

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In re: Implementation of Florida lifeline program involving bundled service packages and placement of additional enrollment requirements on customers.**

**DOCKET NO. 080234-TP**

**Filed: April 3, 2009**

**SPRINT NEXTEL'S POST-HEARING BRIEF**

Pursuant to the Post-Hearing Procedures set forth in Order No. PSC-09-0095-PHO-TP issued on February 13, 2009 and Rule 28-106.215, F.A.C., NPCR, Inc. d/b/a Nextel Partners and Sprint Corporation n/k/a Sprint Nextel Corporation d/b/a Sprint PCS ("Sprint Nextel"), by counsel, hereby submit their Post-Hearing Brief in the above-captioned case.<sup>1</sup> As amply demonstrated by the evidence in this proceeding, by both existing federal and Florida law, and in the following, the Commission is not authorized to require wireless ETCs such as Sprint Nextel to apply the Lifeline discount to bundled service offerings.

**I. INTRODUCTION**

This case involves the Commission's proposal in Order No. PSC-08-0417-PAA-TP ("Lifeline PAA" or "PAA") to interpret existing state and federal law to require that eligible telecommunications carriers ("ETCs") in Florida, including wireless ETCs, apply the federal Lifeline discount to "bundled service packages." Such packages of services are defined in the PAA in terms of state law definitions relating to "basic local exchange

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<sup>1</sup> A hearing on this matter was held at the Florida Public Service Commission on March 2, 2009.

service” and “nonbasic” services offered by Florida local telecommunications service providers that are regulated by the Commission. Specifically, a “bundled service package” is any package of services that includes a “basic local exchange service” unlimited local dialtone service with any “nonbasic” service. “Nonbasic” services consist of all telecommunications services offered by a Florida local telecommunications service provider other than basic service and include Internet service.<sup>2</sup> Although wireless ETCs are not local telecommunications service providers or ETCs under Florida law,<sup>3</sup> are not regulated by the Commission, and do not offer services that fit into the “basic local exchange service” definition, the Lifeline PAA concluded they must nonetheless apply the Lifeline discount to all service plans based on the Commission’s proposed interpretation of a Federal Communications Commission (“FCC”) rule, 47 C.F.R. 54.403(b), which prescribes how the Lifeline discount is to be applied.

However, the plain meaning of that rule does not support the PAA’s conclusion and instead states clearly the opposite: that the Lifeline discount shall only be applied to *one* service plan, specifically, the lowest tariffed or otherwise generally available residential rate. The FCC’s Rule 54.403(b) states in part as follows:

Other eligible telecommunications carriers **shall** apply the Tier-One federal Lifeline support amount, plus any additional support amount, *to reduce their lowest tariffed (or otherwise generally available) residential rate* for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.<sup>4</sup>

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<sup>2</sup> PAA, p. 2.

<sup>3</sup> See Section 364.011 and 364.10(2)(a), Florida Statutes.

<sup>4</sup> Emphasis provided.

By the plain text and meaning of FCC Rule 54.403(b), wireless ETCs, which are considered “other ETCs” because they do not charge the federal End User Common Line Charge or equivalent federal charges, shall apply the federal Lifeline discount to reduce their lowest tariffed or otherwise generally available residential rate that includes the enumerated services.<sup>5</sup> Sprint Nextel and other wireless ETCs have only one such plan. For Sprint Nextel, the lowest generally available residential rate that includes the enumerated services is \$29.95.<sup>6</sup> Requiring application of the federal Lifeline discount to additional wireless rate plans clearly is inconsistent with and contrary to FCC Rule 47 C.F.R. § 54.403(b).

The Staff witness, Mr. Casey, attempts to solve this problem by asserting arguments and interpretations that produce inconsistent and illogical results that do not, in fact, solve the problem and only cause unnecessary confusion. First, Mr. Casey asserts that 47 C.F.R. § 54.403(b) requires the discount to be applied to “one of two” residential rates: either the lowest tariffed residential rate; or any other generally available rate.<sup>7</sup> He next asserts that the rule actually requires the discount to be applied to multiple rate plans because the Lifeline discount must be applied to the “basic local service functionality” of bundled service packages that include both “basic” and “nonbasic” service, as long as such plans are not tariffed but “otherwise generally available.”<sup>8</sup> (Interestingly, if they are tariffed, Mr. Casey concludes that the Lifeline discount applies only to the lowest rate

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<sup>5</sup> The services enumerated in 47 C.F.R. 54.101(a)(1)-(9) are: voice grade access to the public switched telephone network, local usage, dual tone multifrequency signaling or its functional equivalent, single party service, access to emergency services, access to operator services, access to interexchange service, access to directory assistance, and toll limitation.

<sup>6</sup> See Direct Testimony of John E. Mitus, p. 4, lines 10-13.

<sup>7</sup> Direct Testimony of Robert J. Casey, p. 29, lines 12-19.

