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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

Case No. GNR-T-03-8

Case No. GNR-T-03-16

REBUTTAL TESTIMONY OF SCOTT PEABODY

FOR NPCR, INC. d/b/a NEXTEL PARTNERS

1 **I. INTRODUCTION**

2 **Q: PLEASE STATE YOUR NAME, PLACE OF EMPLOYMENT, POSITION, AND BUSINESS**
3 **ADDRESS.**

4 A: My name is Scott Peabody. I am employed by Nextel Partners, Inc. as a Director in its
5 Engineering Department. I provide engineering services for Nextel Partners, Inc. and its
6 affiliates and indirectly wholly owned subsidiaries, including the Applicant NPCR, Inc.
7 (collectively, "Nextel Partners" or the "Company"). My business address is 4500
8 Carillon Point, Kirkland, WA 98033.

9 **Q: WHAT IS THE PURPOSE OF THIS REBUTTAL TESTIMONY?**

10 A: I am responding to direct testimony filed by Lance A. Tade on behalf of Citizens
11 Telecommunications Company of Idaho ("Citizens"), and direct testimony by Daniel L.
12 Trampush on behalf of Citizens and the Idaho Telephone Association ("ITA"). Citizens
13 and ITA are collectively referred to as "Intervenors."

14 **Q: WHAT IS YOUR REACTION TO INTERVENORS' TESTIMONY?**

15 Both Mr. Tade and Mr. Trampush oppose our designation based on policy arguments that
16 have little to do with the criteria for ETC designation. As I understand the "public
17 interest" standard as applied by the FCC, opposing ILECs should be required to identify
18 compelling reasons to treat rural telephone company areas different from non-rural
19 telephone company areas. I see no evidence that these areas are unable to support
20 competitive universal service, and no reason to deny high cost areas that which is
21 available in urban areas. I see Intervenors as having one goal – to be the only federally-
22 funded provider in their service areas, forever. Any other result they claim is bad policy
23 and will put them at an unfair disadvantage. I work for a competitive company that is
24 guaranteed nothing – we need to work hard every day to win and keep customers, and

1 will make a profit only if we do so successfully. It astonishes me to hear ILECs claim to
2 be disadvantaged when:

- 3 • They have built monopoly networks while being essentially guaranteed a
4 profit.
- 5 • They currently have a captive customer base and no real competition.
- 6 • They receive extraordinary amounts of money from federal universal
7 service funds based on embedded costs, and are guaranteed those funds for
8 at least 2 more years.
- 9 • They have regulatory advantages such as the ability to charge interstate
10 and intrastate access rates.

11 These companies may be afraid of long-term competition from Nextel Partners. Perhaps
12 they should be. As we continue to deploy our network and our technology gets better we
13 expect more consumers will choose our services over landline services. Fundamentally,
14 however, consumers should be able to make these decisions, which will only happen if
15 wireless networks can be built and maintained in high cost areas of Idaho.

16 **Q: PLEASE SUMMARIZE THE SPECIFIC POINTS THAT YOU MAKE IN THIS REBUTTAL**
17 **TESTIMONY.**

18 **A:** Nextel Partners provides the supported services and commits to do so where it seeks
19 designation. Nextel Partners' requested service areas are appropriate and consistent with
20 law. Nextel Partners' request to be designated in only certain Citizens exchanges is not
21 "cream skimming," but based on our license boundaries, and fully consistent with federal
22 law.

23 The record in this case clearly demonstrates that Nextel Partners' designation would serve
24 the public interest. Nextel Partners brings the benefits of increased competition, and the
25 benefits of Nextel Partners' service offerings, such as increased local calling areas and

1 mobility, and its commitment to provide rural consumers with services available in urban
2 areas, at the same rates. This case should be about customers having the opportunity to
3 choose for themselves the basic service package that best meets their needs. The
4 Intervenor's opposition to that concept is contrary to clear federal policy, and is designed
5 to benefit themselves, not the public. This Commission should take advantage of federal
6 funding that is available to allow Nextel Partners to extend its high quality network into
7 more areas of Idaho.

8 **II. NEXTEL PARTNERS PROVIDES THE SUPPORTED SERVICES**

9 **Q: YOU PREVIOUSLY TESTIFIED THAT NEXTEL PARTNERS PROVIDES THE FCC'S NINE**
10 **SUPPORTED SERVICES. IS THAT DISPUTED?**

11 **A:** I am not sure. Mr. Tade suggests that we do not satisfy local usage requirements and he
12 attacks our interconnection capabilities. LT Direct, pp. 10-12, 14-15. As to local usage,
13 he seems to think that unlimited local usage is a supported service. It is clearly not.
14 Local usage is defined as "an amount of minutes of use of exchange service ... provided
15 free of charge." 47 C.F.R. § 54.101(a). In fact, the FCC has recently determined that
16 "unlimited local usage should not be added to the list of supported services." *In the*
17 *Matter of Federal-State Joint Board on Universal Service*, CC 96-45, FCC 03-170, Order
18 and Order on Reconsideration, ¶ 14 (rel. July 14, 2003) ("*July 2003 Order*").

19 I have testified that we provide customers with an amount of local usage free of charge.
20 We currently do include unlimited usage as part of one service offering, but have found
21 customers generally do not need – and do not want to pay for – 43,000 minutes of use per
22 month. Mr. Tade apparently believes that Nextel Partners must provide unlimited local
23 usage simply because the Commission has previously required Citizens, in its capacity as

1 an ILEC, to do so. But under the federal rules it is clear that unlimited local usage is not
2 a universal service under federal law.

3 **Q: WHAT DOES HE SAY ABOUT NEXTEL PARTNERS' INTERCONNECTION CAPABILITIES?**

4 A: He claims "[m]any wireless carriers, including Clear Talk and Nextel [Partners], do not
5 properly compensate rural ILECs for wireless calls terminated on ILECs' local networks."
6 LT Direct, p. 14. Mr. Tade further states that "both Clear Talk and Nextel enjoy the
7 benefit of the ILECs' networks without paying for the use of those networks," and that if
8 designated, Nextel Partners "will actually receive Federal monies to use for free the
9 networks that were constructed and paid for by the ILECs." LT Direct, pp. 14-15.

10 I am unclear as to what ETC requirement Mr. Tade is addressing here. Whether or how
11 Nextel Partners and rural ILECs compensate one another is not a required or even
12 relevant consideration in the ETC analysis. But even if it were, Mr. Tade is simply
13 wrong. Nextel Partners has agreements in place that allow it to provide its customers
14 with access to public switched network, which is what is required of an ETC.

15 **Q: HAS NEXTEL PARTNERS AVOIDED ENTERING INTO INTERCONNECTION AGREEMENTS**
16 **WITH RURAL TELEPHONE COMPANIES?**

17 A: No. But in most cases, it makes more sense for rural telephone companies like Citizens
18 and Nextel Partners to operate under a bill and keep arrangement in which each
19 terminates the other carrier's calls without billing each other. Nextel Partners has
20 received no other requests for negotiations with Citizens and so assumes it is satisfied
21 with this arrangement. I am aware of at least one other state in which Nextel Partners
22 does have a formal agreement with Citizens.

1 The Commission should find Nextel Partners provides the FCC's supported services as
2 required by Section 214(e) of the Act.

