

1. Pursuant to IPUCRP 263.01(a)(2) the Commission may take judicial notice of the orders of “any other regulatory agency, state or federal.”

2. Evidentiary hearings in this matter concluded on December 11, 2003 and the Nextel Partners Arkansas Order was issued on December 22, 2003, after the close of the Idaho evidentiary record.

3. The Nextel Partners Arkansas Order is relevant to the Commission’s deliberations because it considers and discusses a number of the issues raised in this proceeding.

4. No party will be prejudiced by the granting of this motion.

WHEREFORE, Nextel Partners respectfully requests that the Commission enter its Order:

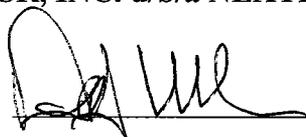
1. Taking judicial notice of the Nextel Partners Arkansas Order;
2. Directing that the Nextel Partners Arkansas Order be marked as Exhibit No. 111 and included in the record as a late-file exhibit.

Oral argument is not requested on this Motion.

Respectfully submitted, January 13, 2004

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

By: _____



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

FILED

IN THE MATTER OF THE APPLICATION OF)
NPCR, INC. D/B/A NEXTEL PARTNERS FOR)
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
PURSUANT TO SECTION 214(e)(2) OF THE)
COMMUNICATIONS ACT OF 1934, AS AMENDED)

DOCKET NO. 03-141-U
ORDER NO. 4

ORDER

On August 28, 2003, NPCR, Inc. d/b/a Nextel Partners ("Nextel") initiated this docket by filing a petition for designation as an eligible telecommunications carrier ("ETC") pursuant to section 214(e)(2) of the Federal Communications Act of 1934 as amended¹, ("the Federal Act"). Nextel's petition asserts that the Arkansas Public Service Commission ("APSC" or "this Commission") has established procedures for designation as an ETC² and that Nextel has complied with those procedures.

Nextel states that it is a commercial mobile radio service common carrier³ and seeks designation as an ETC for certain specified wire centers in a Southwestern Bell Telephone Company study area.⁴ Nextel asserts that, pursuant to § 214(e)(2) of the Federal Act and consistent with this Commission's Order in Docket No. 97-326-U, the Commission must designate more than one common carrier as an ETC in non-rural service areas as long as each carrier requesting ETC status meets the requirements of § 214(e)(2) of the Federal Act.

In support of its petition, Nextel offers the affidavit of Donald J. Manning, Vice President and General Counsel for Nextel. Mr. Manning's affidavit asserts that Nextel is able to offer all

¹ 47 U.S.C § 214 (e)(2).

² See *in the Matter of Determining Eligible Telecommunications Carriers in Arkansas*, Order No. 1, Docket 97-326-U (August 15, 1997).

³ Also referred to as a wireless or cellular carrier.

⁴ See attachment 1, exhibit A to Nextel's petition.

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services and functionality required by 47 CFR § 54.101(a) to its customers using its own facilities in the Southwestern Bell wire center areas. Specifically, Nextel states that it is able to offer voice grade access to the public switched network, local usage, dual tone multi-frequency signaling or its functional equivalent, single-party service or its functional equivalent, access to emergency service, access to operator services, access to interexchange service, access to directory assistance, and toll limitation for qualifying low-income consumers. The affidavit states that Lifeline and Linkup programs, which can only be offered by ETCs, and toll blocking for Lifeline subscribers, will be made available when Nextel receives an ETC designation.

Three sets of comments were filed on September 29, 2003 by three groups of incumbent local exchange carriers (“ILECs”)⁵. The rural ILECs argue that wireless carriers are essentially unregulated in Arkansas and do not provide their customers with the protections provided in the APSC’s Telecommunications Provider Rules because wireless carriers are not subject to those rules. The rural ILECs argue that, because wireless carriers are not subject to the APSC’s Telecommunications Provider Rules, it may not be in the public interest to approve Nextel’s ETC request.