<sup>8</sup> *Id.*

plan.) This interpretation does not comply with the federal rule's clear direction that the discount be applied to a single, lowest residential rate and it attempts to read terms into the rule, such as "basic local service rate portion" that do not appear in the text. Furthermore, wireless service plans by their very nature and definition do not include a "basic" portion. Wireless service providers generally offer service that is not distance-sensitive, but instead allows a particular amount of calling nationwide for a fixed price. Such plans are priced at a single monthly rate that covers all services in the plan. There is no portion of the plan price that is attributed to a "basic" service and the wireless provider's lowest generally available residential rate is not a component of each plan. Each plan is different and each plan is priced at a single rate for all service included in the plan. And there is only one lowest generally available residential rate.

Mr. Casey's testimony also obscures the plain meaning of § 54.403(b) by citing multiple statutes, regulations and excerpts from FCC orders to search for a "broader context" and thus avoid the plain meaning of the rule. For example, Mr. Casey cites paragraph 60 of FCC Report and Order 05-46 as support for applying the Lifeline discount to bundled service packages.<sup>9</sup> The order deals with the ETC designation process and the minimum requirements for designation. The word "Lifeline" appears in two places in the order, both in paragraph 17 which provides an overview summary of the requirements for ETC designation. The word is used once to explain that one requirement for designation as an ETC is that a carrier must advertise the availability of Lifeline and Linkup and a second time in a footnote to describe the purpose of the Lifeline program. The paragraph Mr. Casey cites, paragraph 60, does not discuss

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<sup>9</sup> *Id.*, P. 14, lines 6-16.

Lifeline but instead instructs states that exercise jurisdiction over ETC proceedings to apply the requirements set forth in the order in a manner that will best promote the universal service goals found in 47 U.S.C. 254(b). That section sets forth the broad principles for universal service which include ensuring that consumers throughout the Nation have access to telecommunications and information services. This subsection does not address Lifeline support. This series of disjointed statements from a variety of sources related to universal service generally cannot support Mr. Casey's attempt to read into the Lifeline rule a non-existent requirement that the Lifeline discount be applied to "bundled service packages." As discussed further below, the plain meaning of Rule 54.403(b) is stretched far beyond the breaking point when the rule is read, as it is in the PAA and according to the Staff's witness, to ignore entirely the clause "lowest tariffed (or otherwise generally available)" and simply state that wireless ETCs must apply the Lifeline discount to multiple residential rate plans. Based on the face of the rule itself, that is simply not what the rule says. The various interpretations to circumvent the word "lowest" result in illogical outcomes. For example, both the PAA and Staff's witness interpret the rule to require that the Lifeline discount be applied to only the lowest residential rate if it is tariffed, but to all residential rates if they are not tariffed but otherwise generally available. The interpretations offered to circumvent the word "lowest" are neither internally consistent nor plausible.

The requirement that wireless ETCs apply the discount to all service plans also flies in the face of the policy behind federal Lifeline service: to ensure access for low-income individuals to affordable, sustainable voice telephone service. The program is not intended to provide "high end" expensive service packages that include, for example,

high-speed Internet services or other services not supported by the universal service program. In fact, the FCC considered whether to prohibit ETCs from marketing even low-cost vertical services such as caller identification and voicemail to Lifeline subscribers based on concerns from the National Association of State Utility Consumer Advocates (“NASUCA”) that allowing marketing of such services to Lifeline subscribers could impact affordability.<sup>10</sup> Although the FCC ultimately declined to prohibit marketing such services, it certainly did not require that such services be included in the residential rate plans that are afforded the Lifeline discount, much less require that “high end” services such as high speed Internet be included. The Lifeline PAA, however, seeks to do precisely that: require the Lifeline discount to be applied to all service plans, including “high end” plans with high monthly charges and additional services that were never contemplated as being included in the Lifeline program.

For the reasons set forth herein, Sprint Nextel respectfully requests the Commission to determine that the proposal to require wireless ETCs to apply the Lifeline discount to all plans is contrary to and inconsistent with federal law and federal Lifeline policy.

## II. CASE BACKGROUND

This case began with a Commission Staff Recommendation on May 8, 2008 addressing “application of the Lifeline discount to bundled service packages.” The Recommendation stated that “[a] bundled service package combines basic local exchange service with nonbasic services to create an enhanced service offering” and noted that

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<sup>10</sup> See *In the Matter of Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, April 29, 2004, para. 53.

“[f]or purposes of this recommendation, nonbasic service includes call waiting, call forwarding, voice mail, internet access, and all other services that may be offered in a bundled package which includes basic service.”<sup>11</sup> Staff recommended that “the Commission find that, pursuant to 47 C.F.R. § 54.403(b), ETCs are required to apply the Lifeline discount to the basic local service rate or the basic local service rate portion of any service offering which combines both basic and nonbasic service” and concluded that “[s]uch a finding would be consistent with the goals and principles of Universal Service and would foster increased participation in the Florida Lifeline Program.”<sup>12</sup> The recommendation did not distinguish between wireless ETCs and wireline ETCs.