3 **III. NEXTEL PARTNERS SATISFIES SERVICE AREA REQUIREMENTS**

4 **Q: WHAT IS THE SERVICE AREA REQUIREMENT FOR AN ETC?**

5 A: For areas served by a rural telephone company, Section 214(e)(5) of the
6 Telecommunications Act provides that an ETC's designated service area must be that
7 rural telephone company's study area unless the ETC seeks authority to service within a
8 smaller area. A rural telephone company's "study area" is generally defined as all of the
9 Company's existing certificated exchange areas in a given state. *Universal Service*
10 *Order*, ¶ 172 n. 434.

11 **Q: DO THE WITNESSES QUESTION NEXTEL PARTNERS' ABILITY TO SATISFY SERVICE AREA**
12 **REQUIREMENTS?**

13 A: I believe they agree that Nextel Partners has identified its requested service areas in a
14 manner consistent with the Act. However, both Mr. Tade and Mr. Trampush contend that
15 Nextel Partners' request in Citizens areas is cream skimming. Mr. Tade and Mr.
16 Trampush misread at best, and misrepresent at worst, federal law regarding service area
17 obligations.

18 **Q: LET'S BEGIN WITH MR. TADE. HOW EXACTLY DOES HE ATTACK NEXTEL PARTNERS'**
19 **SATISFACTION OF SERVICE AREA REQUIREMENTS?**

20 A: Mr. Tade first argues that Nextel Partners' request for designation in only certain Citizens'
21 exchanges "fosters asymmetric regulation." LT Direct, p. 7.

22 **Q: IS HE CORRECT?**

23 A: No, absolutely not. There is a process in federal law to authorize service in only a
24 portion of a rural LEC service area. 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207(b). We

1 are seeking designation in most of the Citizens exchanges within our licensed areas, and
2 have excluded those where we do not hold licenses. We have excluded from our request
3 a few Citizens exchanges that are distant from our network because we simply do not
4 believe that it is reasonable to commit to serve there at this time. We hope at some point
5 to extend our designation to all areas within where we hold licenses. There is simply
6 nothing sinister about what we have done.

7 Moreover, I understand that the original reason for requiring a competitive ETC to serve
8 throughout the study areas was that universal service support was based on costs
9 averaged over the study area. Now that Citizens has targeted its support on an exchange
10 basis, that rationale no longer exists. If the areas we have included in our application are
11 lower cost, then we presumably will get less support there. Mr. Tade's notion of
12 asymmetric regulation is essentially the same as Mr. Trampush's cream skimming
13 concept. However, both witnesses seem to disagree with the FCC on this point:

14 Rural telephone companies, however, now have the option of
15 disaggregating and targeting high-cost support below the study area level
16 so that support will be distributed in a manner that ensures that the per-line
17 level of support is more closely associated with the cost of providing
18 service. Therefore, any concern regarding "cream-skimming" of
19 customers that may arise in designating a service area that does not
20 encompass the entire study area of the rural telephone company has been
21 substantially eliminated.

22 *In the Matter of Federal-State Joint Board on Universal Service Petition for*
23 *Reconsideration of Western Wireless Corporation's Designation as an Eligible*
24 *Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Order on
25 Reconsideration, FCC 01-311, ¶ 12 (rel. Oct. 19, 2001) (emphasis added). Mr. Wood's
26 testimony deals with this issue in more detail.

1 **Q: WHAT ABOUT SUGGESTIONS THAT NEXTEL PARTNERS SUBMIT A DETAILED**
2 **EXPLANATION FOR HOW IT WILL BUILD OUT ITS NETWORK TO SERVE ALL CUSTOMERS**
3 **WITHIN RURAL TELEPHONE COMPANY STUDY AREAS IMPLICATED IN ITS APPLICATION?**
4 **LT DIRECT, P. 9; DT DIRECT, PP. 17-18.**

5 A: Nextel Partners is licensed in all areas where we seek ETC designation, and commits to
6 meet the obligations of an ETC. I am not a lawyer, but I understand that the FCC has
7 made clear that state commissions cannot require the detailed business plans as part of an
8 application. *In the Matter of Federal-State Joint Board on Universal Service Western*
9 *Wireless Corporation Petition for Preemption of an Order of the South Dakota Public*
10 *Utilities Commission*, CC Docket 96-45, Declaratory Ruling, FCC 00-248 (rel. Aug. 10,
11 2000) ("*Declaratory Ruling*"). Instead, a new entrant like Nextel Partners must be given
12 a reasonable opportunity, subject to real world business limitations, to enter an area. The
13 *Declaratory Ruling* contains the following discussion:

14 12. A new entrant faces a substantial barrier to entry if the
15 incumbent local exchange carrier (LEC) is receiving universal service
16 support that is not available to the new entrant for serving customers in
17 high-cost areas. We believe that requiring a prospective new entrant to
18 provide service throughout a service area before receiving ETC status has
19 the effect of prohibiting competitive entry in those areas where universal
20 service support is essential to the provision of affordable
21 telecommunications service and is available to the incumbent LEC. Such
22 a requirement would deprive consumers in high-cost areas of the benefits
23 of competition by insulating the incumbent LEC from competition.

24 13. No competitor would ever reasonably be expected to enter a high-
25 cost market and compete against an incumbent carrier that is receiving
26 support without first knowing whether it is also eligible to receive such
27 support. We believe that it is unreasonable to expect an unsupported
28 carrier to enter a high-cost market and provide a service that its competitor
29 already provides at a substantially supported price. Moreover, a new
30 entrant cannot reasonably be expected to be able to make the substantial
31 financial investment required to provide the supported services in high-
32 cost areas without some assurance that it will be eligible for federal
33 universal service support. In fact, the carrier may be unable to secure

1 financing or finalize business plans due to uncertainty surrounding its
2 designation as an ETC.

3 *Declaratory Ruling*, ¶¶ 12-13 (emphasis added).

4 This is exactly Nextel Partners' situation – we began providing service in parts of Idaho
5 only slightly more than three years ago. The ILECs have had many decades and
6 substantial universal service subsidies to build out their networks. As a competitor, we
7 cannot make business commitments about specific buildout until we are designated an
8 ETC, evaluate funding levels, consider our own capital budgets, and analyze other market
9 dynamics. Intervenors propose that we guarantee that we will complete a significant
10 buildout in a short period of time with no certainty that we will have any chance to make
11 a profit. No unregulated new entrant could ever meet this standard.

12 **Q: ARE THESE AREAS IMPORTANT TO NEXTEL PARTNERS' LONG TERM PLANS IN IDAHO?**

13 A: Absolutely. FCC licenses are neither inexpensive nor easy to obtain. Nextel Partners
14 does not acquire licenses unless it intends to use those licenses. Nextel Partners won its
15 Idaho spectrum through the exhaustive bidding process in multiple economic area license
16 auctions. In addition, we took the extra step of negotiating eighteen spectrum exchanges
17 (swaps) and purchase agreements so that we would have more than sufficient spectrum
18 for our Idaho customer base. Reaching these agreements was a lengthy and complicated
19 process, requiring negotiations, channel clearing, provision of replacement equipment,
20 retuning and licensing. We have made a company commitment to serve these areas.

21 **Q: DOES NEXTEL PARTNERS HAVE THE INTENT AND ABILITY TO PROVIDE SERVICE AS AN**
22 **ETC IN THE AREAS IDENTIFIED IN ITS APPLICATION?**

23 A: Yes, absolutely.

1 **Q: HOW DOES MR. TRAMPUSH DISPUTE NEXTEL PARTNERS' SATISFACTION OF SERVICE**
2 **AREA REQUIREMENTS?**

3 A: Mr. Trampush, like Mr. Tade, relies principally on concerns of alleged cream skimming
4 and the effect it may have on competition. Mr. Trampush contends that the requirement
5 that an ETC applicant serve the entire study area of a rural telephone company exists to
6 ward off what he deems to be anti-competitive "cherry picking." DT Direct, pp. 10-11.
7 As discussed above, however, the FCC has decided there are no such cherry picking
8 concerns given the option ILECs have to disaggregate support. This is a red herring.

