILEC] to link [its] networks, directly or indirectly, with those of other telecommunications carriers."[33] The Tenth Circuit recently has addressed the "fallacy" of

[30] 47 U.S.C. § 251(a) (emphasis added).

[31] 47 C.F.R. § 51.5.

[32] It is illogical that the Act would provide for indirect interconnection but permit the Commission to ignore the need for transit service. Transit is essential to the provision of indirect interconnection. *See e.g.,* Sprint Petition For Declaratory Ruling, CC Docket No. 01-92, Ex Parte Presentation of Sprint Corporation, Attachment at 5 (filed Jan. 25, 2005).

[33] *Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1238 (9th Cir. 1999).

the argument that "the general requirement to interconnect 'directly or *indirectly*' is superseded by the more specific obligations under § 251(c)(2)."[34]

ILECs further have the obligation – under Section 251(b)(5) – to establish, upon request, reciprocal compensation arrangements for the "transport and termination" of telecommunications traffic.[35] The Commission's rules define this transport as "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC."[36] Termination is defined as "the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[37]

The Commission determined that this obligation to handle telecommunications traffic extends not only to LEC traffic but also to local traffic originated or terminated by CMRS carriers.[38] Further, the Commission specified that "traffic to or from a CMRS network that

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[34] *Atlas Telephone Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1265 (10th Cir. 2005) (emphasis in original).

[35] 47 U.S.C. § 251(b)(5).

[36] 47 C.F.R. § 51.701(c).

[37] 47 C.F.R. § 51.701(d).

[38] The Commission has stated: "LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers." *See* 47 C.F.R. § 51.703(a); *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 1041.

originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access charges."[39] Any CMRS traffic that originates and terminates in a single MTA is therefore telecommunications traffic subject to the reciprocal and cost-based requirements of Sections 251(b)(5) and 252.

C. The Commission Has Legal Authority Under Sections 2(b) and 332 of the Act to Require ILEC Transit in Support of ILEC-CMRS Interconnection.

The 1993 Balanced Budget Act, which amended Sections 2(b) and 332(c)(1)(B) of the Act, provides the Commission with yet another mandate to require ILECs to provision transit service in support of interconnection to CMRS carriers on reasonable request. In the 1993 Balanced Budget Act, Congress, among other things, took extraordinary steps to encourage the uniform, nationwide development of commercial wireless operations on a competitive basis. As part of this landmark legislative effort, Congress conferred plenary jurisdiction on the Commission over all CMRS-ILEC interconnection matters.[40] The Commission in fact, proposed to invoke that authority in its 1996 Notice of Proposed Rulemaking to apply bill and keep to the exchange of CMRS-ILEC traffic.[41]

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[39] *Local Competition Order* at ¶ 1036; *see also* 47 C.F.R. § 51.701(b)(2);

[40] *See* 47 U.S.C. §§ 152(b), 332(c)(1)(B).

[41] Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, ¶ 111 (1996) ("We tentatively conclude that the Commission has sufficient authority to implement these options, including our proposal that interconnection compensation on a bill and keep basis be adopted on an interim basis. As a preliminary matter, Section 332 explicitly preempts state regulation in this area to the extent that such regulation precludes (or effectively precludes) entry of CMRS providers. In addition, to the extent state regulation in this area precludes reasonable interconnection, it would be inconsistent with the federal right to interconnection established by Section 332 and our prior decision to preempt state regulation that prevents the physical

Once the 1996 Act, with its detailed framework for interconnection agreement negotiation and arbitration process was passed, the Commission determined that the interconnection rules and policies the agency implemented under Section 251 should, for the time being, apply to CMRS-ILEC interconnection. However, the Commission stated at that time: "should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates."[42]

There is thus no question that the Commission has jurisdiction to regulate ILEC-CMRS interconnection terms and rates under Sections 2(b) and 332 of the Act. Indeed, the Eighth Circuit confirmed the Commission's unique jurisdiction over CMRS under Sections 332 and 2(b) with the following observation: "Because Congress expressly amended section 2(b) [and] 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers."[43] Multiple provisions of the Act, therefore, confer on the Commission authority to regulate all aspects of ILEC transit.

