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NPCR, Inc. d/b/a Nextel Partners and Sprint Corporation n/k/a Sprint Nextel Corporation d/b/a Sprint PCS (collectively "Sprint Nextel")

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SPRINT NEXTEL'S SUPPLEMENTAL POST-HEARING BRIEF

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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.

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SPRINT NEXTEL'S SUPPLEMENTAL POST-HEARING BRIEF

Pursuant to the July 27, 2009 Third Order Modifying Procedure, 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 this Supplemental Post-Hearing Brief addressing the impact of Chapter 2009-226, Laws of Florida, on the issues in this case.

I. INTRODUCTION

Chapter 2009-226 amends Chapter 364.02(10), Florida Statutes, to make it clear that "[a]ny combination of basic service along with a nonbasic service or an unregulated service is nonbasic service." As the Commission is aware from Sprint Nextel's April 3rd Post-Hearing Brief, Sprint Nextel does not offer a "basic" service and in fact does not offer any regulated services in the State of Florida. None of Sprint Nextel's wireless plans include a "basic service rate portion" to which the Lifeline discount may (or must) be applied.¹ In fact, the only relevant law controlling how Sprint Nextel is to apply the Lifeline discount makes no mention of "basic" service or a "basic service rate portion." The relevant law, set forth in 47 C.F.R § 54.403(b), states only that the Lifeline discount

¹ Sprint Nextel Post-Hearing Brief, pp. 2, 4. 16-17.

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for wireless eligible telecommunications carriers (i.e., those “other ETCs” that do not charge an end user common line charge) is to be applied to a single rate which is the lowest tariffed or otherwise generally available rate. Thus the definition of “basic” and “nonbasic” services are not relevant to how Sprint Nextel must apply the Lifeline discount and should not be relevant to the Commission’s analysis of whether the Lifeline discount should be applied to the so-called “bundled service offerings” of Sprint Nextel.

However, as Sprint Nextel noted in its April 3rd Post-Hearing Brief, the Commission has relied in Order No. PSC-08-0417-PAA-TP (“Lifeline PAA” or “PAA”) on the concept of a “basic portion” of “bundled packages” to justify application of the Lifeline discount to bundles.² According to the PAA, the Commission considers wireless “bundles” to include such a basic portion of the service. The Commission relies upon the distinction between this “basic” portion and the other services included in wireless service plans to reach the erroneous conclusion that it may require the Lifeline discount to be applied to wireless “bundles” because the discount is being applied only to the “basic” portion of wireless service plans. To the extent the PAA relied upon such a faulty premise (i.e., that all wireless plans include a “basic” portion) and such a faulty analysis (that the Lifeline discount is to be applied only to that “basic” portion” of all rate plans), the amendment set forth in Chapter 2009-226 makes such reliance impossible now, even under the Commission’s own prior rationale.³ The amended law makes it abundantly clear that service plans or “bundles” that consist of a combination of services that include unregulated and/or nonbasic services are not considered “basic.” Therefore,

² See PAA, p. 5.

³ The Legislature is presumed to be aware of constructions placed on its statutes. The enactment of Chapter 2009-226 therefore must be viewed as a legislative rejection of PAA Order’s attempt to apply the Lifeline discount to services not defined as Lifeline service.

the amendment clarifies that any premise that the Lifeline discount is applied to only the “basic” portion of a bundle is invalid.

II. BASIC/NONBASIC DISTINCTIONS DO NOT APPLY TO WIRELESS ETCs UNDER FLORIDA LAW AND ARE NOT RELEVANT TO 47 C.F.R. § 54.403(b) UNDER FEDERAL LAW

