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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")

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Post-Workshop Comments of Sprint Nextel

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**FLORIDA PUBLIC SERVICE COMMISSION**

CLEC Intrastate Access Charges Workshop

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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"), provide the following Comments regarding the Staff Workshop on CLEC intrastate access charges held at the Florida Public Service Commission ("Commission") on July 16, 2008.

**I. INTRODUCTION**

Sprint Nextel wholeheartedly supports examination of the reasonableness of intrastate switched access rate levels and appreciates the opportunity to participate in the workshop and provide these post-workshop comments. Whenever switched access rates are set above economic cost, competition and ultimately consumers suffer. This is particularly true when the rates are not only above cost, but also include substantial subsidies benefiting one competitor over another and creating a discriminatory marketplace. The most pressing problem in Florida with regard to anticompetitive switched access rates is the extraordinarily high rates charged by the state's incumbent

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local exchange carriers ("ILECs"), which are among the highest in the nation.<sup>1</sup> ILECs control by far the most customer access lines in Florida that are subject to switched access charges<sup>2</sup> and therefore create the greatest burden on the customers of marketplace competitors (i.e. interexchange carriers, CLECs and wireless providers) that are forced to pay the ILECs' high rates to reach ILEC customers. Sprint Nextel urges the Commission to take on this, by far the biggest problem, as its first priority and act to lower the rates of Florida's ILECs. The Commission not only possesses sufficient authority to do so, but Sprint Nextel also respectfully asserts that it is incumbent upon the Commission to do so under the exclusive jurisdiction conferred upon it by the Legislature.

The Florida Legislature has provided the Commission with broad authority and responsibility to oversee the transition from monopoly to competition in Florida and has expressly given it the charge of effectively regulating monopoly service rates and preventing anticompetitive behavior.<sup>3</sup> Specifically, Section 364.01(4), Florida Statutes, provides:

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)

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(g) Ensure that all providers of telecommunications services are treated fairly, *by preventing anticompetitive*

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<sup>1</sup> ILEC intrastate switched access rates in Florida range between 1.5 cents per minute and just under 6 cents per minute.

<sup>2</sup> Wireless providers are not permitted to charge switched access to terminate calls to wireless subscribers.

<sup>3</sup> See Section 364.01(4), Florida Statutes.

*behavior and eliminating unnecessary regulatory restraint.*  
(emphasis added)

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(i) *Continue its historic role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.* (emphasis added)

Although the Commission previously determined that it could not lower ILEC switched access rates by its own method because the Legislature had prescribed a specific and detailed statutory method for doing so, that rationale no longer applies. The Legislature repealed its statutory process for lowering ILEC switched access rates, leaving the door open for the Commission to act.

Sprint Nextel respectfully recommends that the Commission begin an immediate investigation of ILEC intrastate switched access in Florida to determine the appropriate rates necessary to move ILEC rates toward cost. Specifically, the Commission should consider an immediate requirement that the rates be set at parity with ILEC interstate rates with the goal of lowering them to parity with reciprocal compensation rates or another alternative that approaches cost.

## **II. MATTERS ON WHICH THERE IS AGREEMENT**

There is wide agreement on two points: 1) eliminating ILEC switched access subsidies is good for consumers; and 2) the market will not discipline switched access rates, so the Commission must act.

### **a. Benefits of Eliminating Anticompetitive ILEC Subsidies**

It is well established in Florida both that substantial subsidies are built into ILEC switched access rates and that competition will benefit when those subsidies are

eliminated. The Florida Legislature, the Commission and the three major Florida ILECs themselves all concur on these points.<sup>4</sup> The Commission has determined that “[t]he elimination of such support will induce enhanced market entry into the local exchange market” and that “[e]nhanced market entry will result in the creation of a more competitive local exchange market that will benefit residential consumers through ... increased choice of service providers; ...new and innovative service offerings, including bundles of local and long distance service, and bundles that may include cable TV service and high speed internet access service; ... technological advances; ...increased quality of service; and ... over the long run, reductions in prices for local service.”<sup>5</sup>

Continuing ILEC subsidies through inflated switched access rates clearly is anticompetitive. All carriers that compete against Florida ILECs in the retail market must purchase switched access to terminate certain calls to the ILECs’ 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 have been inflated as a mechanism to subsidize the price of basic local service. The holdover effect of this monopoly-era policy is that the Florida ILECs’ own competitors subsidize their services. However, in a competitive market, all retail competitors, including the Florida ILECs, must be required to collect the cost of retail services from their own retail customers, not from purchasers of monopoly

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<sup>4</sup> See generally the Legislature’s 2003 Tele-Competition Innovation and Infrastructure Enhancement Act, and FPSC Docket Nos. 030867-TL, 030868-TL and 030869-TL. Additionally, as AT&T representative Greg Follensbee indicated at the Staff Workshop, AT&T’s rates are above cost and AT&T agrees the end result should be elimination of ILEC subsidies. Workshop Transcript, pgs. 66 and 110.