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interconnection of LEC and CMRS networks...we note that several entities have argued that Section 332 itself gives the Commission exclusive jurisdiction in this area.")

[42] *Local Competition Order* at ¶ 1025. *See also* Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610, ¶ 78 (2001).

[43] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n. 21 (8th Cir. 1997); *rev'd on other grounds, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

IV. A UNIFIED INTERCARRIER COMPENSATION REGIME DOES NOT REQUIRE REVENUE NEUTRALITY.

A. Revenue Neutrality Does Not Promote the Public Interest in an Increasingly Competitive Marketplace for Telecommunications Services.

A number of the proposals to reform intercarrier compensation contain mechanisms specifically designed to offset any loss of interstate access revenues that certain incumbent LECs would experience with a change in intercarrier compensation rules. Nextel believes that Commission adoption of an intercarrier compensation plan that relies to any significant degree on revenue neutrality would only delay much needed reform. In addition, reliance on revenue neutrality will likely perpetuate the problems that prompted the Commission to initiate this rulemaking.

A number of stakeholders participating in this proceeding already have directly warned against erecting backstops in the form of new federal support mechanisms solely to shelter certain ILECs from the rigors of competition. The proposals and principles submitted by the National Association of State Utility Consumer Advocates ("NASUCA"), CTIA and Western Wireless each oppose revenue neutrality guarantees in any form. CTIA calls for intercarrier compensation rules that "focus on benefits to consumers rather than favor any class of carrier."[44] Western Wireless specifically opposes revenue guarantees, arguing that the absence of such guarantees will promote "full-fledged competition" and thus benefit consumers.[45] NASUCA's proposal also sees no need for revenue guarantees. That organization opposes "regulatory action

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[44] Ex Parte Presentation of CTIA, Attachment at 4, CC Docket No. 01-92 (filed Feb. 4, 2005).

[45] Ex Parte Presentation of Western Wireless, Attachment at 2-3, 18, CC Docket No. 01-92 (filed Feb. 3, 2005).

that would short-circuit this market evolution by guaranteeing each carrier's current level of access revenues into the indefinite future."[46]

The *Further Notice* also questions the value of a revenue replacement policy and seeks comment on the scope of any Commission legal obligation to provide alternative cost recovery mechanisms to ILECs.[47] As an initial matter, the technological and economic forces that are leading to an erosion of access minutes are likely to continue and to expand, even in the absence of intercarrier compensation reform. In other words, maintaining the *status quo* is likely to result in the loss of interstate access revenue naturally, as the market finds less expensive alternatives, such as IP – Enabled services, to paying per minute ILEC access rates to terminate calls. As the NASUCA proposal observes, in such a market environment, it is unnecessary to make carriers "whole" for their own investments in network. Rather, the Commission needs to make carriers responsible for their decisions either to adapt or to ignore these market trends.

Moreover, there is no evidence in the record that revenue neutrality is necessary to maintain service to the public at affordable prices. In fact, revenue replacement, by the creation of new federal support mechanisms, would only reward inefficient behavior.[48] Revenue

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[46] Ex Parte Presentation of NASUCA, Attachment at 2, CC Docket No. 01-92 (filed Dec. 17, 2004).

[47] *Further Notice* at ¶ 99.

[48] The Commission previously has determined that some traditional forms of rate regulation – specifically the rate of return regulatory paradigm that allows earnings on a regulated rate base and shares something in common with revenue replacement guarantees – create disincentives towards efficient behavior. *See, e.g.*, Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, ¶ 22 (1990), *aff'd on recon.* 6 FCC Rcd 2637 ("Rate of return regulation lacks incentives for carriers to become more productive."); Policy and Rules Concerning Rates for Dominant Carriers, *Further Notice of Proposed Rulemaking*, 3 FCC Rcd 3195, ¶ 46 (1988) ("The distorted efficiency incentives established by rate-of-return regulation also may have a negative effect on innovation."). This concern prompted the Commission to

neutrality insulates only one segment of the telecommunications industry from the effects of technological and economic forces, effectively conferring a market advantage on those market participants who fail to adapt to change. Insofar as certain ILECs may not be efficient providers, consumers have an increasing array of alternatives to meet their telecommunications needs and market forces should be permitted to prevail and benefit these consumers.

