

**Lead Counsel:**

Martin C. Rothfelder  
(admitted in NJ, PA, NH and MO only)  
The Rothfelder Law Offices  
625 Central Avenue  
Westfield, NJ 07090  
Tel:(908) 301-1211 Fax: (908) 301-1212

**Local Counsel:**

Jill W. McLaughlin, Esq.  
Nextel West Corp.  
860 W. Levoy Drive, Suite 102  
Salt Lake City, Utah 84123  
Tel: (801) 685-5825 Fax: (801) 685-5803

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of Telephone Number )  
Conservation Measures for (801) Area )  
Code Relief )  
\_\_\_\_\_ )

Docket No. 99-999-04

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In the Matter of the Request of the North )  
American Numbering Plan Administrator )  
for a New Area Code Within the (801) )  
Area Code )  
\_\_\_\_\_ )

Docket No. 99-999-05

**NEXTEL MOTION FOR RECONSIDERATION, REVIEW AND REHEARING  
OF NOVEMBER 2, 2000 ORDER**

Nextel West Corp. (“Nextel”), a wireless carrier operating in Utah’s NPA 801<sup>1</sup>, hereby

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<sup>1</sup>Nextel and its affiliates provide a unique combination of two-way digital mobile telephone, text messaging, alpha-numeric paging and one-to-one and one-to-many dispatch services (Direct ConnectK) using a single integrated handset. Such services are provided in Utah and other jurisdictions through the

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use of Nextel's facilities and through interconnection with the public switched telephone network. Nextel provides these services through specialized mobile radio ("SMR") licenses issued by the Federal Communications Commission ("FCC") under Part 90 of its rules (47 C.F.R. §90). Such services constitute commercial mobile radio service ("CMRS") as that term is defined in 47 U.S.C. §332 and 47 C.F.R. §20.3. Nextel is also a "telecommunications carrier" as that term is defined in 47 U.S.C. §153 as amended by the Telecommunications Act of 1996.

Nextel has filed a Motion to Intervene in this docket simultaneously with this filing.

requests that the Utah Public Service Commission (“PSC” or “Commission”) reconsider, rehear and review the portions of its Order of November 2, 2000 that involve the imposition of a requirement that all telecommunications carriers “utilize their existing resources at 90% utilization factor before seeking additional number resources.”<sup>2</sup>

Nextel agrees with the goals of number conservation and has supported development of number conservation measures through its participation in the numbering dockets at the FCC, number conservation dockets in at least 10 states, industry committees and groups working on number conservation, and its participation as a member of the North American Numbering Council. Nevertheless, Nextel respectfully opposes and requests reconsideration, review and rehearing of the imposition of this Utah-specific NXX utilization requirement. This requirement is unlawful because it exceeds the Commission’s authority. The requirement was also imposed without the basic notice and hearing procedures required by law. The utilization rate imposed is also unworkable and unlawfully vague due to the failure to specify a geographic area in which the utilization rate applies, such as the NPA, rate area, etc. Thus, the Order should be changed to remove this requirement of meeting a Utah-specific utilization factor prior to seeking additional numbering resources.

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<sup>2</sup>*In the Matter of Telephone Number Conservation Measures for (801) Area Code Relief, In the Matter of the Request of the North American Numbering Plan Administrator for a New Area Code within the (801) Area Code, Utah PSC Docket Nos.99-999-04, 99-999-05, at page. 4.*

**I. THE UTAH COMMISSION LACKS AUTHORITY TO IMPOSE NXX UTILIZATION RATES ON NEXTEL AND OTHER SIMILAR CARRIERS**

**A. THE FCC HAS NOT DELEGATED AUTHORITY TO UTAH TO IMPOSE NXX UTILIZATION RATES.**

Section 251 (e)(1) of the Communications Act of 1996, 47 U.S.C. §251(e)(1), provides the FCC with exclusive jurisdiction over the administration of telephone numbers in the United States and also permits the FCC to delegate those duties. Delegations of such authority that are applicable to Utah include the area code relief function provided in 47 C.F.R. §52.19, the FCC Order providing Utah with authority to implement specified area code conservation measures<sup>3</sup> (*Utah Numbering Order*), and the March 31, 2000 FCC Numbering Resource Optimization Order<sup>4</sup> (*NRO Order*).

The FCC's delegation of the area code relief function provides no authority for Utah to impose minimum NXX utilization standards prior to obtaining additional numbering resources. The area code relief function as addressed in the FCC rules and related orders address how a state may provide for a new area code when an NPA in its state is at or near exhaust of Central Office Codes (NXXs). 47 C.F.R. §52.19. While states have authority for certain acts ancillary to providing such relief, Utah specific NXX utilization rates are not such ancillary actions.