9 **Q: SO THEN DOES NEXTEL PARTNERS SATISFY ALL FEDERAL ETC SERVICE AREA**
10 **OBLIGATIONS?**

11 A: There is no question that Nextel Partners can and will comply with all applicable FCC
12 service area requirements. Nextel Partners holds FCC licenses that cover all of its
13 requested designated areas, and commits to the obligations of an ETC.

14 **IV. FEDERAL FUNDING MECHANISMS ARE IN THE HANDS OF THE FCC**

15 **Q: MR. TADE ALSO RAISES CONCERNS ABOUT THE IMPACT THAT HE BELIEVES NEXTEL**
16 **PARTNERS' ETC DESIGNATION WOULD HAVE ON THE FEDERAL UNIVERSAL SERVICE**
17 **FUND. LT DIRECT, PP. 12-13. ARE HIS COMMENTS VALID?**

18 I do not believe so. I will defer to Mr. Wood, who is quite familiar with that topic.

19 **V. NEXTEL PARTNERS' ETC DESIGNATION SERVES THE PUBLIC INTEREST**

20 **Q: DO THE WITNESSES CONTEND THAT DESIGNATING NEXTEL PARTNERS AS AN ETC**
21 **WOULD NOT SERVE THE PUBLIC INTEREST?**

22 A: Yes, both witnesses suggest in one way or another that it would not be in the public
23 interest to designate Nextel Partners as an ETC. But both fail to properly account for
24 relevant public interest factors.

25 **Q: LET'S BEGIN WITH MR. TADE. HOW DOES HE CHALLENGE THE PUBLIC INTEREST**
26 **DETERMINATION?**

1 A: Mr. Tade suggests that the public interest could only be served if the Commission
2 imposes upon Nextel Partners the following additional requirements: (1) publish and
3 adhere to a tariff, (2) file service area maps, (3) provide service quality data, and (4)
4 respond to customer complaints and otherwise adhere to certain customer relations rules.
5 LT Direct, pp. 15-16.

6 **Q: HOW DO YOU RESPOND?**

7 A: Mr. Tade's proposed requirements are not in the Act, the FCC's Rules, or the
8 Commissioner's rules, and simply do not apply to the wireless industry generally. We are
9 a federally-regulated carrier under the FCC's regulatory authority subject to competitive
10 market pressures.

11 **Q: ARE REQUIREMENTS SUCH AS THOSE PROPOSED NECESSARY TO SERVE THE PUBLIC**
12 **INTEREST?**

13 A: No. We do not file tariffs. Instead, our rates are publicly available and are far more
14 accessible than they would be if tariffed. State service rules do not apply to us, but based
15 on my review of the Idaho rules, we generally meet or exceed those standards as a matter
16 of basic business practice. In a competitive market carriers do not need to be forced to
17 provide high quality service. The same is true with regard to customer complaints.
18 Nextel Partners was recently designated as an ETC in Wisconsin, and that Commission
19 recognized that it is in the public interest to let a wireless carrier operate as a wireless
20 carrier and provide more and better services to customers. *Application of NPCR, Inc.*
21 *d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier in*
22 *Wisconsin*, PSC Docket No. 8081-TI-101, Final Decision (Sept. 30, 2003) (Ex. 108.)

1 I would also like to point out what I believe to be the absurdity of suggesting that
2 competitive entrants need to be regulated the same as dominant monopoly providers. The
3 FCC, this commission (as I understand it) and every other state commission I am aware
4 of has decided as a matter of policy that these two types of carriers should be regulated
5 differently. That is not unfair, it is sound, well-established public and economic policy.

6 **Q: BUT MR. TADE ALSO CLAIMS THAT "CONGRESS HAD QUESTIONS ABOUT WHETHER IT**
7 **WAS WISE TO HAVE COMPETING ETCs IN RURAL AREAS." LT DIRECT, P. 16. IS HE**
8 **CORRECT?**

9 A: I don't know how he could be. Congress explicitly incorporated the benefits of
10 competition in rural areas into its declared principles "for the preservation and
11 advancement of universal service:"

12 Consumers in all regions of the Nation, including low-income consumers
13 and those in rural, insular, and high cost areas, should have access to
14 telecommunications and information services, including interexchange
15 services and advanced telecommunications and information services, that
16 are reasonably comparable to those services provided in urban areas and
17 that are available at rates that are reasonably comparable to rates charged
18 for similar services in urban areas.

19 47 U.S.C. § 254(b)(3). I believe "all areas" means "all areas." Mr. Tade apparently
20 disagrees.

21 **Q: DOES MR. TRAMPUSH ALSO QUESTION WHETHER NEXTEL PARTNERS' DESIGNATION AS**
22 **AN ETC WOULD SERVE THE PUBLIC INTEREST?**

23 A: Yes, and his testimony is similarly misguided.

24 **Q: WHAT SPECIFICALLY DOES MR. TRAMPUSH CLAIM?**

25 A: Mr. Trampush predictably claims that Nextel Partners has presented no evidence in favor
26 of the public interest other than the presumed benefits of competition. DT Direct, p. 24.
27 Mr. Trampush then devotes nearly the remainder of this public interest discussion to

1 whether Nextel Partners' designation would, in the very short term, promote competition.
2 DT Direct, pp. 26-29.

3 **Q: IS THIS POINT VALID?**

4 A: No. Universal service policies are not about what happens today or tomorrow, but about
5 whether, in the long run, Idaho consumers will have access to telecommunications
6 facilities and services like those available for urban areas, and whether wireless carriers
7 will be given a fair chance to compete with landline companies. Nextel Partners believes
8 it is in the public interest to make federal universal service funding available so that
9 Nextel Partners can continue to fulfill its mission of providing small and rural service
10 areas with basic and advanced services at rates terms and conditions comparable to those
11 charged in urban areas. In other words, Nextel Partners believes rural customers are
12 entitled to the full benefits of wireless service even though they live in areas that are
13 costly to serve.

14 As an example, Albion takes in over \$2,000,000 per year in federal support mechanisms
15 to serve 5,000 lines. Can Nextel Partners ever expect to compete effectively if Albion
16 has a \$2,000,000 per year cash advantage over Nextel Partners simply because it is the
17 ILEC?

18 **Q: SO WHAT IS THE PROPER PUBLIC INTEREST ANALYSIS?**

19 A: As I stated in my direct testimony, the public interest determination should be made from
20 the presumption that competition benefits consumers, and that all citizens in the state are
21 entitled to the benefits of competitive universal service. If competition is denied, it must
22 be based on some fundamental difference between rural and non-rural service areas.

1 The FCC has mandated that a public interest inquiry should examine whether consumer
2 benefits from designation outweigh demonstrated adverse impacts on consumers. *In the*
3 *Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation*
4 *Petition for Designation as an Eligible Telecommunications Carrier In the State of*
5 *Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896, ¶ 16
6 (rel. Dec. 26, 2000), *aff'd*, FCC 01-311 (rel. Oct. 19, 2001).