In addition, the Commission is not under any legal requirement to guarantee carrier revenues. The loss of switched access revenues by ILECs will not result in any meritorious regulatory "taking" or "confiscation" claims. In the first instance, the threshold requirement for finding regulatory confiscation is that an agency's rate prescription threatens an incumbent's financial integrity.[49] Any Commission elimination of access revenues, together with a direction permitting carriers to recover their costs through other avenues, however, would not be a regulatory taking.

A long line of Supreme Court cases on regulatory confiscation of carrier property establishes that regulatory agencies have discretion to supersede previous forms of rate making and methodologies with new forms that do not guarantee recovery of carrier costs, however prudently these costs were incurred. For example, in 1975, the Supreme Court in *FPC v. Hope Natural Gas* confirmed that regulatory commissions are "not bound to the use of any single formula or combination of formula(s)" in setting a utility's rate base.[50] Rather:

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adopt a price cap form of regulation on large ILECs to encourage more market-oriented behavior.

[49] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 312 (1989).

[50] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

> [u]nder the statutory standard of "just and reasonable" it is the result reached not the method employed that is controlling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. [51]

The Commission has applied these principles to ILEC rates and ratemaking. In imposing price cap regulation on former rate-of-return ILECs, for example, the Commission cited its broad mandate to regulate "so as to make available...efficient, Nation-wide...communication service with adequate facilities at reasonable charges...".[52] The Commission noted that it had a variety of tools to fulfill this mandate in seeking to police the requirement that rates for interstate service be just, reasonable and not unreasonably discriminatory.[53] Further, in implementing the provisions of the 1996 Act, the Commission rejected ILEC claims that a rate based on a forward-looking cost methodology (TELRIC) did not permit the recovery of ILEC historical or embedded costs and thus was confiscatory. The Commission observed:

> The [Supreme] Court has consistently held since Hope Natural Gas that it is the end result, not the method used to achieve that result, that is the issue to be addressed. Indeed, the Court has found that the "fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." Moreover, the Court has upheld as reasonable changes in ratemaking methodology when the change resulted in the exclusion of historical costs prudently incurred. Thus, the mere fact that an incumbent LEC may not be able to set rates that will allow it to recover a particular cost in establishing its regulated network does not, in and of itself, result in confiscation. [54]

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[51] *Id. See also Communications Satellite Corporation v. F.C.C.*, 611 F.2d 883 (D.C. Cir. 1977).

[52] Policy and Rules Concerning Rates for Dominant Carriers, *Further Notice of Proposed Rulemaking*, 3 FCC Rcd 3195, ¶ 5 (1988) (*citing* 47 U.S.C. § 151) (omissions in original).

[53] *Id.* (*citing* 47 U.S.C. §§ 154, 201-204, 213-14, 220).

[54] *Local Competition Order* at ¶ 736.

The Supreme Court upheld this specific Commission determination, rejecting the argument that TELRIC rates could be considered confiscatory.[55] The Court also rejected the argument that ILECs had any legitimate expectation of particular earnings results that could not be upset by the imposition of TELRIC network pricing for a particular set of network services. The Supreme Court observed:

> To the extent that the incumbents argue that there was at least an expectation that some historically anchored cost-of-service method would set wholesale lease rates, no such promise was ever made. First Report and Order ¶ 706 ("[C]ontrary to assertions by some [incumbents], regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that [the FCC] or the states have provided in the past"). Cf. Duquesne, supra, at 315. Any investor paying attention had to realize that he could not rely indefinitely on traditional ratemaking methods but would simply have to rely on the constitutional bar against confiscatory rates.[56]

In gauging the ability of an ILEC to recover the costs of its network investment, the Supreme Court's reasoning is instructive. As the Commission observed in 1996, the case law on confiscation "requires only that the end result of our overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. In other words, incumbent LECs' overall rates must be considered, including the revenues from other services under our jurisdiction."[57]

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[55] *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467 (2002).

[56] *Id.* at 528 (citing *Local Competition Order* at ¶ 739).

[57] *Local Competition Order* at ¶ 737.