<sup>5</sup> Order No. PSC-03-1469-FOF-TL, In re: Petition by Verizon Florida, Inc. to reform intrastate network access and basic local telecommunications rates in accordance with Section 364.164, Florida Statutes et seq., December 24, 2003, p. 17.

switched access services who are also direct retail competitors. Given that ILECs serve the vast majority of Florida access lines, the Commission will do far more to meet its statutory goal of increasing competition and benefiting consumers by reducing ILEC switched access rates than by addressing CLEC rates at this time.

**b. Switched Access is a Monopoly Service Which the Market Will Not Discipline**

Likewise, there appears to be agreement that switched access is a monopoly service whose price cannot be retrained by the market because the local exchange carrier charging the access has bottleneck control over access to each of its end users. In its responses to Staff's questions provided in advance of the workshop, AT&T notes in response to Question 4 (asking whether consumers are harmed by high CLEC access rates) that IXCs and other LECs "are forced to pay these unreasonable rates at a competitive disadvantage because CLECs have bottleneck control over access to each of their end users, such that an IXC has no alternative path over which to terminate traffic to a certain end user other than the CLEC that end user has selected for its local exchange service." AT&T goes on in the same response to say that CLECs have no incentive not to inflate their own rates because "those that do not are paying the inflated access prices of, and thus subsidizing, their competitors." Sprint Nextel notes that the very same logic applies to AT&T's own ILEC intrastate switched access rates. First, AT&T has the same bottleneck over its customers' access lines, which far outnumber CLEC access lines. Therefore, when Mr. Follensbee says that although AT&T's intrastate switched access rates are not set at cost but "over time they are moving towards cost," he cannot mean

that AT&T's rates will go down somehow without Commission action.<sup>6</sup> For wireless providers like Sprint Nextel without ILEC affiliates, there is no way to charge their competitors high access rates because wireless providers are not permitted to charge terminating switched access when they terminate another carrier's call.

Therefore, it is widely agreed that ILEC switched access subsidies should be eliminated as a matter of policy and that it will not happen voluntarily or by market forces. The question then becomes whether the Commission can do so and on this point there is disagreement.

### III. MATTERS ON WHICH THERE IS DISAGREEMENT

Sprint Nextel's impression based on comments made at the workshop is that the conventional wisdom appears to be that the Commission may have authority to regulate intrastate switched access rates charged by CLECs, but not those charged by ILECs. This appears to be based on two premises, both of which are invalid:

First, at one time there was a specific and detailed process in the Florida Statutes for the capping and reduction of access charges and that "when a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner."<sup>7</sup> As discussed below, this premise is no longer valid.

Second, price cap ILEC switched access rates are untouchable. This premise is simply false.

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<sup>6</sup> See Workshop Transcript p. 66. Mr. Hatch (AT&T) later admitted as much in discussing whether AT&T would voluntarily lower its rates: "...why would you voluntarily blow a hole in your foot when none of your other competitors are likely to follow suit?" (p. 140)

<sup>7</sup> Final Order Granting Motion to Dismiss, In re: Complaint by MCI Telecommunications Corporation against GTE Florida Incorporated regarding anti-competitive practices related to excessive intrastate switched access pricing, Order No. PSC-97-1370-FOF-TP, October 29, 1997, p. 10.

For the reasons set forth below, there are no impediments to prevent the Commission from acting on ILEC switched access rates today. In fact, the Florida Statutes create an imperative for the Commission to act, given that present ILEC rates are a monopoly service for which an anticompetitive rate is charged.

**a. The Florida Statutes No Longer Prescribe a Process for ILEC Access Reductions and Do Not Limit the Commission's Authority to Reduce ILEC Access Charges**

Mr. Hatch of AT&T asserted during the workshop that "[t]here is case law in Florida to suggest that [the Commission does not] have the authority on ILEC access rates."<sup>8</sup> He went on to discuss a complaint MCI filed against GTE in 1997, over 11 years ago, in which the Commission interpreted the then-current Florida Statutes to preclude Commission jurisdiction over ILEC switched access rates. Mr. Hatch concluded that "[t]he rationale of the statute and what the Commission's rationale in relying on the statute was, I don't think has changed. What it said was that that is the statute, 364.163 that applies and controls ILEC access charges."<sup>9</sup>

AT&T's argument is untenable because it relies on specific statutory authority that was expressly repealed. The decision in the MCI/GTE case was based entirely on explicit statutory language that set forth a detailed process for reducing ILEC switched access rates. That statutory language no longer exists. The Legislature repealed it, replacing it with the current Section 364.163, Florida Statutes, which merely caps ILEC rates at the amount in effect immediately prior to July 1, 2007. It contains no method for

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<sup>8</sup> Workshop Transcript, p. 138.

