

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE PETITION OF)
IAT COMMUNICATIONS, INC. DBA NTCH-) CASE NO. GNR-T-03-8
IDAHO, INC. OR CLEAR TALK FOR)
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER.)**

**IN THE MATTER OF THE APPLICATION)
OF NPCR, INC. DBA NEXTEL PARTNERS) CASE NO. GNR-T-03-16
SEEKING DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER.) ORDER NO. 29541**

On February 3, 2003, IAT Communications, Inc. dba NTCH-Idaho, Inc. or Clear Talk (“Clear Talk”) filed an Application requesting that the Commission designate it as an eligible telecommunications carrier (“ETC”) in specific rural areas of Idaho. A similar petition was filed on April 28, 2003 by NPCR, Inc. dba Nextel Partners (“Nextel Partners”). ETC designation would allow the Applicants to receive federal universal service support for providing universal telecommunications services to consumers in specified rural, high cost areas in Idaho. 47 U.S.C. § 214(e). Each of these rural areas is now served by an incumbent telephone company that was previously designated as an ETC. The incumbent companies oppose designating the Applicants as ETCs.

These Applications raise issues of first impression. The primary issue is whether it is in the public interest to designate Clear Talk and Nextel Partners as ETCs in the specified rural telephone company study areas. A “study area” is a geographic area used for the purpose of determining universal service obligations and support. 47 U.S.C. § 214(e)(5). In order to be designated as an ETC in a study area served by a rural telephone company, the applicant must demonstrate and the Commission must find that it would be in the public interest. 47 U.S.C. § 214(e)(2). A secondary issue is whether the Applicants are committed to bringing competition and providing universal services throughout these rural areas.

After reviewing the record in this proceeding, the Commission finds that the Applicants have failed to carry their burdens of proof to demonstrate that they should be designated as an ETC in the rural telephone company study areas identified in their respective Applications.

BACKGROUND

1. Procedural History

On May 27, 2003, the Commission ordered that these Applications be consolidated in a joint proceeding and processed under Modified Procedure, IDAPA 31.01.01.201-204.¹ At the same time, the Commission granted intervention to the Idaho Telephone Association, a state telephone association with members that include both commercial companies and cooperatives. Some of these telephone companies provide basic and advanced telecommunications services in the rural areas where the Applicants seek to be designated as an ETC.² Project Mutual Telephone Cooperative, and Citizens Telecommunications Company of Idaho also intervened. They provide local exchange services in some of the rural areas specified in the Applications. As stated previously, ITA and Citizens opposed Clear Talk's and Nextel Partners' Applications. The other parties in this case are Qwest Corporation and the Commission Staff. These latter parties did not participate actively or state positions on the Applications.

On June 10, 2003, ITA filed comments opposing the use of Modified Procedure and requested the Commission hold an evidentiary hearing. The Commission granted ITA's request and a hearing was held on December 9 and 10, 2003.³ The parties filed post-hearing briefs on their positions advanced at hearing and on new issues raised by a recent decision involving ETC designation issued by the Federal Communications Commission ("FCC").⁴ Finally, the Commission granted motions to take official notice of several ETC decisions from other jurisdictions pursuant to Commission Rule 263, IDAPA 31.01.01.263.⁵

¹ Order No. 29240.

² ITA has numerous members but those directly affected by this case are Albion Telephone Company, Farmers Mutual Telephone Company, Filer Mutual Telephone Company, Mud Lake Telephone Cooperative Association, Project Mutual Telephone Cooperative Association, Rural Telephone Company, and Fremont Telecom.

³ Order Nos. 29292 and 29312.

⁴ *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, 19 F.C.C.R. 1563 (2004) (hereinafter "*Virginia Cellular*").

⁵ The Commission took official notice of the following decisions: 1) *In the Matter of the Application of Nextel Partners for ETC Designation as an ETC*, Docket No. 03-141-U (Ark. 2003); 2) *In the Matter of the Application of Nextel Partners for Designation as an ETC*, Application No. C-2932, (Ne. 2004); 3) *Virginia Cellular, LLC*, 19 F.C.C.R. 1563 (2004); 4) *In the Matter of the Federal-State Joint Board on Universal Service, Recommended Decision*, Docket No. 96-45, FCC 04J-1, 19 F.C.C.R. 4257 (Feb. 27, 2004); 5) *In the Matter of Federal State Joint Board on Universal Service – Highland Cellular, Inc. Petition for Designation as an ETC in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004) (hereinafter "*Highland Cellular*").

2. The Telecommunications Act of 1996's Twin Goals

The Applicants request that the Commission designate them as ETCs in certain rural telephone company study areas so they can seek support from the federal Universal Service Fund to provide telecommunications services that promote competition and universal service in rural high cost areas in Idaho.⁶ Because the Commission's review of these Applications involves the Telecommunications Act of 1996 (the "1996 Act") a brief overview of it and the Communications Act of 1934 (the "1934 Act"), is necessary to understanding the principles of competition and universal service in this case.

The 1996 Act has twin congressional mandates of providing universal telecommunications service in the United States and implementing competition into the market for local telephone service. 47 U.S.C. § 151 *et. seq.* See also *Alenco Communications v. F.C.C.*, 201 F.3d 608, 614-15 (5th Cir. 2000). Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the 1934 Act. *Id.* Section 1 of the 1934 Act defined federal universal service policy as "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (as amended). See also *Texas Office of Public Utility Counsel v. FCC ("TOPUC")*, 183 F.3d 393, 405-06 and n. 2 (5th Cir. 1999). The 1934 Act also created the FCC and charged it with the responsibility to carry out this policy as well as to regulate the telecommunications industry in general.