On June 3, 2008, after some discussion, the Commission approved the Staff Recommendation, and thereafter issued its PAA Order PSC-08-0417-PAA-TP on June 23, 2008, noting that any protests to the PAA were due on July 14, 2008. Three ETCs, Sprint Nextel, Verizon and Alltel Communications LLC, filed protests and requested formal proceedings. The Office of Public Counsel filed its notice of intervention on July 16, 2008 which the Commission acknowledged on August 8, 2008. On September 3, 2008 an issue identification meeting was held with all parties and intervenors attending. The Hearing Officer issued his Order Establishing Procedure, Order PSC-08-0594-PCO-TP, on September 15, 2008. Staff served Sprint Nextel, Verizon and Alltel with interrogatories on November 19, 2008, and the parties responded separately to Staff’s discovery on December 19, 2008. Sprint Nextel filed the Direct Testimony of its witness, John Mitus, and Verizon filed the Direct Testimony of Paul Vasington on December 5,

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<sup>11</sup> Docket No. 080234-TP – Implementation of Florida Lifeline Program involving bundled service packages and placement of additional enrollment requirements on customers. Staff Recommendation, May 8, 2008, p. 2.

<sup>12</sup> *Id.*, pp. 12-13.

2008. Commission Staff filed the testimony of Robert Casey on January 9, 2009. The parties, intervenors and staff each filed prehearing statements on January 27, 2009 and the pre-hearing conference was held on February 9, 2009. Depositions by Staff of Verizon Witness Vasington and Sprint Nextel Witness Mitus were held on February 11, 2009, and the evidentiary hearing in this matter was held on March 2, 2009.

### III. DISCUSSION OF THE ISSUES

The issues in this case address two types of ETCs, which are subject to different federal requirements. Issues 1 and 3 address ETCs that charge the federal End User Common Line Charge ("EUCL") or equivalent charges. Issues 2 and 4 address "other ETCs", such as wireless ETCs, that do not charge the EUCL. Sprint Nextel takes a position only on Issues 2 and 4 relating to non-EUCL ETCs.

**Issue 1: UNDER APPLICABLE LAW, MAY THE COMMISSION REQUIRE FLORIDA ETCs THAT CHARGE FEDERAL END USER COMMON LINE CHARGES, OR EQUIVALENT FEDERAL CHARGES, TO APPLY THE LIFELINE DISCOUNT TO BUNDLED SERVICE OFFERINGS WHICH INCLUDE FUNCTIONALITY THAT IS COMPARABLE TO THAT DESCRIBED AT 47 CFR 54.101(A)(1)-(9) OR SECTION 364.02(1), FLORIDA STATUTES?**

**\*\*Sprint Nextel's Position:** Sprint is not an ETC that assesses federal EUCL charges and therefore does not take a position on this issue.\*\*



**Issue 2:** UNDER APPLICABLE LAW, MAY THE COMMISSION REQUIRE FLORIDA ETCs THAT DO NOT CHARGE FEDERAL END USER COMMON LINE CHARGES, OR EQUIVALENT FEDERAL CHARGES, TO APPLY THE LIFELINE DISCOUNT TO BUNDLED SERVICE OFFERINGS WHICH INCLUDE FUNCTIONALITY THAT IS COMPARABLE TO THAT DESCRIBED AT 47 CFR 54.101(A)(1)-(9) OR SECTION 364.02(1), FLORIDA STATUTES?

**\*\*Sprint Nextel's Position:** No. Section 364.02(1) is not applicable to Sprint and 47 CFR 54.403(b) unequivocally states that the discount may be applied only to the lowest generally available residential rate for the services enumerated in 47 CFR 54.101(a)(1)-(9). \*\*

### **Discussion**

Neither state law nor federal law requires Florida ETCs that do not charge the EUCL or equivalent federal charges to apply the Lifeline discount to "bundled service offerings" or to any rate other than the lowest residential rate plan that includes the services enumerated in 47 CFR 54.101(a)(1)-(9). As an initial matter, it is important to note that this case initially involved a proposal to interpret existing law and rules concerning application of the federal Lifeline discount, and not the promulgation of new regulations that would add additional requirements. Therefore, the inquiry appropriately should be limited to whether the proposed interpretation of existing federal and state rules is correct, not whether new Lifeline regulations should be put in place. That would be a matter for a separate rulemaking proceeding.<sup>13</sup>

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<sup>13</sup> For the reasons stated herein, a new rule, promulgated as a result of any future rulemaking proceeding, which requires ETCs that do not charge a EUCL or equivalent charge to apply the federal Lifeline discount to residential rates other than the lowest tariffed or otherwise generally available residential rate, would be inconsistent with FCC rules. Accordingly, it would be both procedurally and substantively improper to adopt such a requirement in this docket.

