**Ruth Nettles**

**From:** Marsha Rule [marsha@reuphlaw.com]
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**To:** Filings@psc.state.fl.us
**Cc:** Nelson, Douglas [GA]; bill.atkinson@sprint.com
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**The full name, address, telephone number, and e-mail address of the person responsible for the electronic filing:**
MARSHA E. RULE
Rutledge, Ecenia, Purnell & Hoffman, P. A.
Post Office Box 551
Tallahassee, Florida 32302-0551
(850) 681-6788
marsha@reuphlaw.com

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**The name of the parties on whose behalf the document is filed:**
Sprint Communications Company Limited Partnership, Sprint Spectrum Limited Partnership d/b/a/ Sprint PCS; Nextel South Corporation, d/b/a/ Nextel; and NCPR, Inc. d/b/a Nextel Partners ("Sprint Nextel")

**The total number of pages in the attached document:** 13

**A brief but complete description of each attached document:**
Post-Workshop Comments of Sprint Nextel

**Marsha Rule, Esq.**
Rutledge, Ecenia & Purnell, P.A.
215 S. Monroe St., Suite 420
Tallahassee, FL 32301
marsha@reuphlaw.com
850.681.6788 phone
850.681.6515 fax

**FLORIDA PUBLIC SERVICE COMMISSION**

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**POST-WORKSHOP COMMENTS OF SPRINT NEXTEL**

Sprint Nextel Corporation, on behalf of itself and its wholly-owned subsidiaries providing wireless and wireline telecommunications services in the State of Florida (collectively "Sprint Nextel"), provides the following Post-Workshop Comments relating to the Staff Rule Development Workshop in the above-captioned matter held at the Florida Public Service Commission ("Commission") on May 14, 2008.

## I. INTRODUCTION

In their Joint Petition to Initiate Rulemaking, a group of large incumbent local exchange carriers ("Joint Petitioners") asked the Commission to eliminate or significantly change a number of existing Commission rules affecting price cap regulated incumbent carriers. The Joint Petitioners seek elimination of some rules based on a "competition test" that was characterized during the workshop as a "nose counting" or "trigger" test. The test does not attempt to gauge an incumbent's market power or determine whether there is a level playing field for the incumbents' competitors, but simply "counts noses" to determine if, for instance, wireless service or broadband service is available to

consumers in a particular area. The petitioning ILECs propose a new rule setting forth the trigger test, but also request that other rules be eliminated or otherwise changed regardless of whether the trigger test is met. The Joint Petitioners assert that competition has such a firm hold that many rules are no longer required, and argue that the rules should be repealed or amended to provide them with a level playing field.

As urged by Sprint Nextel, CompSouth and others during the workshop, the Commission should firmly reject the ILECs' proposed competition test because it bears no relationship to whether a particular rule is obsolete or should be waived for any ILEC. Furthermore, all Joint Petitioners admitted during the workshop that they meet the competition test for their entire service areas right now, and thus the test has no practical value whatsoever even if one were to assume, arguendo, that such a relationship existed.

The Joint Petitioners' trigger test is not only useless for determining whether to grant the rule waivers requested in this proceeding, but it is also woefully inadequate in providing any useful measure of whether a market is competitive or whether the environment for competition is sustainable. Given its complete lack of utility in this proceeding, it appears that the Joint Petitioners are introducing the concept of a competition test merely to legitimize it in preparation for future advocacy by the Joint Petitioners, perhaps in more sweeping deregulatory efforts before the Commission or the Florida Legislature, by which they will seek to remove many of their services from price cap regulation.

Rather than adopt the irrelevant and self-serving test proposed by the ILECs, the Commission should review their proposed rule changes using the processes required by the Florida Administrative Procedure Act. Specifically, the Commission should conduct

a rule review under Section 120.74, F.S., and eliminate obsolete rules, after which Joint Petitioners could seek a variance or waiver from any remaining rules under Section 120.542, F.S. Not only are these administrative processes perfectly adequate for evaluating the Joint Petitioners' requests, but they are designed precisely for that purpose, and their application is mandatory. In contrast, there is no statutory authority for development of a competition test by the Commission, or for waiving the application of rules other than in compliance with Section 120.542.

Sprint Nextel has no objection to the Commission's repeal of most of the rules from which the ILECs seek relief. However, as explained more fully below, Sprint Nextel objects to the ILECs' proposed exemption from Rule 25-4.046, Incremental Cost Data Submitted by Local Exchange Companies; and Rule 25-9.005, Information to Accompany Filings. These two rules were promulgated to implement Section 364.3381, F.S. prohibiting cross-subsidization, which remains a major impediment to current and future competition.