<sup>9</sup> Workshop Transcript, p. 139.

reducing or otherwise setting ILEC switched access rates, nor does it prohibit the Commission from doing so. In fact, the current Section 364.163 is the result of the Legislature's abandonment of the specific process that had been in place for rebalancing rates -- and upon which AT&T's argument relies.

On July 6, 1997, MCI Telecommunications Corporation ("MCI") petitioned the Commission to lower the switched access rates of GTE Florida Incorporated ("GTE"), alleging GTE's high rates constituted an anticompetitive practice in violation of Sections 364.3381(3) and 364.01(4)(g).<sup>10</sup> MCI alleged that GTE used profits from its excessive intrastate switched access rates to subsidize the market entry of its long distance affiliate. MCI also alleged that because GTE had nearly 100% market share for access services in its territory, it had a defacto monopoly on access services.<sup>11</sup> In defense, GTE argued that "Section 364.163, Florida Statutes, was "a complete prescription of intrastate switched access rates" and that the Commission's authority was limited to determining the correctness of price increases and decreases resulting from application of the specific provisions of 364.163, Florida Statutes. GTE further argued that by setting forth a very specific process for capping intrastate access rates and mandating specified reductions,

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364.01 Powers of commission, legislative intent.--

(4) The commission shall exercise its exclusive jurisdiction in order to:

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

364.3381 Cross-subsidization.--

(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.

<sup>11</sup> Order No. PSC-97-1370-FOF-TP, p. 2.

the Legislature had considered alternatives and made a policy decision that the Commission was “without authority to override.”<sup>12</sup>

The Commission agreed with GTE and dismissed the complaint. In doing so, it determined that “the specific provisions of Section 364.163, Florida Statutes, clearly limit our authority to act with regard to switched access rates.”<sup>13</sup> The Commission found that the then-current version of Section 364.163, Florida Statutes, presented “a specific and detailed process for the capping and reduction of access charges” over which the Commission had “been given regulatory oversight.” Based on the maxim of statutory construction *expressio unius est exclusio alterius*,<sup>14</sup> the Commission determined that because the statute specified a process for reductions and limited the Commission to only ministerial oversight, the Commission could not reduce switched access rates in another manner. The Commission further determined that rules of statutory construction “also require that specific statutory provisions be given greater weight than general provisions when the provisions in question cannot be harmonized.”<sup>15</sup> The conclusion reached was that the specific provisions in Section 364.163, Florida Statutes, prevail over the general authority conveyed in Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, “or act as an exception to [the Commission’s] ability to investigate anticompetitive acts and complaints of cross subsidization.”<sup>16</sup> Finally, the Commission determined that Section 364.163(9), Florida Statutes defined the specific oversight role for determining the

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<sup>12</sup> *Id.*, p. 4.

<sup>13</sup> *Id.*, p. 6, emphasis added.

<sup>14</sup> “Expression of one is the exclusion of another.” *Black’s Law Dictionary*.

<sup>15</sup> *Id.*, p. 10.

<sup>16</sup> *Id.*, p. 11.

correctness of rate increases specified by the legislature and no other role was expressly enumerated, nor did Sections 364.01(4)(g) or 364.3381(3) state that the Commission's general authority to investigate anticompetitive practices and claims of cross-subsidization applies in the area of access charges.<sup>17</sup>

The "exception" cited by the Commission in 1997 to its "ability to investigate anticompetitive acts and complaints of cross subsidization" no longer exists. Today, Section 364.163, Florida Statutes, section merely caps ILEC switched access rates and has no provision that either requires or prohibits reducing them:

Network access services.--For purposes of this section, the term "network access service" is defined as any service provided by a local exchange telecommunications company to a telecommunications company certificated under this chapter or licensed by the Federal Communications Commission to access the local exchange telecommunications network, excluding the local interconnection arrangements in s. 364.16 and the resale arrangements in s. 364.161. Each local exchange telecommunications company subject to s. 364.051 shall maintain tariffs with the commission containing the terms, conditions, and rates for each of its network access services. The switched network access service rates in effect immediately prior to July 1, 2007, shall be, and shall remain, capped at that level until July 1, 2010. An interexchange telecommunications company may not institute any intrastate connection fee or any similarly named fee.

Thus the Commission's rationale for determining it had no authority to investigate and reduce GTE's rates in 1997 no longer applies. There are no longer any specific provisions with respect to reducing switched access rates that prevail over the general authority conveyed in Section 364.01(4) Florida Statutes or elsewhere, including the authority to investigate potential cross subsidization pursuant to Section 364.3381(3).

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<sup>17</sup> *Id.*, p. 11-12.