7 **Q: DOES NEXTEL PARTNERS MEET THAT TEST?**

8 A: Yes. Despite the Act's promise of competitive telecommunications markets in all areas
9 of the nation, rural customers do not today have the choices that urban customers have.
10 Wireless companies like Nextel Partners that serve rural areas can fill that need perfectly,
11 but only if they are able to compete on a level playing field with the rural LECs. Nextel
12 Partners is a national company that has a corporate mission of providing top-quality
13 services to rural consumers at urban rates. Our continued buildout is good for consumers
14 in Idaho.

15 Nextel Partners provides high-quality basic and advanced services. Our network uses a
16 packet-based platform known as integrated Digital Enhanced Network (iDEN™)
17 technology, and provides exceptional sound and transmission quality, using state-of-the-
18 art methods capable of delivering Digital Cellular, Direct ConnectSM Service PUSH TO
19 TALK® (walkie-talkie service), Mobile Messaging, and Internet access. We implement
20 E911 upon request, which means consumers can purchase phones that accomplish GPS
21 location assistance in an emergency. The mobility of our service is a tremendous
22 convenience and safety feature that consumers want and need, especially important to

1 residents in rural areas where there may be many miles between landline phones. Indeed,
2 this can be of the utmost importance in emergencies.

3 **Q: WHAT CONSUMER CHOICES ARE PROVIDED BY NEXTEL PARTNERS THAT ARE NOT**
4 **OFFERED BY ILECS?**

5 A: As I said earlier, we provide the benefits of mobility. We offer larger local calling areas
6 to our customers, and in some offerings, provide nationwide calling. We offer our Direct
7 Connect service that cannot be provided by any ILEC. We offer mobile wireless data
8 services, including access to the Internet, email, and text messaging. We offer mobile
9 911 – perhaps the greatest personal safety feature available anywhere. We offer GPS
10 location for mobile subscribers where implemented by the PSAP. In addition, we operate
11 in an environment where carriers do not believe that customer service is something that
12 must be mandated by the government – we expect that competitive choice in rural LEC
13 areas will get rural telephone companies thinking more like competitors (fighting for
14 customers) and less like regulated monopolies (fighting to prevent competition).

15 **Q: HOW DOES COMPARABILITY FIT IN AS A UNIVERSAL SERVICE GOAL?**

16 A: Section 254(b)(3) of the Act states:

17 [C]onsumers in rural, insular, and high cost areas, should have access to
18 telecommunications and information services, including interexchange
19 services and advanced telecommunications and information services, that
20 are reasonably comparable to those services provided in urban areas and
21 that are available at rates that are reasonably comparable to rates charged
22 for similar services in urban areas. (Emphasis added).

23 Fundamentally, universal service is about bringing services to rural areas in a manner that
24 is comparable to that provided in urban consumers. Nextel Partners bridges this gap
25 between urban and rural services.

1 Nextel Communications, a separate publicly-traded company, serves large urban markets.
2 Nextel Partners provides its Idaho markets with the same rates, service offerings, terms,
3 and conditions as offered by Nextel Communications in larger markets. This aspect of
4 comparability is directly in line with universal service goals.

5 **Q: DOES NEXTEL PARTNERS PROVIDE GOOD CUSTOMER SERVICE?**

6 A: Yes, absolutely. As I stated in my direct testimony, we take great pride in our high level
7 of customer service. Robust competition requires that we show each customer why
8 Nextel Partners is the best of the available alternatives for his or her communications
9 needs, and thus we are firmly committed to ensuring high quality customer satisfaction
10 and service. It is no surprise that Nextel Partners has one of the highest customer
11 satisfaction and customer retention ratings in the industry.

12 Designating Nextel Partners as an ETC will also serve the public interest by furthering
13 the extensive role we play in providing communications services to public schools,
14 libraries and local, state and federal government agencies, specifically law enforcement.
15 Because designating Nextel Partners as an ETC in rural telephone company areas in
16 Idaho will bring the benefits of competition without causing adverse impacts for
17 consumers, the Commission should find that designating Nextel Partners as an ETC
18 serves the public interest in accordance with Section 214(e)(2).

19 **Q: HAVE INTERVENORS IDENTIFIED ANY CONSUMER HARMS THAT WILL BE CAUSED BY**
20 **ALLOWING NEXTEL PARTNERS TO CONTINUE TO PROVIDE SERVICE AND EXTEND ITS**
21 **NETWORK TO RURAL CONSUMERS IN IDAHO?**

22 A: Not really. Mr. Trampush talks at a high level about costs and density (DT Direct, p. 8),
23 but that does not tell the Commission anything about whether consumers will be harmed

1 if competitive universal service is provided. Mr. Wood will address "evidence" that Mr.
2 Trampush includes in this testimony.

3 I will also point out that we will obtain funding only if customers choose our service. In
4 this market, if customers choose our service, that means they find more value in that
5 service then they can get elsewhere. If consumers do not find value in the service, they
6 will not choose to take that service, and we will not obtain funding. I do not see how
7 consumers can be harmed if they have more competitive choices from which to choose.

8 **Q: INTERVENORS SEEM UNCOMFORTABLE WITH THE IDEA OF WIRELESS CARRIERS**
9 **PROVIDING SERVICE AS WIRELESS CARRIERS? HOW DO YOU RESPOND?**

10 A: The Commission should not have that same discomfort simply because we are subject to
11 federal regulation. The wireless industry is a wonderful example of how new competitive
12 markets can work to benefit consumers. The wireless industry has grown significantly,
13 and is extremely competitive. The FCC has generally taken an approach that
14 competition, market pressures and consumer demand are the best way to ensure that
15 consumers get the best services at the most affordable prices. In fact, the FCC recently
16 issued its annual report on CMRS competition, and its conclusions were described by
17 Chairman Powell as follows:

18 The annual analysis of the CMRS market demonstrates how a lighter
19 regulatory hand has ushered in innovation and technological advancement,
20 and the power of facilities-based competition into the marketplace. Today
21 95% of American consumers now have three or more choices in wireless
22 providers, and a stunning 71% have six or more choices. And with this
23 wealth of choices has come lower per minute prices and more innovative
24 services. The conclusion is inescapable: the wireless industry is highly
25 competitive. The Report, however, notes that rural areas have fewer
26 competitors than urban areas. I look forward to working with my
27 colleagues to develop policies that will enhance the effectiveness of
28 competition in rural areas by removing unnecessary regulatory barriers to
29 facilitating the deployment and delivery of spectrum-based services in

1 these areas. This is the most comprehensive wireless competition report
2 that the Commission has ever produced and I applaud the efforts of the
3 Wireless Bureau to update, verify, and diversify our data to better capture
4 the state of the marketplace.

5 *In the matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation*
6 *Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect*
7 *to Commercial Mobile Services*, WT Docket No. 02-379, Eighth Report, FCC 03-150
8 (rel. July 14, 2003) (separate statement of Chairman Powell) (emphasis added).

9 Intervenor challenge wireless service, and would have the Commission decide that rural
10 consumers are hurt by the current regulatory structure imposed by the FCC, and the
11 public interest is served by denying access to capital and erecting regulatory barriers to
12 the continuing deployment of wireless service in rural areas. The FCC – the agency
13 responsible for regulating the industry – clearly does not think such regulations serve the
14 public interest. The FCC instead thinks that additional regulations will inhibit
15 competition in a way that hurts rural consumers. We agree with the FCC.