One critical matter that must be addressed as a prerequisite to declaring a competitive level playing field is the elimination of the substantial historic subsidies inherent in the Joint Petitioners' intrastate switched access rates. All carriers that compete against the Joint Petitioners in the retail market must purchase switched access to terminate certain calls to their customers, including traffic originated by wireless providers who must pay terminating access on wireless calls to ILEC landline customers that cross Metropolitan Trading Area ("MTA") boundaries. Historically, ILEC switched access rates were inflated as a mechanism to subsidize the price of basic local service. The holdover effect of this monopoly-era policy is that the Joint Petitioners' own

competitors subsidize the Joint Petitioners' services. However, in a competitive market, all retail competitors, including the Joint Petitioners, must be required to collect the cost of retail services from their own retail customers, not from purchasers of monopoly switched access services who are also direct retail competitors of theirs. The Joint Petitioners argue that "[a]n environment in which competitive outcomes are driven by the prices, features and quality of the services different telecommunications providers offer, instead of on the weight of the legacy regulatory burdens they bear, will benefit customers and the Florida economy." (p.18) Sprint Nextel agrees, but adds that the historic ILEC subsidies must also be removed as a prerequisite to prevent skewed, anticompetitive outcomes that result when one competitor is forced to subsidize the services of another.

## II. THE COMPETITION TEST IS UNNECESSARY

The Commission already has the tools it needs to review the rules as requested by the Joint Petitioners. The Commission has inherent authority to review and amend or repeal its rules, and has the specific obligation to conduct such a review on a regular basis. See Section 120.74, F.S., which requires each state agency to conduct a biennial review of its rules and delete those rules it determines are unnecessary or obsolete. Sprint Nextel agrees that many of the rules addressed by Joint Petitioners could be repealed after such a review.

The Commission also has the authority under Section 120.542, F.S., to grant waivers of those rules remaining after the Commission's review. Section 120.542(18), F.S., defines "waiver" as follows:

> "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any

> waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

Joint Petitioners clearly seek a "waiver" of specific rules. Section 120.542(1), F.S., specifies that agencies may only grant rule waivers "consistent with this section and with rules adopted under the authority of this section...." Finally, Section 120.542(2), F.S., sets forth the standard for granting a waiver as follows:

> [W]aivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship[1] or would violate principles of fairness.[2]

Nothing in Chapter 120, F.S. authorizes the Joint Petitioners to bypass the required demonstration that the purpose of the statute has been achieved and that continued application of the rule would create a substantial hardship. Nothing in Chapter 120 authorizes the Commission to grant a petition for wavier that does not meet the substantive requirements of Section 120.542 or its implementing rules.

In order to qualify for a rule waiver, the party requesting relief must demonstrate that the rules are actually burdensome and, most importantly, that the objectives of the statute which the rule implements are nonetheless served. The Joint Petitioners have made it clear in their Petition and through their comments during the workshop that they do not want to comply with such standards, likely because they cannot meet them. Their rationale for deleting or changing specific rules is often provided only in a brief comment

[1] "Substantial hardship" means "a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver." Section 120.542(2), F.S.

[2] Pursuant to Section 120.542(2), Florida Statutes, "Principles of fairness are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule."

in their exhibits and is completely insufficient to meet the statutory requirements. For instance, the rationale given for elimination of Rule 25-9.005, Information to Accompany Filings, is as follows:

> This rule should not apply to competitive markets of Streamlined Regulation companies.
>
> Cost information has to be available but is not required to be filed, even for basic service. The Joint Telecommunications Companies recognize that some cost requirements, imposed by statutes, would still have to be met, even if this rule was made inapplicable to Streamlined Regulation Companies.

(Petition, Attachment B, page 26 of 37)

This rationale clearly fails to meet the statutory requirements for a variance or waiver. It does not demonstrate the existence of substantial hardship or any violation of principles of fairness, and makes no attempt to explain how the purpose of the underlying statute would be met.

Indeed, during the workshop Joint Petitioners made no secret of the fact that they did not want to discuss specific rules, as Staff had proposed in its workshop notice:

> Ms. Clark: ... However, we're unsure how fruitful it is to discuss the specific benefits to customers and companies of each proposed rule amendment or repeal also as suggested by staff. Indeed, many customers appear to find the rules irrelevant, as demonstrated by their switching to providers that are unregulated and under no obligation to comply with these rules. However, we do acknowledge that the proposed rule amendments and repeals would benefit both customers and companies by freeing the ILECs from compliance with obsolete or unnecessary regulations which do not apply to their competitors, thus allowing them to focus on providing quality service to their customers. (Transcript pp. 5-6)

Clearly, Joint Petitioners want to create an unnecessary new process for waiving rule requirements on their own terms and without reference to the current mandatory statutory process. The Commission should resist this end run around the requirements of Section 120.542, F.S.