a. **Existing Florida Law Does Not Permit the Commission to Require Wireless ETCs to Apply the Lifeline Discount to Bundled Service Offerings**

Florida law does not permit the Commission to require wireless ETCs, which do not charge the EUCL or equivalent charges, to apply the federal Lifeline discount to bundled service offerings that include the functionality that is comparable to that described at 47 CFR 54.101(A)(1)-(9) or Section 364.02(1), Florida Statutes. Although Florida has Lifeline rules for ETCs that are local exchange telecommunications companies, Florida statutes expressly exclude wireless ETCs.

The Commission has very limited jurisdiction over wireless providers generally and wireless ETCs in particular. The Commission does not regulate wireless providers' rates, terms and conditions of service. Florida law expressly provides that "wireless telecommunications, including commercial mobile radio service providers" are "exempt from oversight by the commission, except to the extent delineated in this chapter or specifically authorized by federal law."<sup>14</sup> Thus, consistent with s.364.011, Florida Statutes, the Commission may regulate wireless providers only to the extent that its authority to do so is delineated in Chapter 364, Florida Statutes, or to the extent "specifically authorized by federal law."

Chapter 364, Florida Statutes, does not provide the Commission with jurisdiction over wireless ETCs. "Eligible telecommunications carriers" as defined in s. 364.10(2)(a) expressly excludes wireless providers. Section 364.10(2)(a) provides, "[f]or the purposes of this section, the term 'eligible telecommunications carrier' means a telecommunications company, as defined by s. 364.02, which is designated as an eligible

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<sup>14</sup> s. 364.011, Florida Statutes.

telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.”<sup>15</sup>  
“Telecommunications company” is defined to expressly exclude CMRS providers.<sup>16</sup>  
Chapter 364’s Lifeline provisions apply only to “eligible telecommunications carriers” as defined in s.364.10(2)(a) and thus expressly exclude wireless providers. Thus, neither s. 364.10 nor any other section of Chapter 364 extends the Commission’s jurisdiction to include wireless ETCs or offers any support for Mr. Casey’s proposal.

**b. Existing Federal Law Does not Require or Authorize the Commission to Require Wireless ETCs to Apply the Lifeline Discount to Bundled Service Offerings**

Federal law prescribes that the Lifeline discount be applied *only* to the lowest tariffed or otherwise generally available rate, not to “bundled service offerings.” As noted by Mr. Casey, the FCC’s universal service rules at 47 C.F.R. §54.401 state that Lifeline “means *a retail local service offering*” (emphasis added) that is available only to qualifying low income consumers, for which they pay reduced charges as a result of the Lifeline discount described in 47 C.F.R. §54.403, and which includes the services enumerated in 47 C.F.R. §54.101 (a)(1) through (a)(9).<sup>17</sup> 47 C.F.R § 54.403(b) imposes different Lifeline obligations on ETCs depending on whether they charge the End User Common Line charge (or equivalent charges):

*Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal*

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<sup>15</sup> s. 364.10(2)(a).

<sup>16</sup> s. 364.02(14)(c). “The term ‘telecommunications company’ does not include ... a commercial mobile radio service provider.”

<sup>17</sup> Direct Testimony of Robert J. Casey, p. 4, lines 9-13.

support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. *Other eligible telecommunications carriers* shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, *to reduce their lowest tariffed (or otherwise generally available) residential rate* for the services enumerated in §54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount. (emphasis added).

The EUCL, a flat monthly charge generally assessed to end user customers by incumbent local exchange carriers ("ILECs"), is designed to compensate the ILEC for the costs associated with the local loop in making interstate long distance calls. ILECs are required by § 54.403(b) to waive this charge for Lifeline customers, with any additional federal support used to reduce the customer's "intrastate rate". Rule 54.403(b) recognizes that not all telecommunications providers charge the EUCL. Those who do not, including wireless providers like Sprint Nextel, are referred to as "[o]ther eligible telecommunications carriers", and are subject to a different specific portion of § 54.403(b) that prescribes how they are to apply the Lifeline discount. Rather than waive the EUCL and reduce the customer's "intrastate rate" as landline ETCs must do, wireless ETCs must instead reduce their "lowest tariffed (or otherwise generally available) residential rate" for the services listed in §54.101(a)(1) through (a)(9).