16 **Q: HOW DO YOU ADDRESS THE CLAIMS THAT NEXTEL PARTNERS DOES NOT CARE ABOUT**
17 **RESIDENTIAL CUSTOMERS. DT DIRECT, PP. 19-20?**

18 A: Mr. Trampush does not understand our company at all, and he is wrong. For example, he
19 relies on an outdated, third-party assessment of another company's stock to draw
20 conclusions about Nextel Partners. DT Direct, p. 19. He also reports the line count data
21 we provided in discovery and concludes that residential customers are included in the
22 same category as single-line business, and concludes this is "presumably because the
23 number of residential customers is not large enough (or of sufficient interest to the
24 company) to justify tracking them separately." DT Direct, p. 21. This is nonsense, and
25 he knows it. We told the ITA in the discovery response he references that we were

1 producing line count data as it is filed with the Universal Service Administrative
2 Company ("USAC"). As I am sure Mr. Trampush knows, USAC requires that those
3 types of lines be reported together. We actually had to create a new internal database to
4 meet this USAC requirement.

5 Had Mr. Trampush actually looked at our service offerings or analyzed our marketing
6 materials, he would have seen that we do market heavily to residential consumers. Many
7 of the nationally-run Nextel television ads over the last year have featured residential and
8 family uses of our Direct Connect product. This is a service that many families find
9 extremely valuable. We take advantage of that by marketing shared plans where two
10 phones share one bucket of minutes.

11 Other rate plans are also clearly designed to win residential customers. We provide
12 offerings that are competitive with other carriers' residential-focused offerings, and
13 provide free nights and weekends, which is a feature that residential customers care
14 about.

15 Again, we are a young company. As we move forward our focus on residential
16 customers will only grow. On October 1, our service plans changed, and our lowest-cost
17 plan is \$6 per month less than was previously the case. If we are going to build out to
18 sparsely-populated areas, we are going to need to try to win every customer we can.
19 Nextel Partners will be there for residential customers in Idaho.

20 **Q: CAN YOU SUMMARIZE YOUR TESTIMONY?**

21 **A:** Yes. Nextel Partners has shown that it meets each and every one of the requirements to
22 be designated an ETC set forth in 47 U.S.C. § 214(e) and Part 54 of the FCC's rules.

1 Furthermore, it is in the public interest to grant the ETC designation, because of the
2 increased competition, innovative service, and enhanced consumer choices that Nextel
3 Partners can bring to the areas in which it seeks designation. Therefore, Nextel Partners
4 urges the Commission to approve its Application for ETC designation.

5 **Q: DOES THIS CONCLUDE YOUR TESTIMONY?**

6 A: Yes.

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of NPCR, Inc., d/b/a Nextel Partners for Designation
as an Eligible Telecommunications Carrier in Wisconsin

8081-TI-101

FINAL DECISION

This is the final decision in this proceeding to determine whether to designate NPCR, Inc. (Nextel) as an Eligible Telecommunications Carrier (ETC), pursuant to 47 U.S.C. § 214(e)(2) and Wis. Admin. Code § PSC 160.13. Designation as an ETC makes a provider eligible to receive universal service fund (USF) monies.

Introduction

Nextel filed an application for ETC designation on April 24, 2003. The Commission issued a Notice of Investigation on June 27, 2003. The Commission issued a Notice Requesting Comments on September 12, 2003. A number of entities filed comments on September 18, 2003.¹ The Commission discussed this matter at its September 25, 2003 open meeting.

Nextel requested ETC designation for the exchanges shown in Appendix B. The territories for which ETC designation is requested are served by a mix of rural and non-rural telecommunications carriers.

¹ Citizens Utility Board ("CUB"); CenturyTel, Inc. and TDS Telecom Corporation; the Wisconsin State Telecommunications Association Small Company Committee (WSTA Small Company Committee); Wisconsin State Telecommunications Association ILEC Division (WSTA ILEC Division); Wisconsin State Telecommunications Association Wireless Division; Nsighttel Wireless (for seven applicants); Nextel and ALLTEL.

Findings of Fact

1. The wireless industry, its customary practices, its usual customer base, and Nextel's desire not to obtain state USF money create an unusual situation.
2. It is reasonable to adopt different ETC eligibility requirements and obligations for Nextel than specified by Wis. Admin. Code § PSC 160.13.
3. It is reasonable to require Nextel to meet only the federal requirements for ETC status in order to be eligible for ETC designation.
4. It is reasonable to relieve Nextel from ETC obligations other than those imposed under federal law.
5. It is reasonable to require that Nextel not apply for state USF funds and that if it ever does, all state requirements for and obligations of ETC status shall again be applicable to it.
6. Nextel meets the federal requirements for ETC designation.
7. It is in the public interest to designate Nextel as an ETC in certain areas served by rural telephone companies.
8. It is reasonable to grant Nextel ETC status in the non-rural wire centers indicated in its application, to the extent that the wire centers are located within the state.
9. It is reasonable to grant Nextel ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent such areas are located within the state.
10. It is reasonable to grant Nextel ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural telephone

company, to the extent the areas are located within the state, conditioned upon the Federal Communications Commission (FCC) approving the use of the smaller areas.

Conclusions of Law

The Commission has jurisdiction and authority under Wis. Stats. §§ 196.02, 196.218 and 196.395; Wis. Admin. Code ch. PSC 160; 47 U.S.C. §§ 214 and 254; and other pertinent provisions of the Telecommunications Act of 1996, to make the above Findings of Fact and to issue this Order.

The law does not require the Commission conduct a hearing in this docket as requested by the CUB; CenturyTel, Inc., and TDS Telecom Corporation; and the WSTA Small Company Committee and WSTA ILEC Division.

If “notice and opportunity for hearing” as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

Opinion

On December 20, 2002, the Commission granted the U.S. Cellular ETC status as applied for in Docket No. 8225-TI-102. *Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin*, Docket No. 8225-TI-102, 2002 WL 32081608, (Wisconsin Public Service Commission, December 20, 2002). The instant application is substantively similar to the application of U.S. Cellular. The Commission reaffirms its decision in Docket No. 8225-TI-102 and relies on the opinion issued in the Final Decision in that docket, to approve Nextel’s application.

ETC status was created by the FCC, and codified in 47 U.S.C. § 214(e)(2). Under FCC rules, the state commissions are required to designate providers as ETCs. 47 U.S.C. § 214(e)(2), 47 C.F.R. § 54.201(b). Designation as an ETC is required if a provider is to receive federal universal service funding. ETC designation is also required to receive funding from some, but not all, state universal service programs.

The FCC established a set of minimum criteria that all ETCs must meet. These are codified in the federal rules. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.101(a). The 1996 Telecommunications Act states that “States may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 U.S.C § 254(f). A court upheld the states’ right to impose additional conditions on ETCs in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999). While states must designate multiple ETCs if more than one provider meets the requirements and requests that status in a non-rural area, it must determine that it is in the public interest before designating more than one ETC in a rural area. 47 C.F.R. § 54.201. The Commission has already designated one ETC in each rural area.

In the year 2000, the Commission promulgated rules covering ETC designations and requirements in Wisconsin. Wis. Admin. Code § PSC 160.13. Those rules govern the process for ETC designation and set forth a minimum set of requirements for providers seeking ETC designation from the Commission. The application filed by Nextel asks that it be designated as an ETC for federal purposes only. It states that it is not seeking designation as an ETC for state purposes and, therefore, is not required to meet the additional state requirements.

