

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

**COMMENTS OF SPRINT NEXTEL CORPORATION**

Sprint Nextel Corporation (“Sprint”), pursuant to the Public Notice released on September 28, 2009 (DA 09-2117), hereby respectfully submits its comments in the above-captioned proceedings regarding USAC’s request for guidance from the Commission on several policy issues related to the universal service high-cost support mechanism and contribution methodology. Sprint addresses several of these issues below.

**1. ETC Advertising**

USAC seeks clarification as to whether eligible telecommunications carriers (ETCs) are required to list separately each supported service enumerated in section 54.101 of the Commission’s rules when advertising the availability of such services and the associated charges for each service.<sup>1</sup> Because nothing in the Act or the Commission’s Rules requires ETCs to list each supported service separately, and because listing each

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<sup>1</sup> See letter from Richard Belden, USAC, to Julie Veach, FCC, dated August 21, 2009 (“August 21 USAC letter”), pp. 1-2.

supported service is likely to be confusing to many consumers, there is no basis to the suggestion that such an advertising requirement applies or is even in the public interest.

Section 214(e)(1)(B) of the Act requires ETCs to “advertise the availability of such services [services supported by USF] and the charges therefore using media of general distribution.” The Commission codified this requirement in Section 54.201(d)(2) of its Rules, which incorporates the statutory language verbatim. Nothing in the Statute or the rules suggests that an ETC must separately list each supported service. Indeed, in the context of Lifeline outreach, the Commission declined to prescribe any “specific outreach procedures,”<sup>2</sup> and instead merely suggested voluntary Lifeline outreach guidelines that encourage ETCs to “utilize outreach materials and methods designed to reach households that do not currently have telephone service.”<sup>3</sup>

Furthermore, many consumers are likely to find an enumeration of each supported service to be far more confusing than an ETC’s more generic advertisement promoting “local telephone service” or “cell phone service.” For example, relatively few consumers know what “Dual tone multi-frequency (DTMF) signaling or its functional equivalent” is, and would be baffled by its inclusion in a Lifeline or other ETC advertisement. In addition, because wireless carriers generally do not even distinguish between local and toll minutes, advertising the availability of “local usage” and “access to interexchange service” is both confusing and irrelevant in the wireless context.

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<sup>2</sup> *Lifeline and Link-Up, Report and Order and Further Notice of Proposed Rulemaking* released April 29, 2004 (FCC 04-87), para. 44.

<sup>3</sup> *Id.*, para. 46.

Although no clarification on this matter would appear to be necessary, the Commission should lay to rest any controversy on this matter and advise USAC that, for the reasons cited above, ETCs are not required to separately list each supported service in advertisements made pursuant to Section 54.201(d)(2).

## **2. High-Cost Program Documentation**

USAC has requested clarification as to “what, if any, remedial actions should be initiated against carriers that did not maintain documentation for periods being audited prior to the establishment of the High Cost Program documentation rules.”<sup>4</sup> Because it is patently unreasonable to penalize any carrier for failure to comply with rules not then in effect, the Commission should advise USAC that no “remedial actions” should be initiated.

Article I, section 9 of the United States Constitution prohibits the federal government from passing *ex post facto* laws. While the Commission’s high-cost program documentation rules are unlikely to implicate criminal activity, the same *ex post facto* principle applies here – a carrier would have had no way of knowing with certainty that the Commission would adopt the five-year document retention period rule until the date that the Commission adopted such rule (August 22, 2007, with an effective date of March 1, 2008), and to hold it responsible for compliance with such a rule retroactively simply makes no sense.

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<sup>4</sup> See letter from Richard Belden, USAC, to Julie Veach, FCC, dated August 19, 2009 (“August 19 USAC letter”), p. 3.

The Commission stated that “[w]e *will* require recipients of universal service support for high-cost providers to retain all records that they may require to demonstrate to auditors that the support they received was consistent with the Act and the Commission’s rules, assuming that the audits are conducted within five years of disbursement of such support.”<sup>5</sup> In other words, the Commission’s high-cost document retention rule unambiguously has prospective effect only,<sup>6</sup> and thus no clarification about whether the rule may be applied retroactively is necessary.

In adopting the 5-year E-rate document retention rule on which the high-cost document retention rule was modeled, the Commission explicitly stated that applicants and service providers would be required “to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year. *This rule change shall go into effect when this order becomes effective and, as such, will apply to Funding Year 2004 and thereafter.*”<sup>7</sup> If the Commission does issue a clarification of the applicability of the high-cost documentation rule, it should specify, consistent with its E-rate ruling, that the high-cost rule applies only after that rule’s effective date (March 1, 2008), and that carriers are

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<sup>5</sup> *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 22 FCC Rcd 16372, 16383-4 (para. 24) (2007), footnote omitted, emphasis added.

<sup>6</sup> Indeed, USAC has correctly stated that the high-cost document retention rules “are applicable on a prospective basis” (August 19 USAC letter, p. 3).

<sup>7</sup> *Schools and Libraries Universal Service Support Mechanism, Fifth Report and Order and Order*, 19 FCC Rcd 15808, 15823 (para. 47) (2004), emphasis added.

not liable for failure to maintain five years' of documentation for periods prior to March 1, 2008.

### **3. AT&T and Alltel High-Cap Orders**

USAC explains that company-specific high-cost caps applicable to AT&T and Alltel were not implemented prior to implementation of the CETC industry-wide cap (which superceded prospectively, but did not reverse, the company-specific caps) “for administrative reasons only.”<sup>8</sup> It therefore requests guidance “as to whether the AT&T and Alltel company-specific cap orders should be implemented for the time periods each order was in effect, prior to the effective date of the industry-wide cap” (*id.*).