Sprint Nextel witness John Mitus explained that the purpose of the parenthetical phrase "(or otherwise generally available)" in the rule is to qualify the term "tariffed," not negate the word "lowest."<sup>18</sup> A tariff is a public document setting forth the rates, terms and conditions of services that are generally available to the public. Increasingly, as with

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<sup>18</sup> Direct Testimony of John E. Mitus, p. 6, line 7 to p. 8, line 6 and Rebuttal Testimony of John E. Mitus, p. 2, line 22 to p. 5, line 2.

wireless services, the rates, terms and conditions of generally available services are set by contract instead of tariff. For such carriers that are also ETCs, the FCC added the parenthetical (“or otherwise generally available”) to clarify that such carriers that do not have a tariff from which to draw a lowest generally available residential rate shall use the lowest residential rate that is otherwise generally available to which to apply the Lifeline discount. Wireless carriers in the normal course of business do not file tariffs, but they do have generally available rates. Thus, this section directs wireless carriers to apply the Tier One federal Lifeline support amount, plus any additional support amount, to reduce their lowest generally available residential rate for the services enumerated in §54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount. Sprint Nextel’s lowest generally available residential rate for a plan that includes the required services is \$29.99.

In this proceeding, several attempts were made to read the word “lowest” out of Rule 54.403(b) and thereby require wireless ETCs to apply the Lifeline discount to all rate plans instead of the lowest rate. Each such attempt fails.

First, the Lifeline PAA asserted that “[t]he plain meaning of this directive [Rule 54.403(b)] is that an ETC is to apply its Lifeline support amount to reduce one of two rates: (1) its lowest tariffed residential rate; *or* (2) any otherwise generally available rate.”<sup>19</sup> By this reasoning alone, the PAA conceded that the rule requires reduction of only “one of two rates.” The resulting question is which of two competing rates must be reduced: the lowest tariffed rate or any otherwise generally available rate. Under this interpretation, if the service is tariffed, the rate to be lowered is the lowest residential rate.

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<sup>19</sup> PAA, p. 5.

If the service is not tariffed but otherwise generally available, the Lifeline discount may be applied to any one generally available residential rate.<sup>20</sup> The logic behind this allegedly “plain meaning” is hard to ascertain, but it gets even less coherent as the PAA goes on to say<sup>21</sup> that:

By default, an ETC’s lowest tariffed rate is its basic local service rate, and its otherwise generally available rates consist of all other rates. The latter necessarily includes service offerings which combine both basic and nonbasic service – bundled service packages. Thus, in applying the discount to rates “otherwise generally available” – that is, bundled services packages – an ETC must simply reduce the basic local service rate portion of the service by the Lifeline support amount. The plain and obvious meaning of this provision clearly requires ETCs to apply the Lifeline discount to both basic and the basic portion of bundled packages. Because the language of this provision is clear and unambiguous, conveying a clear and definite meaning, there is no need to apply other canons of statutory construction.

Sprint Nextel respectfully suggests that the rule on its face is clear and unambiguous (and requires that the Lifeline discount be applied only to a single lowest rate plan), but that the PAA’s tortured interpretation is not. The PAA’s interpretation does not in fact apply the discount to “one of two rates” as it states. Instead it applies the Lifeline discount not only to the lowest tariffed rate (which it maintains is the ETC’s basic local service rate “[b]y default”) but also to all non-tariffed but otherwise generally available rates (which it deems to constitute bundled service packages that combine both basic and nonbasic services). Under this theory, if a bundled service that is not tariffed but otherwise generally available is converted to a tariffed service, the Lifeline discount would no longer be applicable. Further, under this theory, an ETC that presently has no

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<sup>20</sup> The word “any” does not appear in the rule and it is clear from Mr. Casey’s testimony that he advocates applying the Lifeline discount not to any one generally available rate but to every generally available rate.

<sup>21</sup> Mr. Casey’s testimony is consistent with the PAA. Direct Testimony of Robert J. Casey, p. 29, lines 12-19.

tariffed services (such as a wireless ETC) also has no rate that constitutes its basic local service rate “by default.” Thus, even under this interpretation, wireless service rate plans are not “bundled services packages” that include “both basic and non-basic service.” Sprint Nextel certainly agrees that wireless service plans do not include a “basic local service rate portion.”

Among the questions left unanswered by this interpretation is why the FCC would arbitrarily exempt most tariffed rates from the Lifeline discount but apply it to all other generally available rates. The obvious answer is that was not the intent. The intent clearly communicated by the rule itself is to apply the Lifeline discount to the lowest generally available residential rate, which traditionally would have been tariffed but may not be tariffed now that competitive ETCs increasingly replace tariffs with contracts.