B. Any Responsibility to Establish Alternative Cost Recovery Mechanisms Is Met by Giving ILECs the Ability to Recover Their Revenue Requirements from End Users.

As explained above, the Commission has no legal obligation to afford revenue neutrality to any carrier. Title II of the Communications Act is a regulatory scheme grounded in carrier-initiated ratemaking. Even under the pre-competition, regulated monopoly model it was up to the carrier to sell its service and recover its costs. When the Commission prescribed rates-of-return and carrier earnings fell short of authorized levels, it was the responsibility of the carrier to retarget rates to bolster earnings on a prospective basis. Carriers are liable for the consequences of underforecasting costs or demand for service in the ratemaking process; they are not permitted to recoup past losses from future rates. The Commission's responsibility is to maintain rules and procedures that afford the regulated entity a reasonable chance to recover its costs, not to provide guarantees.

Subscriber line charges ("SLCs") were introduced some twenty years ago and over time have accounted for an increasing share of ILEC revenues. Prudent Commission oversight of SLCs has enabled substantial reductions in interstate access charges without adverse consequences to consumers. Current rules place limitations on the SLC rate levels ILECs may charge.[58] As the Commission eliminates access charges and moves towards other forms of intercarrier compensation, the SLC rules can be revised to allow ILECs to recover their full revenue requirements from their end users. Whether or not individual ILECs would choose to do so would be a business decision. The Commission, of course, could establish some parameters

[58] *See, e.g.*, 47 C.F.R. § 69.104 (End User Common Line for Non-Price Cap ILECs) and 47 C.F.R. § 69.152 (End User Common Line for Price Cap ILECs).

on the design and application of SLCs to prevent unreasonable discrimination and anti-competitive practices, as well as take into account the likely effect of changes on consumers, while still providing ILECs with the ability to recover their costs.

Affording ILECs greater leeway to recover costs from end users empowers these carriers to adapt to an increasingly competitive market, where carriers assume the risks of their innovations as well as the risks of their failure to perform in line with financial expectations. Just as carriers under price cap and rate-of-return regulation can fall short of their performance goals, ILECs may be unable, due to competitive market conditions, to recover their costs from SLCs. Having provided ILECs with the "ability" to do so, however, the Commission has no further legal responsibility to guarantee cost recovery.

C. Proposed New Programs to Ensure Revenue Neutrality Are Not "Universal Service" Programs and Do Not Fit Within Section 254(b) Funding Principles.

In reviewing the submitted proposed intercarrier compensation reform plans, the Commission asks whether it should rely solely on deregulating end-user charges, or whether it should also rely on universal service fund support mechanisms – either new or existing – to offset any remaining ILEC revenue loss that is no longer recovered through interstate access charges.[59] In this regard the Commission does not have unlimited discretion simply to create new USF programs – universal service support must fit within the framework of Section 254(b) of the Act as interpreted by the Commission and the courts.

No new USF mechanisms or programs should be created as part of or related to any reform of intercarrier compensation. As an initial matter, universal service is designed to make

[59] *Further Notice* at ¶ 101.

certain that designated core services are affordable and available to consumers. Section 254(b) and the Commission's rules implementing the principles of Section 254(b) nowhere mention that a principle of USF is to protect carrier regulated revenue streams from competition or from changes in technology.[60] Rather, the mandate of the Commission and the USF Joint Board is to establish "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."[61] The goal of federal universal service policy is to improve service to the public, not to benefit particular carriers. In this regard, the Fifth Circuit in 2000 upheld Commission rules that some ILECs contended provided insufficient funding for their claimed USF cost recovery needs by noting that the Commission is <u>not</u> required to make sure there is sufficient funding of every local telephone provider.[62] It should be obvious that providing

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[60] *See* 47 U.S.C. § 254(b); 47 C.F.R. § 54.7 (stating that a "carrier that receives federal universal service support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"); Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, ¶¶ 44-47 (1997).

[61] 47 U.S.C. § 254(b)(5).

[62] *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000), where the Court stated:

> The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well. . . . Moreover, excessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers--and thus indirectly by the customers--excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.