States must examine the federal requirements, but are allowed to create additional requirements. Wisconsin has done so. The Commission’s requirements for ETC designation

clarify and expand upon the more basic FCC rules. There is no provision in the rule for designation as an ETC for federal purposes only. If a provider seeks to be designated as an ETC, it must follow the procedures and requirements in Wis. Admin. Code § PSC 160.13 and, if such a designation is granted, that designation serves to qualify the provider for both state and federal universal service funding. However, Wis. Admin. Code § PSC 160.01(2)(b) provides that:

Nothing in this chapter shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances involved, the adoption of requirements as to individual providers or services that may be lesser, greater, other or different than those provided in this chapter.

Nextel's request for ETC status presents an unusual situation. The wireless industry, its customary practices, and its usual customer base are quite different than those of wireline companies. Additionally, Nextel has stated that it has no desire to obtain state USF money. The Commission finds that under the particular circumstances of this case, it is reasonable to adopt different ETC requirements for Nextel to meet, and to grant ETC status to Nextel with certain limitations.

Because Nextel only wishes to obtain federal USF support, the Commission shall adopt the federal requirements for ETC status as the requirements that Nextel must meet to obtain ETC status. The federal requirements are found in 47 U.S.C. § 214(e)(1) and 47 C.F.R. §§ 54.101(a), 54.405 and 54.411. Further, the Commission relieves Nextel from ETC obligations other than those imposed under federal law. However, since Nextel will not be subject to the state requirements and state obligations, the Commission requires that Nextel not apply for state USF money. If Nextel ever does apply for state USF money, then all of the state requirements for and obligations of ETC status shall again be applicable to Nextel.

The Commission finds that Nextel has met the requirements for ETC designation; it will offer supported service to all customers in its designation areas and will advertise these services. In the FCC Declaratory Ruling *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, FCC 00-248 (released 8/10/00), par. 24 (South Dakota Decision) the FCC has stated:

A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.

If this is sufficient for a new entrant, it would seem to be even more so for someone who has already started to serve portions of the exchanges. Nextel submitted an affidavit ensuring compliance and, as mentioned earlier, is not only providing service in other areas of the state but also in parts of the areas for which it has requested ETC status.

The Commission finds that Nextel meets the requirement to offer service to all requesting customers. It has stated in its application and comments that it will do so. Many filing comments argue that the applicant will not provide service to all customers in the indicated exchanges and thus, because of the issue of "cellular shadows," the applicant will not meet the same standard that is applied to wireline providers. However, this is a case where "the devil is in the details." It is true that the purpose of universal service programs is to ensure that customers who might not otherwise be served at affordable rates by a competitive market still receive

service. However, like for wireline companies, access to high cost assistance is what helps ensure that service is provided. For Nextel, access to high cost assistance is exactly what will make expanding service to customers requesting service in the areas for which it is designated as an ETC “commercially reasonable” or “economically feasible.” As the FCC has said:

A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. South Dakota Decision, par. 17.

Nextel, like wireline ETCs, must fulfill this mandate, and access to high cost funding is what will help make doing so possible. The issue of “dead spots” is not significantly different from a wireline ETC that does not have its own lines in a portion of an exchange, perhaps a newly developed area. After obtaining a reasonable request for service, the wireline is required to find a way to offer service, either through extending its own facilities or other options. So too, Nextel must be given a reasonable opportunity to provide service to requesting customers, whether through expansion of its own facilities or some other method.

Nextel has also stated in its affidavit, application, and comments that it will advertise the designated services as required under 47 U.S.C. § 214(e)(1)(B), including the availability of low income programs.

Other objections to Nextel’s designation focus on an alleged inability to meet certain additional state requirements in Wis. Admin. Code § PSC 160.13. These are moot, however, since the Commission has adopted different requirements for Nextel.

Some of the exchanges for which Nextel seeks ETC status are served by non-rural ILECs (SBC or Verizon). Under Wis. Admin. Code § PSC 160.13(3) and 47 U.S.C. § 251(e)(2), the Commission must designate multiple ETCs in areas served by such non-rural companies.

However, the Commission may only designate multiple ETCs in an area served by a rural company if designating more than one ETC is in the public interest. Some of the exchanges for which Nextel seeks ETC status are served by rural telephone companies.

The Commission finds that designating Nextel as an additional ETC in these areas is in the public interest. In its determination, the Commission is guided by the Wis. Stat. §196.03(6) factors to consider when making a public interest determination:

- (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
- (b) Promotion of consumer choice.
- (c) Impact on the quality of life for the public, including privacy considerations.
- (d) Promotion of universal service.
- (e) Promotion of economic development, including telecommunications infrastructure deployment.
- (f) Promotion of efficiency and productivity.
- (g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

The Commission finds that designating Nextel as an ETC in areas served by rural companies will increase competition in those areas and, so, will increase consumer choice. While it is true that Nextel is currently serving in at least some of these areas, the availability of high cost support for infrastructure deployment will allow Nextel to expand its availability in these areas. Further, designation of another ETC may spur ILEC infrastructure deployment and encourage further efficiencies and productivity gains. Additional infrastructure deployment, additional consumer choices, the effects of competition, the provision of new technologies, a mobility option and increased local calling areas will benefit consumers and improve the quality of life for affected citizens of Wisconsin. As a result, the Commission finds that it is in the

public interest to designate Nextel as an ETC in the areas served by rural telephone companies for which it has requested such designation.²

The areas for which Nextel is granted ETC status vary. Wis. Admin. Code § PSC 160.13(2) states that the areas in which a provider shall be designated as an ETC depend on the nature of the ILEC serving that area. If the ILEC is a non-rural telephone company, the designation area is the ILEC's wire center. The FCC has urged states not to require that competitive ETCs be required to offer service in the entire territory of large ILECs. It has found that such a requirement could be a barrier to entry. *Report and Order in the Matter of Federal-State Joint Board on Universal Service*, FCC 97-157 (released 5/8/97) pars. 176-177 (First Report and Order). Wisconsin's rule provision resolves this federal concern. As a result, Nextel is granted ETC status in the SBC and Verizon wire centers for which it requested such status, to the extent that such wire centers are located within the state.

Wis. Admin. Code § PSC 160.13(2) provides that if the ILEC is a rural telephone company, the ETC designation area is different. For an area served by a rural telephone company, the designation area is generally the entire territory (study area) of that rural company. A smaller designation area is prohibited unless the Commission designates and the FCC approves a smaller area. 47 C.F.R. § 54.207(b). Nextel's application contained a list of rural telephone company areas for which it requested ETC status. Attachment B, prepared by the Commission, show the rural areas for which it believes Nextel is seeking ETC status. If this list is not accurate, Nextel is ordered to submit to the Commission a revised list, in the same format as the attachment to this order, by October 31, 2003.

² Eighteen other state commissions and the FCC have approved wireless ETC applications as second ETCs in rural areas on similar grounds.

The Commission also grants ETC status to Nextel in the areas for which it is seeking designation for the entire territory of a rural telephone company, to the extent that such exchanges are located within the state. Finally, where Nextel is asking for ETC designation in some, but not all, parts of the territory of a rural telephone company, the Commission conditionally grants ETC status in the areas for which Nextel has requested such designation, to the extent that such exchanges are located within the state. However, Nextel must apply to the FCC for approval of the use of a smaller area in such a designation. 47 C.F.R. § 54.207(c)(1). If the FCC approves use of the smaller area, then Nextel's ETC status for the smaller area(s) becomes effective. If the FCC does not approve use of the smaller area(s), then Nextel's conditional ETC status for such an area is void. In such a case, if Nextel determines that it then wants to apply for ETC status in the entire territory of the rural company, it may submit a new application requesting such designation.