Mr. Casey argues that Sprint Nextel and other wireless service plans do in fact have a “basic local service portion” because they include local usage as required by FCC Rule 54.101(a)(2) to qualify for federal universal service support.<sup>22</sup> Mr. Casey states that “[a]lthough I am not an attorney, I believe that pursuant to 47 C.F.R. § 54.403(b), ETCs are required to apply the Lifeline discount to any bundled service package which they offer that includes a functionality similar to that described at 47 CFR 54.101(a)(1)-(9) or Section 364.02(1), Florida Statutes.”<sup>23</sup> But this argument over whether wireless ETCs do

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<sup>22</sup> See Direct Testimony of Robert Casey, January 9, 2009, p. 26 line 14 to p. 28 line 9 (Tr. pp. 120-122). While it is perhaps a technical point, the definition of basic local telecommunications service under Florida law and the definition of local usage in FCC Rule 54.101(a)(2) are not the same. The former includes unlimited local calling and the latter includes “an amount of minutes of use of exchange service, prescribed by the [FCC], provided free of charge to end users.” As acknowledged by the Staff witness, the FCC has determined that even though wireless ETCs like Sprint Nextel may not have unlimited local calling, the local usage included in its plans are sufficient to satisfy the local usage requirement in Rule 54.101(a)(2).

<sup>23</sup> *Id.*, p. 28, Lines 22-25.

or do not have a “basic local service portion” is irrelevant to how the Lifeline discount is to be applied by wireless ETCs. Rule 54.101, upon which Mr. Casey relies, does not address low-income support (Lifeline); it enumerates the services designated for rural, insular and high cost support. It does not address how Lifeline support must be applied. That is set forth in Rule 54.403(b), which does not prescribe that the Lifeline discount is to be applied to “any bundled service package which they offer that includes a functionality similar to that described at 47 CFR 54.101(a)(1)-(9) or Section 364.02(1)” as proposed by Mr. Casey. Instead, the rule states that the Lifeline discount is to be applied to wireless ETCs’ lowest tariffed (or otherwise generally available) residential rate that includes the services enumerated in 47 CFR 54.101(a)(1)-(9) or Section 364.02(1). While local usage is included in more than the lowest tariffed or otherwise generally available residential rate, the discount is only to be applied to the lowest generally available rate. Mr. Casey seeks to read into the rule something that is not there in order to change the plain meaning.

The interpretation of Rule 54.403(b) set forth in the Lifeline PAA and supported by Mr. Casey also is flawed in that it relies on a sham “basic local service” rate that it presumes is included in every wireless ETC’s bundled offering as the basis for its determination that the “clear and definite meaning” of § 54.403(b) requires the Lifeline discount to be offered on all generally available rate plans, not just the lowest rate. Of course, the phrase “basic local service rate” does not appear anywhere in the rule, and the rule does not state anywhere that “an ETC must simply reduce the basic local service rate portion of the service by the Lifeline support amount.” As discussed earlier, Sprint Nextel does not have a “basic local service rate” portion in each of its service offerings



and does not presently tariff its services as a general matter. Each plan is different and each plan is priced at a single rate for all service included in the plan. Thus, applying the PAA's purported "clear and definite meaning" interpretation does not accomplish anything except confusion with respect to wireless ETCs.

It is worth noting that during the hearing, Mr. Casey testified that Rule 54.403(b) presents an either/or scenario in which one of two rates is to be lowered.<sup>24</sup> He stated that if a wireless ETC has multiple tariffed rates, the Lifeline discount must be applied only to the lowest among them.<sup>25</sup> However, he also admitted that he reads Rule 54.403(b) in a manner that completely ignores the clause "lowest tariffed (or otherwise generally available) rate" and would apply the discount to every rate that includes what he considers basic local usage.<sup>26</sup> Specifically, Mr. Casey reviewed Sprint Nextel's Exhibit 13 and confirmed his belief that removing the words "lowest tariffed (or otherwise generally available) rate" from Rule 54.403(b) and adding the letter "s" to the word "rate" as follows would not change the meaning of the rule:

Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their ~~lowest tariffed (or otherwise generally available)~~ residential rates for the services enumerated in §54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.<sup>27</sup>

Such an interpretation simply ignores all limitations in Rule 54.403(b) and requires that the discount be applied to all residential rates that include the enumerated services. Presumably, this would include tariffed as well as non-tariffed rates. The

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<sup>24</sup> Tr., p. 182, lines 15-17.

<sup>25</sup> Tr., p. 184 lines 13-19.

<sup>26</sup> Tr., p. 186, lines 4-11.

<sup>27</sup> Tr., p. 185, line 16 to p. 186, line 11.

obvious question this begs is why the FCC would include the words “lowest tariffed (or otherwise generally available)” if they had absolutely no effect. The only answer supplied by Mr. Casey is the incorrect speculation that perhaps wireless ETCs tariffed their rates when the rule was promulgated.<sup>28</sup> Of course the real answer is found in the plain and unambiguous meaning of the rule: the words were included to ensure that the Lifeline discount is applied to only the lowest generally available residential rate.

Sprint Nextel respectfully urges that Rule 54.403(b) is clear and unambiguous and that the clear interpretation, giving effect to the clause “lowest tariffed (or otherwise generally available)” is the one proposed by Sprint Nextel’s witness, John Mitus. Specifically, this section directs wireless carriers to apply the Tier One federal Lifeline support amount, plus any additional support amount, to reduce their lowest generally available residential rate for the services enumerated in §54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount. The language of Rule 54.403(b) is not ambiguous or subject to differing interpretations.