Id. at 620.

carriers with additional subsidies to replace revenues lost from the elimination of access charges is not an appropriate use of universal service funds, but rather a departure from the principles of Section 254(b) in order to achieve some other goal.

As stated previously, any intercarrier compensation reform adopted by the Commission should be aimed at promoting growth and competition in the marketplace – which in turn benefits consumers. No guaranteed revenue streams or revenue replacement to any class of carrier under any new intercarrier compensation regime falls within the USF program as articulated in Section 254(b). Thus, there is no legal basis to argue that the federal USF program can be modified to include ILEC access revenues "lost" by the application of a different intercarrier compensation regime. Section 254 specifies that universal service support mechanisms may be used for one purpose and for one purpose only: to promote the universal service goals of the Communications Act. The USF – or the equivalent made to appear different by renaming, such as an "Access Restructure Mechanism" – may not be used to replace lost access revenues unless such funding independently is found by the Commission to be necessary to satisfy the universal service principles in Section 254(b).

The Tenth Circuit in both *Qwest I and Qwest II* confirmed that the Commission is not free to stray from the core Section 254(b) USF principles in designing a USF program. The *Qwest I* court stated that: "(t)he plain text of the statute mandates that the FCC 'shall' base its universal policies on the principles listed in 254(b). The FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."[63] The *Qwest II* court again faulted the Commission for

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[63] *Qwest v. FCC,* 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*").

its failure to define the Section 254 statutory terms "sufficient" and "reasonably comparable." While noting the court's previous decision, that "excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)" the court reaffirmed that "[t]he FCC is compelled to balance the § 254(b) principles to the extent they conflict."[64]

The Commission also cannot ignore the practical implications of the creation of additional funds on the growth and sustainability of the USF program as a whole. The USF contribution factor has increased substantially during the past year, continuing an upward trend. It is well understood that the rules governing the Federal USF are in need of reform, as the Commission readily acknowledges in several major open proceedings on the subject.[65] The USF Joint Board and the Commission are grappling with many difficult issues as they try to fix problems with the rules governing just the existing programs – without the added complication of new funding mechanisms that would threaten the overall viability of the USF. Developing workable rules will take time; meanwhile funding requirements continue to escalate. This is the worst possible time to create new universal service programs and stress the fund possibly to the

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[64] *Qwest v. FCC,* 398 F.3d 1222 (10th Cir. 2005) (*"Qwest II"*).

[65] *See, e.g.*, Public Notice, Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support, FCC 04J-2, CC Docket No. 96-45 (rel. Aug. 16, 2004) (requesting comment on possible modifications to the Commission's rules governing High-Cost support); Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24983 (2002) (requesting comment on "additional modifications to the [Universal Service] contribution methodology").

breaking point. Rather, it is important for the Commission to complete the existing comprehensive universal service reform rulemakings apart from this proceeding.[66]

The emergence of new bundled offerings – by incumbents and competitive carriers alike – demonstrates the continuing evolution of the market. Proposals to use rate and revenue benchmarks and forward-looking costs to calculate universal service support levels have been under consideration for years, yet little progress has been made to implement affordability and market-based standards for testing sufficiency. The Commission must resist the temptation to fashion expedient solutions in this proceeding to what are complex, far-reaching legal and policy issues. The new support mechanisms proposed in several intercarrier compensation plans raise more questions than they answer about appropriate USF funding requirements and eligibility criteria.

V. INTERCARRIER COMPENSATION REFORM CAN ACCOMMODATE THE CURRENT FRAMEWORK OF CMRS-ILEC INTERCONNECTION.

The basic structure of CMRS-ILEC interconnection generally is sound. Commission clarification and reinforcement of existing obligations is preferable to altering fundamentally the rules governing these arrangements. Nextel and other CMRS provider networks have evolved based on years of diligent planning to meet business needs cost-effectively. Requiring CMRS

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[66] *See* Federal-State Joint Board on Universal Service, Comments of Nextel Communications, Inc., CC Docket No. 96-45 (filed Oct. 15, 2004); IP-Enabled Services, Reply Comments of Nextel Communications, Inc., WC Docket No. 04-36, at 20-21 (filed July 14, 2004). To the extent that the Commission decides that it must address universal service in this proceeding, it must be faithful to the principles set forth in Section 254(b) of the Act. At a minimum, universal service support should be based on forward looking costs of reasonably efficient networks and targeted and distributed on a competitively neutral basis through a single High Cost universal service funding mechanism. In addition, the Commission should expand the assessable contribution base to ensure that all providers of interstate telecommunications services contribute to the Universal Service Fund on an equitable and nondiscriminatory basis.

providers to reconfigure their networks as part of an intercarrier compensation reform plan would impose unnecessary costs on the industry and the public.