## III. THE COMPETITION TEST IS INADEQUATE

The end game of the Joint Petitioners is to win adoption of a weak "nose counting" test for determining whether a market (or entire ILEC service area) is "competitive" in preparation for using it to introduce substantial pricing deregulation, most likely by seeking to remove almost all of their services from their price plans when such a test is met. The Joint Petitioners clearly want the Commission to adopt the test despite the fact that it has no value for the purposes of the present proceeding. This is apparent from Dr. Taylor's comments during the workshop:

> The assessment that we make is a fairly simple one. I guess I should say before I go into the assessment that in most cases where we're talking about market power and relaxing regulation, we're really talking about removing price regulation. And I guess it's important to realize that that isn't what we are doing here. There will come a time, I'm sure, for all of the companies in Florida that such a showing will be made and people will be making that argument, but that isn't what's going on here. And if nothing else, it's important to recognize that *there are a lot of rules on the list that really have nothing to do with the presence or absence of market power and could be dispensed with irrespective of what we decide*, what you decide, staff, Commission, on the state of market power in Florida. . . (Transcript, p. 106, emphasis added.)

Given Joint Petitioners' likely use in future deregulation efforts of any test adopted in this proceeding, the Commission should be wary of the potential harm that could be caused by such adoption. The mere presence in a given moment of certain

types of competitors in a market, without regard to the competitors' ability to compete head to head with the Joint Petitioners, is simply insufficient to demonstrate that the local service market is subject to robust and sustainable competition.

There are many factors that must be considered in determining whether a market is suited to sustain competition, not the least of which is whether historical monopoly era switched access subsidies have been removed. Such subsidies unfairly benefit the Joint Petitioners and have no place in competitive markets. Florida previously had a statutory method for greatly reducing the switched access subsidy through rate rebalancing, but the statute was repealed and Joint Petitioners' switched access rates remain among the highest in the nation.

Sprint Nextel urges that in order to protect consumers and competitive markets, switched access subsidies must be eliminated as a prerequisite to a determination that sufficient competition exists in any context. Retaining such monopoly-era subsidies creates a discriminatory marketplace, invites anticompetitive behavior by the Joint Petitioners, and ultimately hurts consumers. Simply put, Joint Petitioners are currently permitted to charge their wireless and wireline retail competitors in Florida an inflated subsidy rate for a monopoly service (intrastate switched access) that its own wireless and wireline affiliate entities effectively do not pay because the charges and revenues balance out on their corporate books.[3]

[3] For example, Verizon Florida charges the same intrastate switched access rate to terminate inter-MTA traffic from Sprint and its own Verizon Wireless affiliate, but when the accounting is done in the corporate offices of the common corporate parent, Verizon Communications Inc., in New York City, the charges to Verizon Wireless are balanced out by the revenues to Verizon Florida. Thus, Verizon pays itself. Sprint Nextel, on the other hand, has only an expense and no corresponding revenue. Unlike the ILEC's affilates, the inflated access rates represent a real cost for Sprint Nextel and all other competitive carriers who are not ILEC affiliates This is simply not appropriate policy for a competitive market, where each competitor is expected to recover its own costs of providing service. If one firm is subsidized by competitors, as the Joint Petitioners are subsidized by their competitors, it creates an uneven competitive playing field and threatens

In Florida, many of the Joint Petitioners now offer services including video, long distance, wireless and broadband. Accordingly, there is a substantial threat that the subsidy they receive from the monopoly switched access fees will in fact support the very retail services that they propose should be counted as "competitive" under their proposed trigger test for determining that a market is "competitive." Further, the subsidies that are built into Joint Petitioners' intrastate switched access rates in Florida are unnecessary to serve the public interest; instead, they serve only to distort the local market and harm competition. Given Joint Petitioners' broad range of products and market strength, retaining the subsidy makes cross-subsidy and market distortion inevitable and the only certain way to safeguard against them is to eliminate the subsidy entirely.

In summary, the trigger test is entirely inadequate in ensuring a competitive level playing field exists or is sustainable.