Accordingly, there is no need to engage in an examination, such as the one Staff embarks upon in this proceeding, of the “statutory context and purpose” of the rule as discussed in the Lifeline PAA. The PAA needlessly attempts to apply a canon of

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<sup>28</sup> See Tr. pg. 191:

COMMISSIONER McMURRIAN: So if the, if wireless companies don't have tariffed rates, why would -- again, I'm just trying to clarify this. I'm not trying to be confrontational here. But why would that sentence have the section about lowest tariffed rates if those don't apply to wireless carriers?

THE WITNESS: They may have in the past when this law was initiated.

COMMISSIONER McMURRIAN: In the past. Okay. \* \* \*

statutory interpretation “to consider both statutory context and purpose” and concludes that “it is abundantly clear that ETCs are required to apply the Lifeline discount to either basic service rates or the basic portion rate of bundled packages.” This analysis of the “broader context” is unnecessary because the rule for applying the Lifeline discount is unambiguously set forth in Rule 54.403(b) itself and is fully consistent with the universal service policy of encouraging sustainable access to affordable telephone service. The PAA’s discussion of the “broader context” of universal service selectively takes provisions of federal law that address universal service generally, but do not address the application of the Lifeline discount as does 54.403(b), and have nothing to do with the issues of this case involving application of the Lifeline discount. For instance, the PAA asserts that “[P]ertinent federal provisions specifically concerning the states include Section 254(f) of the Act, which deals with Universal Service and 47 C.F.R. § 54.401(d), which deals with Lifeline” and “the former grants states the authority to adopt regulations not inconsistent with FCC rules to preserve and advance Universal Service...[t]he latter requires the state commission or ETC to file information with the Universal Service Administrator demonstrating compliance with Lifeline federal rules and statutes.”<sup>29</sup> However, what the PAA fails to note is that neither of these rules provide any clarification on how the Lifeline discount is to be applied other than the directive in 47 C.F.R. § 54.401 that Lifeline “means *a retail local service offering*” [emphasis added] that is available only to qualifying low income consumers, for which they pay reduced charges as a result of the Lifeline discount described in 47 C.F.R. §54.403, and which includes the services enumerated in 47 C.F.R. §54.101 (a)(1) through (a)(9).” Further, as

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<sup>29</sup> PAA, p. 7.

noted above, any state regulation that seeks to apply the Lifeline discount in a manner that ignores the plain language of Rule 54. 403(b) is clearly inconsistent with FCC rules. Finally, the PAA quotes from 47 USC Section 254(b) “[c]onsumers in all regions of the Nation, including low-income consumers...should have access to telecommunications and information services, including interexchange services and advanced telecommunications services...”<sup>30</sup> This leaves the false impression that the FCC has determined that the Lifeline discount is to be applied to advanced telecommunications services and other services. This is simply not correct.

Therefore, the strained analysis advanced by Staff, purportedly conducted under the canons of statutory interpretation, is merely calculated to obscure the plain meaning of the one rule that is relevant in this case. This analysis must be rejected.

**Issue 3: SHOULD THE COMMISSION REQUIRE EACH FLORIDA ETC THAT CHARGES FEDERAL END USER COMMON LINE CHARGES, OR EQUIVALENT FEDERAL CHARGES, TO APPLY THE LIFELINE DISCOUNT TO ITS BUNDLED SERVICES WHICH INCLUDE FUNCTIONALITY THAT IS COMPARABLE TO THAT DESCRIBED AT 47 CFR 54.101(A)(1)-(9) OR SECTION 364.02(1), FLORIDA STATUTES?**

**\*\*Sprint Nextel’s Position:** Sprint is not an ETC that assesses federal EUCL charges and therefore does not take a position on this issue.\*\*

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<sup>30</sup> *Id.*

**Issue 4:** SHOULD THE COMMISSION REQUIRE EACH FLORIDA ETC THAT DOES NOT CHARGE FEDERAL END USER COMMON LINE CHARGES, OR EQUIVALENT FEDERAL CHARGES, TO APPLY THE LIFELINE DISCOUNT TO ITS BUNDLED SERVICES WHICH INCLUDE FUNCTIONALITY THAT IS COMPARABLE TO THAT DESCRIBED AT 47 CFR 54.101(A)(1)-(9) OR SECTION 364.02(1), FLORIDA STATUTES?