The rural ILECs also argue that if Nextel takes a customer from an ILEC, the rural ILECs would lose terminating access charges which would have been paid to rural ILECs for terminating the toll calls of the customer taken by Nextel. The rural ILECs acknowledge that Nextel would pay terminating access charges to rural ILECs for termination of toll calls from

⁵ The commenting parties are three groups of ILECS which will be referred to as (1) “the rural ILECS”, which consist of Arkansas Telephone Company, Inc.; Central Arkansas Telephone Cooperative, Inc.; Madison County Telephone Company; Magazine Telephone Company; Northern Arkansas Telephone Co.; Pinnacle Communications; Prairie Grove Telephone Company; Rice Belt Telephone Company; South Arkansas Telephone Company, Inc.; Southwest Arkansas Telephone Cooperative, Inc.; Walnut Hill Telephone Company; and Yell County Telephone Company (2) “the Ritter companies”, which consist of Ritter Communications Holdings, Inc. on behalf of its wholly owned subsidiaries Ritter Telephone Company and Tri-County Telephone Company, along with Yelcot Telephone Company and Mountain View Telephone Company and (3) “the CenturyTel companies” which consist of CenturyTel of Central Arkansas, LLC; CenturyTel of Northwest Arkansas, LLC; CenturyTel of Arkansas, Inc.; CenturyTel of Mountain Home, Inc.; CenturyTel of Redfield, Inc.; CenturyTel of South Arkansas, Inc.; Cleveland County Telephone Company, Inc.; and Decatur Telephone Company, Inc.

Nextel customers, however, the rural ILECs assert that the terminating access rates paid by wireless carriers are substantially less than those paid by other ILECs, such as Southwestern Bell, and the resulting reduction in access charges paid to the rural ILECs could affect their profitability and lead to rate increases for the customers of the rural ILECS.

The Ritter companies argue that ACA § 23-17-405(b) (5) provides that Nextel may not be designated as an ETC unless “it is determined by the Commission that the designation is in the public interest” and that Nextel is not entitled to an automatic grant of ETC status. The Ritter companies state that Nextel has failed to demonstrate that ETC designation for Nextel is in the public interest and that Nextel has not shown that competition will be materially increased or that new or advanced services will be delivered sooner as a result of Nextel receiving ETC designation. The Ritter companies assert that granting ETC status to Nextel could detrimentally effect the Federal Universal Service Fund, (“USF”), because the USF is funded by assessments on telecommunications providers’ interstate revenue and as the size of the USF grows, as a result of commercial mobile radio service providers receiving ETC status, the customers of the Ritter companies will be charged increasing amounts to fund the USF and will receive no demonstrable benefit.

The Ritter companies also argue that CMRS providers are not subject to the same quality of service standards as ILECs and are not required to act as a provider of last resort. The Ritter companies assert that the lack of these protections for Nextel’s customers leads to the conclusion that Nextel’s designation as an ETC is not in the public interest.

The Ritter companies’ comments also point out the continuing activity by the Federal-State Joint Board on Universal Service (“Joint Board”) and the United States House of Representatives Energy and Commerce Committee which are reviewing the operations of the USF. The Ritter companies suggest that this Commission wait until the Joint Board and

Congress have completed their reviews of the USF and made any necessary changes before granting ETC status to Nextel.

The CenturyTel companies also raise many of the issues that are currently under review by the Joint Board, arguing that the availability of affordable high quality telephone services to consumers is at risk because of the ever-increasing demands on the USF from new carriers being granted ETC status. The CenturyTel companies request that the APSC deny the ETC request and initiate a generic proceeding to examine the policy and factual issues presented by the application or delay any decision until the Joint Board reports its findings regarding the USF to the Federal Communications Commission ("FCC"). The CenturyTel companies refer to the "spiraling" demands on the USF caused by the influx of ETC applications asserting that Nextel does not need USF support to be competitive and that granting ETC status to carriers that do not need USF support places the USF at risk. The CenturyTel companies note that the Federal Universal Service charge has increased from 6.8 % to 9.3 % on interstate revenue over the past two years and note that this issue is currently under review by the Joint Board.

The CenturyTel companies also argue that, when a carrier like Nextel receives an ETC designation, it can increase its revenues through USF support funds regardless of whether it adds any additional customers or obtains any customers from the ILEC serving the same area. CenturyTel suggests that this ability to artificially inflate revenues through Federal USF support when it cannot be shown that the revenues are needed is contrary to the public interest.

The CenturyTel companies claim that Nextel has not shown that it is able to provide service in the entire study area, i.e., the geographical area for which Nextel seeks ETC status, and argue that the FCC rules which require wireless ETCs to use the customer billing address for the purpose of identifying the service location provides an opportunity for customers to misuse the service by obtaining service using a billing address within the ETC designated area, but using

the service primarily within the service area of a rural ILEC. The CenturyTel companies argue that the Commission should hold all pending ETC applications in abeyance until the FCC has an opportunity to consider the Joint Board recommendations on the issues raised by the CenturyTel companies in their comments.