The Commission grants this conditional status after having considered the changing market and the reason why the limitations on ETC designation in rural areas was created. Originally, there were concerns about "cherry picking" or "cream skimming." At that time, the USF support was averaged across all lines served by a provider within its study area. The per line support was the same throughout the study area. The concern was that competitive companies might ask for ETC designation in the parts of a rural company's territory that cost less to serve. It could thereby receive the averaged federal high-cost assistance while only serving the low-cost areas of the territory, while the ILEC received federal high-cost assistance but had to serve the entire territory, including the high-cost areas. First Report and Order, par. 189. As a result, the FCC found that unless otherwise approved by both the state and the FCC, a competitor

seeking ETC status in the territory of a rural company must commit to serving the entire territory. First Report and Order, par. 189.

However, since that time, the USF funding mechanisms have changed. Currently, a competitive ETC gets the same amount of federal high-cost assistance per line as the ILEC. An ILEC has the option to target the federal high-cost assistance it receives so that it receives more USF money per line in the parts of the territory where it costs more to provide service, and less federal USF money in the parts of the territory where it costs less to provide service. *In the Matter of Multi-Association Group (MAG) Plan*, FCC 01-157 (released 5/23/01), par. 147. (MAG Order) Since the competitive ETC receives the same per line amount as the ILEC, if it chooses to only serve the lower cost parts of the territory, then it receives only the lower amount of federal USF money. As a result, as recognized by the FCC, the concerns about “cherry picking” and “cream skimming” are largely moot. *In the Matter of Reconsideration of Western Wireless Corporation’s Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, FCC 01-311 (released 10/16/01), par. 12.

In the MAG Order, rural telephone companies were given the opportunity to choose a disaggregation and targeting method or to not disaggregate and target USF support. MAG Order, pars. 147-154. Companies were allowed to choose one of three targeting paths. Some of the companies in whose territory Nextel is seeking ETC designation chose Path One (no targeting) and some chose Path Three (targeting). If a competitive ETC is named in all, or part, of the service territory of a rural company, that company may ask the Commission to allow it to choose another Path. The FCC believed that state involvement in path changes gave competitors some certainty as to the amount of per line support available while preventing a rural company

from choosing or moving to a different path for anti-competitive reasons. MAG Order, par. 153. Some of the companies in whose territory Nextel is seeking ETC designation have disaggregated and targeted USF support, and some have not. However, the Commission may allow a company to change paths when a competitive ETC is designated in a rural company's territory.

Requests for Hearing

In accordance with the Notice Requesting Comments, dated September 12, 2003, the Commission received eight filings, four of which requested, on various grounds, the Commission conduct a contested case hearing before deliberation of the application. CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42. WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. Citizens Utility Board (CUB) also claimed a right to a hearing under Wis. Stat. § 227.42. The law, however, does not require the Commission conduct a hearing in this docket as requested. Furthermore, if "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42.

Wis. Admin. Code § PSC 160.13 (3) states:

For an area served by an incumbent local exchange service provider that is a rural telephone company, the commission may only designate an additional eligible telecommunications carrier after finding that the public interest requires multiple eligible telecommunications carriers, pursuant to federal law and

s. 196.50 (2), Stats. For an area served by an incumbent local exchange service provider that is not a rural telephone company, the commission may designate an additional eligible telecommunications carrier without making such a finding.

Wis. Stat. § 196.50(2), designates the process to certify a telecommunications utility.

Wis. Stat. § 196.50(2), states in part, “. . . after notice and opportunity for hearing, that the applicant possesses sufficient technical, financial and managerial resources to provide telecommunications service to any person within the identified geographic area.” According to the rule and statute it would appear that notice and opportunity for hearing is a required procedure in the instant case.

Wis. Stat. § 196.50(2), however, does not apply to an application for ETC status of a wireless company to be an additional ETC in a rural area. Wis. Stat. § 196.202,³ expressly restricts Commission jurisdiction over wireless providers. This statute prevents the Commission from applying almost every provision of Wis. ch. 196, to wireless providers, except for Wis. Stat. § 196.218(3).⁴ This section only applies if, “the commission promulgates rules that

³ Wis. Stat. § 196.202, states:

Exemption of commercial mobile radio service providers. (2) Scope of regulation. A commercial mobile radio service provider is not subject to ch. 201 or this chapter, except as provided in sub. (5), and except that a commercial mobile radio service provider is subject to s. 196.218 (3) if the commission promulgates rules that designate commercial mobile radio service providers as eligible to receive universal service funding under both the federal and state universal service fund programs. If the commission promulgates such rules, a commercial mobile radio service provider shall respond, subject to the protection of the commercial mobile radio service provider's competitive information, to all reasonable requests for information about its operations in this state from the commission necessary to administer the universal service fund.

(5) Billing. A commercial mobile radio service provider may not charge a customer for an incomplete call.

⁴ Wis. Stat. § 196.218 (3), states, in part:

Contributions to the fund. (a) 1. Except as provided in par. (b), the commission shall require all telecommunications providers to contribute to the universal service fund beginning on January 1, 1996. determined by the commission under par. (a) 4.

designate [cellular] providers as eligible to receive universal service funding under both the federal and state universal service fund programs.” Wis. Stat. § 196.218(3), mandates telecommunications providers contribute to the Wisconsin Universal Service Fund (WUSF). (Wireless providers currently have been exempted.) This section, however, is wholly unrelated to the requirements for eligibility to receive money from the WUSF and, otherwise, unrelated to this case.⁵

The Commission cannot apply Wis. Stat. § 196.50(2), to wireless providers. The Commission, therefore, cannot proceed under Wis. Stat. § 196.50(2)(f), when evaluating the ETC application of a wireless provider. As a matter of law, the reference to Wis. Stat. § 196.50(2)(b)(f), in Wis. Admin Code § PSC 160.13, cannot apply to ETC applications of wireless providers, including Nextel.

Wis. Stat § 227.42 provides a right to a hearing, treated as a contested case, to any person filing a written request for a hearing with an agency who meets the following four part test:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

CenturyTel, Inc. and TDS Telecom Corporation own local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas

⁵ Like the Legislature, Congress has also limited the state role in regulating on wireless carriers. 47 U.S.C. § 332(c)(3); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000).

at issue. These companies are competitors of Nextel. On this basis, these companies claim they have a substantial interest protected by law, and will suffer special injury based on the ETC designation of Nextel. Federal law and state law, however, do not create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs. *Alenco Communications v. FCC*, 201 F.3d 608 (2000) (“The purpose of universal service is to benefit the customer, not the carrier.”); *WITA v. WUTA*, 65 P.3d 319 (2003); *In re Application of GCC License Corp.*, 647 N.W.2d 45, 52, 264 Neb. 167, 177 (2002). (“[r]ather, customers’ interest, not competitors’, should control agencies’ decisions affecting universal service” and that “[t]he Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETCs simply by default as the sole service provider operating in a particular area.”) *See also, State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 311 (1980). (Economic injury as the result of lawful competition does not confer standing.); *MCI Telecommunications v. Pub. Serv. Comm.*, 164 Wis. 2d 489, 496, 476 N.W.2d 575 (Ct. App. 1991); and *Wisconsin Power & Light v. PSC*, 45 Wis. 2d 253 (1969) (“... the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.”)