**\*\*Sprint Nextel's Position:** No. Such a requirement is contrary to federal law. The purpose of the Lifeline Program is to provide low-cost service that low-income individuals can afford to maintain. Further, the requirement is not necessary to ensure Lifeline customers have access to vertical services because those services already are available to them. \*\*

**Discussion**

In addition to the lack of a legal basis to do so, there are strong policy reasons supporting the conclusion that the Commission should not require Florida wireless ETCs to apply the Lifeline discount to bundled service packages. First, the basic overarching policy underlying the Lifeline program is to help maintain affordable and sustainable telephone service for low-income individuals. This policy will not be served by encouraging subscription to expensive services that provide more than the voice service contemplated by policymakers because it will reduce the ability of low-income subscribers to afford the expense of such services in the long-term. Second, existing Lifeline products provide qualifying low-income consumers with choices of services and providers already and, as in the case of Sprint Nextel's Lifeline rate plan, vertical services such as Caller ID, voicemail and Call Waiting. Thus, the available Lifeline supported services are not unattractive or without the features customers desire. And if one ETC does not offer the choice of service and features desired, most Lifeline consumers will have alternatives available, including the purchase of vertical features to add to their Lifeline plans.

a. **The Purpose of Lifeline is Served with Existing Rate Plan Availability**

As noted by Sprint Nextel's witness, the purpose of the Lifeline program is to provide affordable service so that low-income individuals can maintain telecommunications service as a "Lifeline." That purpose may not be served if low-income consumers are encouraged to subscribe to expensive plans that they may not be able to maintain even with the Lifeline discount. The Commission discussed this issue during the June 3, 2008 Agenda Conference when the Lifeline PAA was approved.<sup>31</sup> Despite the ultimate approval of the PAA item, there was substantial concern that the PAA went beyond the intended purpose of the Lifeline program. If the concern is truly that consumers who qualify for Lifeline should have access to certain vertical voice services rather than the "high end bundled packages which would include Internet access and cable TV" mentioned by the Commission Staff during the Agenda Conference, it should be noted that the Lifeline plan Sprint Nextel offers already includes Call Waiting, Voicemail and Caller ID.<sup>32</sup> This plan clearly provides Lifeline consumers with a unique alternative to "plain old telephone service" at a very affordable price, consistent with the FCC's policy choice in defining Lifeline according to the lowest cost plan.<sup>33</sup> The PAA fails to consider these issues

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<sup>31</sup> See June 3, 2008 Transcript at pp. 10-12.

<sup>32</sup> These vertical services may be separately purchased by any Lifeline subscriber who subscribes to a plan that does not already include them; there is no record evidence in this proceeding that any Florida ETC has refused to permit Lifeline subscribers to purchase vertical features in conjunction with a Lifeline plan.

<sup>33</sup> Sprint Nextel does not advocate second-guessing or limiting any consumer's choice of service or service provider. Sprint Nextel's Lifeline customers have always been free to add-on available services such as text messaging to its lowest generally available rate plan, regardless of the Commission's action in this docket.

and, unfortunately, ignores the plain language of the FCC's rule requiring that the discount be applied only to the lowest rate plan.

**b. Lifeline Subscribers Already Enjoy Competitive Choice**

Sprint Nextel strongly agrees that Lifeline subscribers should not be denied a choice of telecommunications services. However, in Sprint Nextel's designated areas where it offers Lifeline, there already is at least one alternative for Lifeline service and often more than one to provide ample choice for consumers to subscribe to the service that fits their needs. There are multiple ETCs in the State of Florida in competition with one another. Much like competition for non-Lifeline customers, as competitive ETCs enter Florida markets the options available to Lifeline-eligible customers increase. As noted by Sprint Nextel witness Mitus, the Commission has acknowledged that TracFone has become a strong entrant in the Lifeline service market with its competing prepaid Lifeline offering that credits 68 minutes of use every month for Lifeline customers.<sup>34</sup> For \$16.49 plus taxes, Sprint Nextel provides 200 Anytime Minutes plus unlimited nights and weekends starting at 9PM, along with the vertical features of Call Waiting, Caller ID, 3-Way Calling and Voicemail. Sprint's local calling scope is the whole of the United States, as it offers long distance as part of its lowest priced generally available rate. The ILEC ETCs in the areas that Sprint Nextel is designated as an ETC generally offer unlimited local calling for a set price as a Lifeline option. It should ultimately be up to the end user to determine

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<sup>34</sup> Numbers of Customers Subscribing to Lifeline Service and the Effectiveness of Procedures to Promote Participation, prepared by the Florida Public Service Commission, December 2008. Page 14.

whether unlimited local calling via the ILEC, the ability to call nationwide for a shorter period of time via Sprint, or a free 68 minutes through TracFone is more beneficial.

#### IV. CONCLUSION

No amount of creative “interpretation” can hide the clear and unambiguous meaning of the relevant FCC rule. Accordingly, Sprint Nextel respectfully requests that the Commission find that it is not authorized to require wireless ETCs such as Sprint Nextel to apply the Lifeline discount to bundled service offerings.

Respectfully submitted this 3<sup>rd</sup> day of April, 2009.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. mail on April 3, 2009, to the following parties:

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