The CenturyTel companies' comments also reiterate the arguments previously made asserting that when a wireless ETC captures a customer from an existing ILEC, the amount of access revenues received by ILECs terminating calls for the wireless ETC is less than the amount of terminating access which the ILEC would have received if it had terminated the call from another ILEC customer, thereby reducing the amount of access revenues available to the ILECs. The CenturyTel companies also argue that Nextel is not required to serve as a carrier of last resort and is not subject to the APSC's Telecommunications Provider Rules. The CenturyTel companies assert that because the Telecommunications Provider Rules are not applicable to Nextel, Nextel customers would not be able to file formal complaints and that the Commission could not require credits or refunds for service interruptions, billing errors or failure to provide service. The CenturyTel companies state that Nextel's rates are not subject to investigation by this Commission and that Nextel's customers deserve the protections of the Commission's Telecommunications Provider Rules. The CenturyTel companies assert that because Nextel is currently providing service in the area in which it seeks ETC designation, this Commission should conclude that adequate competition exists in the area and that it is not in the public interest to designate Nextel as an ETC since such designation would not further promote competition.

Nextel's response to the comments filed by the ILECs asserts that it has met all of the criteria set forth in the Federal Act and this Commission's previous orders regarding ETC designation. Nextel emphasizes that it is not seeking ETC designation in any area served by a

rural telecommunications company. Nextel argues that the Federal Act requires this Commission to provide Nextel with an ETC designation if it meets the qualifications set forth in 47 USC § 214(e)(1) and 47 CFR § 54.201(d). Nextel asserts that it has met those requirements and this Commission must, therefore, provide an ETC designation to Nextel. Nextel argues that FCC precedent holds that designation of an ETC in non-rural territory per se satisfies the public interest requirement, citing *In the Matter of Federal-State Joint Board on Universal Service; Farmer's Cellular Telephone, Inc. Petition for a Designation as an Eligible Telecommunication Carrier*, 18 FCC Rcd 3848 (released March 12, 2003).

Although the comments raise significant public policy issues, those issues are properly being addressed at the Congressional level and at the Federal Communications Commission. To the extent comments raise public policy issues such as the potential expansion of the Federal Universal Service Fund, these matters of public policy should be addressed at the Federal level and should not effect this Commission's decision in this case for two reasons. First, this Commission has no jurisdiction to make changes in the Federal USF or the laws under which the Federal USF is established, and, second, this Commission is obliged to follow the requirements of Arkansas law which require this Commission to act consistently with the Federal Act.

ACA § 23-17-405 provides that the Commission may designate other telecommunications providers to be eligible for high-cost support consistent with 47 USC § 214(e) (2). This grant of authority to the Commission is conditioned on the telecommunications provider accepting responsibility to provide service to all customers in the ILEC's local exchange area through its own facilities or a combination of facilities, and the support will not begin until the telecommunications provider has the facilities in place to serve the area. The telecommunications provider may only receive funding for the portion of its facilities that it owns and maintains, the telecommunications provider must advertise the availability and

charges for its services, and the Commission must determine that the designation is in the public interest.

47 USC § 214(e)(2) states that:

A State Commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State Commission. Upon request and consistent with the public interest, convenience, and necessity, the State Commission may in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State Commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State Commission shall find that the designation is in the public interest.

(Emphasis added).

Nextel seeks ETC designation in an area served by a non-rural telephone company. Section 214(e)(2) clearly directs the Commission to designate more than one common carrier as an ETC if the requirements of paragraph (1) are met. Sections 214 (e)(1)(A) and (B) require that the carrier seeking ETC status must “offer the services that are supported by Federal Universal Service support mechanisms under § 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier); and advertise the availability of such services and the charges therefore using media of general distribution.) The affidavit submitted by Nextel clearly indicates that Nextel has, or upon receiving ETC designation will, offer the services required and advertise the availability of those services in compliance with § 214(e)(1) and § 254(c) thereby meeting the requirements of § 214(e)(2) of the Federal Act.

ACA § 23-17-405 requires this Commission to act in a manner which is “consistent with § 214(e)(2) of the Federal Act . . .” The fact that Nextel has agreed to comply with § 214(e) in

obtaining ETC designation in an area served by a non-rural carrier is sufficient to determine that granting ETC status is consistent *per se* with the public interest. *In the Matter of Federal-State Joint Board on Universal Service; Farmer's Cellular Telephone, Inc. Petition for Designation as an Eligible Telecommunications Carrier*, 18 FCC Rcd 3848 (released March 12, 2003); *Cellco Partnership d/b/a Bell Atlantic Mobile Petitioned for Designation as an Eligible Telecommunications Carrier*, 16 FCC Rcd 39, ¶ 14 (2000); *Pine Belt Cellular and Pine Belt PCS, Inc. Petition for Designation as an Eligible Telecommunications Carrier*, 17 Rcd 9589, ¶ 13 (2002).