In addition, these companies also claim that granting Nextel ETC status will reduce the amount of USF funds available to the public. As explained above, such result does not injure companies’ protected interest. As explained below, increasing the number of carriers eligible for federal USF money will increase the amount of federal

USF dollars brought into Wisconsin. Moreover, companies' claim is entirely speculative.

WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. These organizations represent local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue who are competitors of Nextel. These comments suggest the Commission hold a contested case hearing. These organizations, however, did not invoke Wis. Stat. § 227.42 or attempt to apply the standards therein. Had these organizations claimed such a right to a hearing under Wis. Stat. § 227.42, the same analysis would apply to them as described for the CenturyTel, Inc. and TDS Telecom Corporation claim.

CUB also claims a right to a hearing under Wis. Stat. § 227.42. CUB further requests that the Commission consolidate ten pending ETC applications of wireless providers into one contested case for investigation of common issues.

CUB asserts it has a substantial interest protected by law, and will suffer special injury based on the ETC designation of Nextel because it claims to represent customers in the geographic area in which the applicant seeks ETC designation. As customers of the current ETC in that area, and as payees into the universal service fund, its members have a substantial interest that fund money is not wasted through certification of an inappropriate carrier. The federal USF, however, provides a benefit to customers through the assistance of carriers who commit to providing service in high-cost areas. The designation of more than one ETC in a particular high-cost area allows more carriers providing service in rural Wisconsin, such as Nextel, to tap into money collected

on a nation-wide basis so that more services and more provider choices can be afforded to these customers. As such, far from threatening their substantial interests, ETC designation, like the instant one, necessarily provides a benefit to customers. On this basis, a hearing was not required by CUB's request.

CUB asserted that it meets the standards of Wis. Stat. § 227.42(1)(d), because it disputes the factual assertions made by the applicant that allowing it to receive ETC status will further the public interest by bringing the benefits of competition to underserved marketplaces and that the application provides the Commission with enough information regarding what services will be offered and at what cost to support it claims ETC designation is in the public interest. These assertions amount to a generalized challenge regarding the sufficiency of Nextel's application. A hearing, however, is not required on such basis. Wis. Stat. § 227.42(1), contemplates that a requester provide some showing that it meets the four part test. CUB fails to present any facts that either contradict the assertions of the applicant or demonstrate that any of CUB's alleged deficiencies in the application are fact-based and material.

All filers requesting a hearing state or allude to the cumulative effect of granting the ten pending wireless ETC applications as an appropriate issue in this docket. The Commission, however, has not consolidated these applications into one case. The ETC designation process is based on the application of an individual carrier to the standards Wis. Admin. Code § PSC 160.13. Issues regarding the cumulative impact of this decision, and decisions like it, are not before the Commission.

The law does not require the Commission conduct a hearing in this docket. If “notice and opportunity for hearing” as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement. *Waste Management of Wisconsin v. DNR*, 128 Wis. 2d 59, 78, 381 N.W.2d 318 (1985). (An appropriate “opportunity for hearing” may be exclusively through written comments.)

Order

1. Nextel is granted ETC status in the non-rural wire centers indicated in its application, to the extent the wire centers are located within the state.
2. Nextel is granted ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent the areas are located within the state.
3. Nextel is granted ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural telephone company, to the extent the areas are located within the state, conditioned upon the FCC approving the use of the smaller areas.
4. Nextel shall file a revised list of rural areas for which it is seeking ETC status by October 31, 2003, if the list attached to this order is inaccurate. The revised list shall use the same format as the attachment.
5. Nextel must request that the FCC approve the use of an area smaller than the entire territory of certain rural telephone companies (listed in an attachment to this order) when granting ETC status in those areas.

6. If the FCC does not approve the use of areas smaller than the entire territory of a rural telephone company when granting ETC status in those areas, then the conditional grant of ETC status in this order is void.

7. Nextel shall not apply for state USF support. If it ever does file for such support, the state eligibility requirements for, and obligations of ETC status, shall immediately apply to it.

8. Based on the affidavit of Donald J. Manning, Vice President and General Counsel, Nextel is an ETC within the meaning of 47 U.S.C. § 214 (c) and is eligible to receive funding pursuant to 47 U.S.C. § 254 (2). This order constitutes the certification to this effect by the Commission.

9. The requests for a contested case hearing by CenturyTel, Inc., TDS Telecom Corp., CUB, WTSA Small Company Committee, and WSTA ILEC Division are rejected.

10. Jurisdiction is maintained.

Dated at Madison, Wisconsin, _____

By the Commission:

Lynda L. Dorr
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A

This proceeding is not a contested case under Wis. Stat. Ch. 227, therefore there are no parties to be listed or certified under Wis. Stat. § 227.47. However, an investigation was conducted and the persons listed below participated.

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APPENDIX B

Rural Operating Companies for which Nextel requests ETC certification for the entire service territory:

Amherst Tel. Co.	Frontier Communications – Viroqua
Badger Telecom, Inc.	Frontier Communications – Wisconsin, Inc.
Bayland Tel. Co.	Grantland Telecom, Inc.
Belmont Tel. Co.	Hillsboro Tel. Co.
Bloomer Tel. Co.	Indianhead Tel. Co.
Bonduel Tel. Co.	Lakefield Tel. Co.
Bruce Tel. Co., Inc.	Lemonweir Valley Tel. Co.
Chibardun Tel. Co-op.	Manawa Tel. Co.
Citizens Tel Co-op. - Wis.	Marquette-Adams Tel. Co-op.
Cochrane Tel. Co-op.	Mosinee Tel. Co.
Cuba City Exchange Tel. Co.	Nelson Tel. Co-op.
Dickeyville Tel. Co.	Northeast Tel. Co.
CenturyTel of the Midwest – Kendall	Siren Tel. Co., Inc.
CenturyTel of Wisconsin – Fairwater- Brandon-Alto	Stockbridge & Sherwood Tel. Co.
CenturyTel of Wisconsin – Forestville	Telephone USA of Wisconsin, LLC
CenturyTel of Wisconsin – Larsen- Readfield	Tenney Tel. Co.
CenturyTel of Monroe County, LLC	Tri-County Tel. Co-op.
EastCoast Telecom, Inc.	Union Tel. Co.
Farmers Independent Tel. Co.	Vernon Tel. Co-op.
Farmers Tel. Co. of Wis.	Waunakee Tel. Co.
Frontier Communications – Mondovi	West Wisconsin Tel. Co-op.
	Wittenberg Tel. Co.
	Wood County Tel. Co.

Rural Operating Companies for which Nextel requests ETC certification for individual exchanges, but not the whole service territory:

CenturyTel of the Midwest – Wisconsin	Casco Coleman Freemont Goodman Harmony	Platteville Shell Lake Thorp Wayside Weyauwega
CenturyTel of the Midwest – WI / Northwest	Boyd Cadott Chetek De Forest Poynette	Ripon Tomah Warrens Wild Rose
Scandinavia Tel. Co.	Iola	
CenturyTel of Northwest Wisconsin, LLC	Lake Nebagamon	
CenturyTel of Northern Wisconsin, LLC	Gilman Holcombe Jim Falls	
CenturyTel of Central Wis.	Alma Center Arcadia Augusta Bangor Black Creek Black River Falls Centerville Cleghorn Denmark Fairchild Fall Creek Fountain City Galesville	Holmen Luxemburg Merrilan Mindoro New Franken Osseo Pickett Rosendale Seymour Shicoton Trepelaeu Wautoma

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2003 I caused to be served true and correct copies of the foregoing document, *Rebuttal Testimony of Scott Peabody*, by the method(s) indicated, upon:

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