The intraMTA rule properly recognizes that the networks and service areas of CMRS providers are different from those of local exchange carriers.[67] The Commission established the intraMTA rule to protect the natural integrity of CMRS markets and service provisioning.[68] The intraMTA rule resists imposing a legacy structure on a technology that has very different characteristics.

As the Commission moves to a unified regime to replace reciprocal compensation and access charges, the pricing implications of the intraMTA rule may be lessened, but there is no reason for the rule to be eliminated. In fact, there is good reason to retain the rule insofar as it mandates treatment of intraMTA traffic as local for purposes of reciprocal compensation obligations. The current ILEC practice of classifying certain intraMTA traffic as long distance and handing off such calls to interexchange carriers, resulting in toll charges on customer bills, would be legitimized by elimination of the rule. This runs counter to consumer expectations and industry-wide trends in package pricing of local and long distance services.

Even today many ILECs interconnecting with Nextel do not fully comply with the intraMTA rule. The adverse effects of this conduct are reduced somewhat by the fact that Nextel has a point of interconnection ("POI") in every LATA. In some cases, however, ILECs send calls to interexchange carriers for delivery to wireless customers, although they would treat these same calls as local if they were wireline-to-wireline calls. This practice, which apparently is

[67] 47 C.F.R § 51.701(b)(2).

[68] *Local Competition Order* at ¶ 1036.

sanctioned or required by several state commissions, enables the ILEC to collect originating access charges, while avoiding paying reciprocal compensation to CMRS providers.

The *Further Notice* seeks comment on whether new rules are required for the rating and routing of wireless calls.[69] Nextel believes that the cell site in use at the beginning of a call is the only practical means of determining the origination point for rating or other purposes. This information is readily available and is being used today. Changing to some other form of measurement would produce no benefit that Nextel can discern and might well impose unnecessary administrative burdens.

Although the *Further Notice* does not propose new or different network interconnection rules, as the Commission considers the network interconnection proposals before it, it must be careful not to fashion new network interconnection rules that would unnecessarily complicate existing relationships or result in expensive or unnecessary network changes or create new administrative or facility costs. In particular, any departure from the single POI per LATA interconnection convention would be highly disruptive to current network arrangements between carriers, without serving any of the Commission's greater policy goals in creating a unified intercarrier "regime designed for a market characterized by increasing competition and new technologies."[70] Finally, any new rule should provide carriers with the flexibility to benefit from evolving and future network architecture technologies.

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[69] *Further Notice* at ¶ 143.

[70] *Id.* at ¶ 1.

VI. CONCLUSION.

Under bill and keep intercarrier compensation, the ILEC obligation under the Act to provide vital transit interconnection services must continue at just, reasonable, and not unreasonably discriminatory rates, terms, and conditions. This will allow the Commission to achieve the objective of promoting intermodal competition under intercarrier compensation reform. Additionally, new carrier support mechanisms that guarantee revenue neutrality and undermine the growth of competition should not be established as part of any reform of intercarrier compensation. Carriers should be able to recover more of their costs from their end users and use existing universal service programs to provide affordable service to the public. Finally, network reconfigurations should be avoided and the intraMTA reciprocal compensation pricing rules should be maintained.

Respectfully submitted,

Laura H Phillips

Laura H. Phillips
Laura S. Gallagher
Patrick R. McFadden
DRINKER BIDDLE & REATH LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005-1209
(202) 842-8800

Kent Nakamura, Vice President and Deputy General Counsel – Regulatory
Anthony M. Alessi, Senior Counsel - Regulatory
Christopher R. Day, Counsel - Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, VA 20191

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