Finally, there are no specific provisions remaining that prescribe a particular limited role in overseeing access reductions. Thus, the Commission has authority to act pursuant to the Sections of the Florida Statutes discussed above, including but not limited to Sections 364.01(4) and 364.3381.

**b. The Commission is not Precluded from Regulating Price Cap LEC Switched Access Rates**

During the workshop, the issue of price cap regulation was raised several times as a basis for arguing that the Commission could not order lower switched access rates for ILECs subject to price cap regulation. The main premise appears to be that because price cap ILECs are constrained in how much they can raise retail basic local exchange rates, the Commission cannot order them to lower intrastate switched access rates because they would not be able to rebalance rates on a dollar for dollar basis. This reasoning is flawed for a number of reasons.

First, the price regulation regime set forth in Section 364.051, Florida Statutes, exempts price cap LECs from the rate of return regulation that previously governed them and prescribes the implementation and operation of the price cap regulation. It does not exempt them from the Commission's exclusive jurisdiction under Section 364.01 that provides the Commission with specific duties and powers to, among other things, "[p]rotect the public health, safety, and welfare by ensuring that monopoly service provided by telecommunications companies continue to be subject to effective price, rate, and service regulation"<sup>18</sup> (emphasis added); [e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive

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<sup>18</sup> Section 364.01(4)(c), Florida Statutes.

behavior...<sup>19</sup> (emphasis added); and [c]ontinue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies."<sup>20</sup> (emphasis added) Section 364.051 applies price regulation and removes previous regulation of rates based on rate-of-return rate-setting, but it does not expressly exempt price cap ILECs from the important powers of the Commission set forth in Section 364.01. These provisions provide the Commission with its duties and powers to protect consumers and manage the transitions from monopoly to competition in Florida. The provisions also specifically contemplate continued regulation of prices and rates for monopoly services such as switched access. Price cap ILECs are the largest telecommunications service providers in Florida and the Legislature, in approving the price regulation statutes, could not possibly have intended to exempt them from the Commission's pro-competitive consumer protection powers.

Second, the price regulation provisions were not intended, nor should they be interpreted, to rigidly lock in perpetual subsidies for ILECs regardless of intervening developments. In particular, Florida ILECs' high intrastate switched access rates have been justified as a method to support ILEC carrier of last resort ("COLR") obligations.<sup>21</sup> Those obligations will sunset at the end of this year, thus lowering ILEC costs and further reducing any possible "need" for subsidies from switched access. Under the ILECs' price cap plans, however, the reduced costs due to elimination of the COLR requirements

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<sup>19</sup> Section 364.01(4)(g), Florida Statutes.

<sup>20</sup> Section 364.01(4)(i), Florida Statutes.

<sup>21</sup> See, e.g., Order No. PSC-95-1592-FOF-TL, pg. 28, issued on December 27, 1995 in Docket No. 950696-TP (In re: Universal Service and Carrier of Last Report Responsibilities), in which the Commission recognized that ILEC switched access charges provide a subsidy for other ILEC services, and determined that ILECs should continue to fund universal service and carrier of last resort obligations "through markups on the services they offer," including switched access.

will not be reflected and will result in a windfall to ILECs rather than price reductions for Florida consumers unless the switched access subsidy is also reduced.<sup>22</sup> The price cap provisions in Section 364.051 were not meant to completely tie the Commission's hands to exercise its exclusive jurisdiction to ensure competitors are treated fairly and effectively regulate prices and rates to the extent necessary to protect consumers and promote competition in light of changing circumstances.

### III. Conclusion

Florida ILECs' switched access services are monopoly services that must "continue to be subject to effective price rate, and service regulation" pursuant to Section 364.01(4)(c), Florida Statutes. The rates, which are far above cost and include large monopoly-era subsidies, are anticompetitive because they force the ILECs' own competitors to subsidize ILEC services. As such, the Commission should exercise its exclusive jurisdiction to prevent this anticompetitive behavior pursuant to Section 364.01(4)(g), Florida Statutes and to assume its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies pursuant to Section 364.01(4)(i), Florida Statutes.

Sprint Nextel respectfully recommends that the Commission begin an immediate investigation of ILEC intrastate switched access in Florida to determine the appropriate rates necessary to move ILEC rates toward cost. Specifically, the Commission should consider an immediate requirement that the rates be set at parity with ILEC interstate

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<sup>22</sup> Although Nextel disagrees with the notion that ILECs are somehow entitled to be made whole if the Commission reduces their switched access rates, Nextel notes that they easily can recover any rate reductions via non-regulated charges, just as CLECs would be forced to do.

rates with the goal of lowering them to parity with reciprocal compensation rates or another alternative that approaches cost.

Respectfully submitted this 8<sup>th</sup> day of August, 2008.

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