The Commission should direct USAC to recover from AT&T and Alltel all high-cost support that should have been withheld from these carriers under their respective cap orders. The AT&T and Alltel caps were imposed “as a condition of” approval of their respective transactions then before the Commission,<sup>9</sup> and no waiver of this condition has been granted to either AT&T or Alltel. Thus, there is no basis for exempting either AT&T or Alltel from the obligation imposed upon them in their respective cap orders.

### **4. USF Contributions: Classification of ATM/Frame Relay Revenue**

USAC seeks guidance on the proper classification of Asynchronous Transfer Mode (“ATM”) and Frame Relay services. According to USAC, during FCC Form 499-A audits, carriers indicated that they categorized these services as “information services”

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<sup>8</sup> August 19 USAC letter, p. 5.

<sup>9</sup> See *Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee for Consent to Transfer Control of Licenses, Leases and Authorizations*, 22 FCC Rcd 19517, 19521 (para. 9) (2007); *Applications of AT&T Inc. and Dobson*

*Footnote continued on next page*

and reported the revenue associated with them as non-telecommunications services on Line 418.<sup>10</sup>

Any determination as to whether a service is a “basic service” or an “information service” must be based on a thorough analysis of the features and functions offered by the service provider. Services referred to as “ATM” and “Frame Relay” have been offered since the early 1990s. While some carriers may still offer the original Frame Relay service that the Commission found in 1995 to be “a basic transmission service, subject to the tariffing and other requirements of Title II of the Communications Act of 1934, as amended (Act),”<sup>11</sup> newer enhanced products have been developed which offer customers a broad array of features and information processing capabilities. A proper analysis to determine the appropriate regulatory classification of these new diverse products requires a review of the features that the audited carriers have relied upon to classify their ATM and Frame Relay services as non-telecommunications services. Once a determination is made, the underlying analysis should be made public so that other carriers may rely on it to classify their products similarly.

The need for such analyses to determine the appropriate regulatory classification of new services that employ advanced technologies and offer IP-based features highlights the problems and inequities with the current contribution methodology and underscores

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*Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, 20330 (para. 72) (2007).

<sup>10</sup> August 19 USAC letter, p. 2.

<sup>11</sup> *Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company, Petition for Declaratory Ruling That All*

*Footnote continued on next page*

the importance of Commission action to adopt a new one. Sprint urges the Commission to act expeditiously in this regard.

**5. USF Contributions: Classification of Virtual Private Network and Dedicated Internet Protocol Revenue.**

USAC also seeks guidance on the classification of Virtual Private Network (“VPN”) and Dedicated Internet Protocol (“Dedicated IP”) services, which carriers have categorized as non-telecommunications services. As with ATM and Frame Relay services, VPN services have been available for about two decades, and additional information about the technology, applications, and capabilities associated with the newer VPN services is required in order to make a proper regulatory categorization.

With respect to Dedicated IP services, USAC states that “the dedicated IP revenue amount was primarily related to data transport using IP.”<sup>12</sup> When Dedicated IP refers to the provision of broadband Internet access service, such service must be found to be an “information service” based on the regulatory framework established by the Commission in its *Wireline Broadband Order*.<sup>13</sup> There, the Commission determined that wireline broadband Internet access service should be classified as an “information service” and that such treatment is “consistent both with the Commission’s classification of cable modem service, as affirmed by the Supreme Court in *Brand X*, and with the Commission’s earlier determination in its *Report to Congress* that Internet access service

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*IXCs be Subject to the Commission’s Decision on the IDCMA Petition, Memorandum Opinion and Order*, 10 FCC Rcd 13717, ¶ 1 (1995), fn. omitted.

<sup>12</sup> August 19 USAC letter, p. 3.

<sup>13</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd at 14853 (2005) (“*Wireline Broadband Order*”).

is an information service.”<sup>14</sup> The Commission also found that “[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.”<sup>15</sup> Further, the classification of broadband Internet access service applies regardless of whether the access is provided over the carrier’s own transmission facilities or over facilities that the carrier obtains from another provider.<sup>16</sup> Thus, Sprint submits that the Commission’s decision concerning wireline broadband Internet access dictates that Dedicated IP access service must be classified as an “information service.”

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<sup>14</sup> *See id.* at 14862, ¶12.

<sup>15</sup> *See id.* at 14864, ¶15.

<sup>16</sup> *See id.* at 14864, ¶16.

Respectfully submitted,

**SPRINT NEXTEL CORPORATION**

*/s/ Charles W. McKee*

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Charles W. McKee  
Vice President, Government Affairs  
Federal and State Regulatory

Marybeth M. Banks  
Director, Government Affairs

Norina T. Moy  
Director, Government Affairs

2001 Edmund Halley Drive  
Reston, VA 20191  
(703) 433-4503

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Sprint Nextel Corp. was filed electronically or via US Mail on this 28<sup>th</sup> day of October, 2009 to the parties listed below.

*/s/ Norina T. Moy*

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Norina T. Moy

Cindy Spiers  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
[Cindy.Spiers@fcc.gov](mailto:Cindy.Spiers@fcc.gov)

Antoinette Stevens  
Telecommunications Access Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
[Antoinette.Stevens@fcc.gov](mailto:Antoinette.Stevens@fcc.gov)

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> St., SW, Room CY-B402  
Washington, DC 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)