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<sup>3</sup>*In the Matter of Numbering Resource Optimization Order*, DA 00-1616, NSD File No. L-99-89, (July 20, 2000).

<sup>4</sup>*In the Matter of Numbering Resource Optimization*, Report and Further Notice of Proposed Rulemaking in the Matter of Numbering Resource Optimization, FCC 00-104, CC Docket No. 99-2000 (released March 31, 2000).

The *NRO Order* provides that the FCC will “adopt a nationwide utilization threshold for non-pooling carriers beginning January 1, 2001.”<sup>5</sup> *NRO Order* at ¶115. In the *NRO Order*, the FCC tentatively concluded that the initial uniform rate would be 50% but did not and has not imposed any rate. *NRO Order* at ¶248. The *NRO Order* invited parties to address what utilization rate should be adopted on January 1, 2001. *Id.* In the *NRO Order*, the FCC did not delegate authority to the states to act on NXX utilization ratio. Instead, the FCC made clear that it will regulate this matter and plans to establish nationwide utilization rates by January 1, 2001. *NRO Order* at ¶115. Thus, there is simply no basis in the *NRO Order* for the Utah PSC to adopt a Utah specific utilization rate in advance of the FCC’s establishment of a national utilization rate.

The *Utah Numbering Order* also provides no authority for this action. That Order provides authority to engage in the following specified numbering conservation techniques:

- 1) Thousand Number Block Pooling
- 2) NXX Code Sharing
- 3) Maintenance of Rationing Procedures 6 Months After Implementation of Area Code Relief
- 4) Hear and Address Claims for Numbering Resources in NPA

This Utah specific FCC delegation of authority also provides no basis for the PSC imposing Utah specific NXX utilization rates as a condition to a carrier receiving NXXs.

In sum, under federal law the FCC has exclusive jurisdiction over numbering except to the extent they delegate it. They have not delegated to Utah the authority to impose NXX

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<sup>5</sup> For carriers not capable of Local Number Portability (LNP) and thus unable to pool, the FCC explicitly noted it was adopting “the utilization requirement suggested by Nextel.” *NRO Order*, at ¶141.

utilization rates. Thus, Nextel respectfully submits the PSC should rescind the portion of the Order requiring such measures as it exceeds the PSC's jurisdiction.

**B. STATE LAW ALSO PROVIDES NO AUTHORITY TO IMPOSE UTILIZATION RATES ON NEXTEL AND CARRIERS LIKE IT.**

The PSC's authority includes only those powers granted to it by state statute. The Utah Supreme Court has said, "It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute." *Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017 (Utah 1995). While the PSC has authority to regulate the terms and conditions of service of carriers under its jurisdiction<sup>6</sup>, the receipt of NXXs by a carrier do not involve how it serves customers. Instead it involves the relationship between North American Numbering Plan Administrator and the carrier -- not the carrier and its customers. There is no statute allowing the Utah PSC to regulate that relationship or the issuance or receipt of NXXs by non-pooling carriers.

In addition, the PSC lacks jurisdiction over CMRS carriers. The statutes explicitly provide that the PSC has authority over "telephone corporations."<sup>7</sup> While this term includes many carriers; the statute explicitly provides that the term does not include CMRS carriers.<sup>8</sup> Thus, even if the Utah statutes are read to include the power to impose utilization rates on the jurisdictional carrier, Nextel and other CMRS carriers are not jurisdictional carriers. Thus, utilization rates may not under any reading of the PSC's powers be lawfully imposed on Nextel and other CMRS carriers.

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<sup>6</sup> U.C.A. §§54-3-1, 54-8b-11.

<sup>7</sup> U.C.A., §54-2-1(22)(a).

<sup>8</sup> U.C.A. §54-2-1(22)(b)(1).

Therefore, Nextel submits that the PSC's lack of any state authority to engage in regulation of NXX usage by Nextel and similar carriers also supports the need of the PSC to alter its Order to remove the NXX utilization requirement.

## II.

### **THE PSC'S IMPOSITION OF NXX UTILIZATION RATES FAILS TO COMPLY WITH THE REQUIREMENTS OF DUE PROCESS**

Notice and an opportunity to be heard are basic requirements of due process under Utah and federal law. No prior notice or opportunity to be heard was provided to Nextel concerning the PSC's action implementing NXX Code utilization. This defective procedure violated due process as required under state statutes as well as the state and federal constitutions.<sup>9</sup>

The Order, on its face, involves the regulation of the privileges, rights, and duties of carriers to use telephone numbers. Receipt of telephone numbers is basic for telecommunications carriers, such as Nextel, to operate their business. The Order appears to apply to all carriers or all carriers under the PSC's jurisdiction.