In adopting the Telecommunications Regulatory Reform Act of 1997(ACA § 23-17-401 *et seq.*), the General Assembly stated that its intent was to provide for a system of regulation, consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms. Many of the objections made to the granting of ETC status by the commenting parties suggest that the granting of ETC status could affect the profitability of those companies and possibly result in rate increases to their customers. They therefore argue that it is not in the public interest and is inconsistent with Arkansas law to approve the ETC request. This argument ignores the statutory intent to implement competition, which will obviously have an affect on the profitability of some companies, but will also provide competitive alternatives to customers. If the ILECs receive reduced terminating access charges from the contracts they have negotiated with wireless carriers, they should receive the benefit of paying reduced access charges for terminating their calls to the wireless networks. Additionally, the terminating access rates paid between ILECs and wireless carriers are negotiated rates which the ILECs have agreed to pay. The contracts between the ILECs and wireless carriers should not, therefore, provide a basis to deny ETC status to a wireless carrier.

The suggestion by the ILECs that granting ETC status could affect their profits and their customers' rates does not suggest that granting ETC status is not in the public interest. The granting of ETC status to Nextel will provide a competitive alternative for customers in the Southwestern Bell area in which Nextel seeks to provide service. The effect on the ILECs in Arkansas, resulting from the funding of the USF through assessments on all carriers' interstate services, is essentially the same regardless of whether an ETC request is granted in Arkansas or by another state commission. There will be some effect on amounts paid by Arkansas ILECs, since all carriers' interstate revenues are assessed to support the USF; however, denying the request would prohibit a group of Arkansas consumers from having the competitive alternatives available to customers in other states even though those Arkansas consumers would be indirectly paying for the benefits to customers in other states through payments for interstate services which originate or terminate in Arkansas.

To the extent that the commenting parties have suggested that the Commission delay its decision pending resolution of some of the issues raised in the comments and currently pending or under consideration in United States Congressional committees or before the FCC's Joint Board, the request to delay would be inconsistent with the requirements of 47 USC § 214 (e)(2) which states that the Commission "shall" grant the ETC request if the requirements of the statute are met. Additionally, the issues raised by the commenting parties are best dealt with in the appropriate forums which have the jurisdiction to effect any changes which might be deemed necessary.

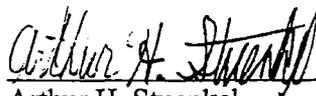
The commenting parties also argue that the ETC designation, if granted, should be conditioned on Nextel's agreement to submit to this Commission's jurisdiction for enforcement of the Commission's Telecommunications Provider Rules. This recommendation appears to be inconsistent with the requirements of ACA § 23-17-411(g), which substantially limits the

Commission's jurisdiction over commercial mobile radio services. The recommendation also lacks support under § 214(e) which requires the Commission to grant ETC status if the conditions set forth in the statute are met.

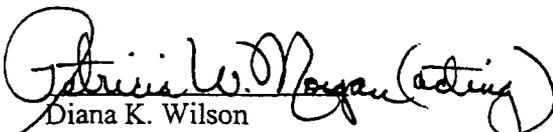
In view of the foregoing, the request by NPCR, Inc. d/b/a Nextel Partners for ETC status in the exchanges of Southwestern Bell Telephone Company-Arkansas (study area code 405211) is hereby granted.

BY ORDER OF THE PRESIDING OFFICER PURSUANT TO DELEGATION.

This 22nd day of December, 2003.

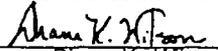


Arthur H. Stuenkel
Presiding Officer



Diana K. Wilson
Secretary of the Commission

I hereby certify that the following order issued by the Arkansas Public Service Commission has been served on all parties of record this date by the U.S. mail with postage prepaid, using the address of each party as indicated in the official docket file.



Diana K. Wilson

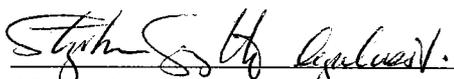
Secretary of the Commission
Date

12-22-2003

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2004 I caused to be served true and correct copies of the foregoing document, *Nextel Partners' Motion to Take Judicial Notice*, by the method(s) indicated, upon:

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CERTIFICATE OF SERVICE