## IV. THE COMPETITION TEST DOES NOT OFFER APPROPRIATE REGULATORY OVERSIGHT TO PROTECT CONSUMERS AND PROVIDE FOR DEVELOPMENT OF FAIR AND EFFICIENT COMPETITION

The Commission has broad jurisdiction - and responsibility - delegated by the Legislature to provide for the development of fair and effective competition and ensure that monopoly services remain subject to effective regulation. The simplistic, narrow trigger test proposed by the Joint Petitioners is not sufficient to identify or ensure development or continuation of fair and effective competition.

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supra-competitive, artificially-high retail prices for consumers. Joint Petitioners' ineffectual trigger test takes no account of this or other anti-competitive practices by Joint Petitioners.

Section 364.01, F.S., describes the Commission's general jurisdiction and responsibility in connection with competition as follows:

> (2) It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies...;
>
> (3) ...The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition...;
>
> (4) The Commission shall exercise its exclusive jurisdiction in order to: ...
>
> (c) Protect the public health, safety, and welfare *by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate and service regulation* (emphasis added);
>
> (g) Ensure that all providers of telecommunications services are treated fairly, *by preventing anticompetitive behavior* and eliminating unnecessary regulatory treatment; and
>
> (h) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, *if competitive telecommunications services are not subsidized by monopoly telecommunications services*, and if all monopoly services are available to all competitors on a nondiscriminatory basis.; and
>
> (i) *Continue its historic role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies* (Emphasis added.)

More specifically, Section 364.3381, F.S., Cross-subsidization, requires the Commission to protect against cross-subsidization and other such anticompetitive behavior:

> (1) The price of a nonbasic telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by customers of basic services.
>
> (2) A local exchange telecommunications company which offers both basic and nonbasic telecommunications services shall establish prices for such services that ensure that nonbasic telecommunications services are not subsidized by basic telecommunications services. The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and nonvolume sensitive costs.
>
> (3) The commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

It is obvious from the plain language of Section 364 that the Joint Petitioners' trigger test is not sufficient to meet the Commission's obligation to oversee the transition to competition.[4]

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[4] Other state commissions that have evaluated such market "tests" fully evaluated the markets and acknowledged the need to remove anticompetitive subsidies. Last year, when the Virginia State Corporation Commission granted Verizon unprecedented deregulation of its retail service rates, although Verizon's intrastate access charges was not before the Commission in that proceeding, it found that "*[e]nsuring reliable, easy and low-cost interconnection of calls between competing providers is an essential element of promoting competitive offerings from all telecommunications providers*" and therefore initiated a proceeding to review Verizon's switched access charges and adjust them if necessary, *"to promote increased competition."* (December 14, 2007 in Case No. PUC 2007-00008, p. 59).

## V. CROSS-SUBSIDY RELATED RULES

Until such time as the Joint Petitioners' substantial subsidies are removed, Sprint Nextel believes it is essential to retain rules related to enforcing Florida's statutes prohibiting cross-subsidization (25-4.046, Incremental Cost Data Submitted by Local Exchange Companies; and 25-9.005, Information to Accompany Filings). The rules Joint Petitioners seek to eliminate were promulgated to implement specific statutes, including Section 364.3381, F.S. (prohibiting cross subsidies). As stated above, the Joint Petitioners have not demonstrated that the purpose of the statutes will be achieved by other means if the rule is eliminated. Indeed, terminating switched access is and will always be a monopoly service. Until ILECs are required to price access at cost, the margin on that service can be used to cross-subsidize any and all of the ILECs' other services. Only when access is priced at cost can the Commission ensure that monopoly services are not subsidizing competitive service. Accordingly, the Commission should not repeal or waive application of Rules 25-4.046 and 25-9.005.

## VI. CONCLUSION

For the reasons set forth above, Sprint Nextel respectfully requests that the Commission decline to propose or adopt the trigger test rule; decline to propose or adopt Streamlined Regulation as sought by Joint Petitioners; retain Rules 25-4.046 and 25-9.00; repeal such other rules that may be obsolete; and require the Joint Petitioners to seek a waiver of any remaining rules pursuant to Section 120.542, F.S.

Respectfully submitted this 20th day of June, 2008.

*/s/ Marsha E. Rule*
Marsha E. Rule, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe St., Suite 420
Tallahassee, FL 32301
850.681.6788 (telephone)
850.681.6515 (facsimile)

Douglas C. Nelson, Esq.
Sprint Nextel
233 Peachtree St. NE, Suite 2200
Atlanta, GA 30303
Telephone: 404.649.0003
Facsimile: 404.649.1652

**ATTORNEYS FOR SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT SPECTRUM LIMITED PARTNERSHIP d/b/a SPRINT PCS, NEXTEL SOUTH CORPORATION d/b/a NEXTEL and NPCR, INC. d/b/a NEXTEL PARTNERS**