Federal law is perfectly clear: the Lifeline discount must be applied to *Lifeline service*.⁴ As discussed in detail in Sprint Nextel’s April 3rd Post-Hearing Brief, the only applicable law that describes wireless Lifeline service is 47 C.F.R. § 54.403(b). Wireless ETCs are not local telecommunications service providers or ETCs under Florida law,⁵ are not regulated by the Commission, and do not offer “basic local exchange telecommunications service.”⁶ 47 C.F.R. § 54.403(b) states that ETCs that do not charge the federal end user common line charge (“EUCL”) or equivalent federal charges are to apply the Lifeline discount to a single rate plan: the lowest tariffed or otherwise generally available rate. Therefore, neither state law nor federal law requires Florida ETCs that do not charge the EUCL or equivalent federal charges – such as Sprint Nextel and other wireless providers – to apply the Lifeline discount to “bundled service packages” or to any rate other than the lowest residential rate plan that includes the services enumerated in 47 C.F.R. § 54.101(a)(1)-(9). As discussed in Sprint Nextel’s Brief, the word “basic” does not appear anywhere in 47 C.F.R. § 54.403(b) and the fictional concept of a “basic” portion of Sprint Nextel’s wireless service plans is irrelevant to the application of the

⁴ See Report and Order, Federal-State Joint Board on Universal Service, FCC 97-157 (May 8, 1997), in which the FCC repeatedly discusses its “Lifeline service,” requires all ETCs to provide “Lifeline service” and adopted Lifeline rules, including 47 C.F.R. 54.403.

⁵ See Section 364.011 and 364.10(2)(a), Florida Statutes.

⁶ Sprint Nextel Post-Hearing Brief, pp. 10-11.

Lifeline discount to the lowest tariffed or otherwise generally available rate.⁷

However, the interpretation of Rule 54.403(b) set forth in the Lifeline PAA and supported by Staff's witness, Mr. Casey, at the hearing relies on a fiction of a "basic local service" rate that is presumed to be a distinct portion of every wireless ETC's bundled offering. This "basic local service" portion is relied upon as the basis for the PAA's 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. As Sprint Nextel stated in its Brief, it does not have a "basic local service rate" portion in its service offerings. Each plan is different and each plan is priced at a single rate for all service included in the plan.

**III. TO THE EXTENT THE PROPOSED AGENCY ACTION
ERRONEOUSLY RELIED ON A "BASIC RATE PORTION" TO
JUSTIFY APPLICATION OF THE LIFELINE DISCOUNT
BEYOND THE SINGLE, LOWEST RATE PLAN, THE RECENT
AMENDMENTS TO CHAPTER 2009-226 UNDERCUT SUCH A
RATIONALE**

The Lifeline PAA "addresses application of the Lifeline discount to bundled service packages...[a] bundled service package combines basic local exchange service with nonbasic services to create an enhanced service offering." (pp. 1-2) The Commission concludes that "[a]s stated above, in accordance with the plain meaning rule, 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."⁸ Sprint Nextel explained in its Brief

⁷ Sprint Nextel Post-Hearing Brief, p. 16.

⁸ PAA, p. 5.

why the plain text and meaning of FCC Rule 54.403(b) prescribes the Lifeline discount be applied to a single, lowest rate.⁹ However, the PAA's own flawed rationale that the Lifeline discount must be applied to "any service offering which combines both basic and nonbasic service, pursuant to 47 C.F.R. § 54.403(b)" is now undercut by the recent amendments set forth in Chapter 2009-226. The Commission's rationale is set forth on page 5 of the PAA:

The plain meaning of [47 C.F.R. § 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. 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.

However, Chapter 2009-226 makes it clear that a bundle of services that includes "[a]ny combination of basic service along with a nonbasic service or an unregulated service is nonbasic service." Thus a bundle does not and cannot include a basic service component. This change in law further bolsters the facts set forth in Sprint Nextel's testimony and Brief in this case that it does not have a "basic local service rate" portion in its service offerings. Each plan is different, each plan consists of unregulated services, and each

⁹ The rule prescribes that 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. 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). *See* Brief, p. 11-13.

plan is priced at a single rate for all service included in the plan.

IV. CONCLUSION

No amount of creative “interpretation” can hide the clear and unambiguous meaning of the relevant FCC rule, 47 C.F.R. § 54.403(b). Accordingly, for the reasons set forth herein and in its testimony and Brief filed in this case, 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 10th day of August, 2009.

/s/ Douglas C. Nelson

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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 August 10, 2009, to the following parties:

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