The U.S. Supreme Court has described the basic requirements of due process as follows:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as

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<sup>9</sup> U.S. Const. Amend. V, XIV; UTAH CONST. Art. I, §7,11

to reasonably convey the required information, and it must afford a reasonable time for those interested to make their appearance.’

*Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). The Utah Supreme Court held in *Nelson v. Jacobsen*, 669 P.2d 1207, 1209 (Utah 1980) that: “Timely and adequate notice and an opportunity to be heard in a meaningful way are at the heart of procedural fairness.” The court further held that: “where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process.” *Id.* Nextel and such other carriers were denied these basic due process protections, as they were denied notice and an opportunity for hearing.

The Order’s imposition of NXX utilization ratios also violated additional state statutory due process protections. For example, when the PSC promulgates a requirement that requires an action, imposes a requirement on a class, or issues a written interpretation of a federal legal mandate, it must follow the procedure in the Utah Administrative Rulemaking Act, U.C.A. §63-46a-1 (*et. seq.*), U.C.A. §63-46a-3(2). The procedures of the Utah Administrative Rulemaking Act include opportunities for notice of the proposed rule and opportunity for comment and hearing, among others. U.C.A. §63-46a-3 through 4. Since the Order imposes a requirement (NXX fill rates necessary to get numbers) and applies to a class - - telecommunications carriers - - the PSC must follow these rulemaking procedures such as notice and comment to enact NXX utilization rates. Since the Commission has not followed these required procedures, the requirement is invalid. *See e.g. Williams v. Public Serv. Comm’n*, 720 P. 2d 773, 775 (Utah 1986).

If rulemaking procedures not apply, the due process requirements for adjudication apply under the Utah Administrative Procedures Act, U.C.A. §63-46b-0.5 *et. seq.*, including explicit statutory rights to notice of the issues in controversy, authority for the action (U.C.A. 63-46b-3),

hearing and other procedures. The Commission did not comply with these basic statutory requirements for an adjudication.

Thus, the Commission should rescind the portions of its Order dealing with NXX utilization rates, for even if it has jurisdiction over this, the Commission failed to comply with due process in imposing these requirements.

**III. THE NXX UTILIZATION RATE REQUIREMENT IS SO UNCLEAR AS TO BE UNWORKABLE AND UNCONSTITUTIONALLY VAGUE**

The November 2, 2000 Order requires that “all telecommunications carriers seeking numbering resources in the 801 area code shall use their existing numbering resources at a 90% utilization factor before seeking additional numbering resources.” Even if the PSC had authority to engage in such regulation and followed due process, the requirement is so vague as to be unworkable and unlawful.

For example, it is unclear which existing “numbering resources” of a carrier must meet the 90% utilization rate. Is it the numbering resources assigned within the North American Numbering Plan, within the United States, within Utah, within NPA 801, within the relevant rate area or within the area handled by the switch associated with the requested NXX?<sup>10</sup> It is impossible to tell from the Order and thus impossible to know how to comply. The vagueness of this requirement makes it unworkable as well as unconstitutional. *See e.g. Greenwood v. City of North Salt Lake*, 817 P.2d 816 (Utah1991).

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<sup>10</sup> Under the NRO, the FCC’s proposed utilization rates will apply on a rate center basis. *NRO Order*, at ¶ 248.

## **CONCLUSION**

The Utah PSC lacks authority to impose NXX utilization rates due to lack of authority in federal and state law. The PSC's order imposing such regulation also failed to provide required due process or a clear workable end result. Thus, the PSC should rescind this portion of the November 2, 2000 order and allow the FCC regulation in this area to go forward on an efficient, unambiguous, national basis.

Respectfully Submitted,

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Martin C. Rothfelder  
(admitted in NJ, PA, NH and MO only)  
The Rothfelder Law Offices  
625 Central Avenue  
Westfield, NJ 07090  
Tel:(908) 301-1211 Fax: (908) 301-1212

**Attorneys and Lead Counsel for  
Nextel West Corp.**

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Jill W. McLaughlin, Esq.  
Nextel West Corp.  
860 W. Levoy Drive, Suite 102  
Salt Lake City, Utah 84123  
Tel: (801) 685-5825 Fax: (801) 685-5803

**Local Counsel**