The 1996 Act expanded the definition of universal service and articulated guiding principles to govern universal service. These principles of universal service are:

- 1) Quality services should be available at just, reasonable, and affordable rates;
- 2) Access to advanced telecommunications and information services should be provided in all regions of the Nation;
- 3) Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications services that are reasonably comparable to the services provided in urban areas and at rates that are reasonably comparable to rates charged for similar services in urban areas;

⁶ Both Applicants made clear that at this time they were not seeking ETC designation for purposes of receiving support from the Idaho Universal Service Fund.

- 4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;
- 5) There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service;
- 6) Schools, health care providers and libraries should have access to advanced services; and
- 7) Such other principles as the Joint Board and FCC may later determine are necessary and appropriate for the protection of the public interest, convenience and necessity.

47 U.S.C. § 254(b)(1-7). Section 254(e) of the 1996 Act requires that any financial support received in furtherance of the goal of universal service must be used only for the provision, maintenance and upgrading of facilities and services for which the support is intended.

Paired with the universal service mandate is the directive that local telephone markets be opened to competition. *See* 47 U.S.C. §§ 251-253; *see also Alenco*, 201 F.3d at 615. The 1996 Act provides that both universal service and competition must be realized and one cannot be sacrificed for the other. *Alenco*, 201 F.3d at 615.

3. Requirements for ETC Designation

To encourage competition and universal service, the 1996 Act allows qualifying telecommunications carriers to receive universal service support for providing service in high cost areas of the Nation by meeting certain ETC requirements.⁷ These requirements are contained in 47 U.S.C. § 214(e) and, if met, allow the carrier to be eligible to receive universal service support throughout the service area where such designation is sought. The 1996 Act defines “service area” as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5). For an area served by a rural telephone company, Section 214(e)(5) provides that the term “service area” means the rural telephone company’s “study area” unless and until the FCC and a state

⁷ The FCC has adopted the principle that ETC status and federal support mechanisms should be competitively neutral, neither unfairly advantaging nor disadvantaging particular service providers or technologies. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 F.C.C.R. 8776, 8801, ¶¶ 46-48 (1997). *See also* First Report and Order, 12 F.C.C.R. at 8932-8934, ¶¶ 286-290, 8944-8945, ¶¶ 311-313.

commission establish different service areas under the procedures set forth in 47 C.F.R. § 54.207(c)-(d).

The 1996 Act gives state commissions authority to determine whether a carrier meets the requirements to be designated as an ETC. 47 U.S.C. §§ 214(e)(2) and 254; 47 C.F.R. § 54.201. To be designated as an ETC the carrier shall be: 1) a “common carrier” as defined by 47 U.S.C. § 153(10); and 2) offer throughout its proposed service area the services set forth in 47 C.F.R. § 54.101(a) either by using its own facilities or a combination of its own and the resale of another carriers.⁸ Section 214(e)(1)(B) also requires that the carrier seeking ETC designation advertise the availability of its universal service offering and the charges therefore using media of general distribution. *See also* 47 C.F.R. § 54.201(d).

A carrier requesting ETC status is not required to provide “ubiquitous” service throughout its service area prior to being designated as an ETC.⁹ However, an applicant must demonstrate that the capability and commitment to provide service is something more than a “vague assertion” of intent on the part of a carrier to provide service. *Western Wireless*, 15 F.C.C.R. at 15178 at ¶ 24 (2000). Thus, an applicant carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation. *Id.*

A new entrant can make a reasonable demonstration of its capability and commitment to provide universal service without the actual provision of the proposed service by providing, 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. *Id.*

⁸ The services/functionality are: 1) Voice grade access to the public switched network; 2) local calling; 3) dual tone multi-frequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services where available; 6) access to operator services; 7) access to long-distance service; 8) access to directory assistance; and 9) toll limitation. 47 C.F.R. § 54.101(a). In addition, ETCs are also required by FCC Rules §§ 54.405 and 54.411 to offer qualifying low-income customers both “Lifeline and Link Up” programs as a condition precedent to receiving federal universal service support.

⁹ *Report and Order, 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*, 15 F.C.C.R. 15168, 15169 at ¶ 2 (2000).

Section 214(e)(2) provides that a state commission “may” designate more than one ETC in areas served by a rural telephone company if it is in the public interest and the Applicants have met the requirements of § 214(e)(1). In all other areas the state commission “shall” designate more than one ETC if a carrier meets the requirements of § 214(e)(1). The study areas in this case are all served by rural telephone companies (incumbent ETCs). Accordingly, the Applicants have the burden of proof to demonstrate that the public interest is served by designating them as ETCs in these rural areas. *Virginia Cellular, LLC Petition for Designation as an ETC*, 19 F.C.C.R. 1563, 1574 (2004). Congress has not defined or limited states’ public interest tests under Section 214(e)(2), leaving it to the states to set their own parameters for public interest analyses for rural service areas, consistent with the underlying purposes of the Act. *TOPUC*, 183 F.3d 393, 417-18 (1999); *WWC Holding Co. v. Public Service Commission*, 44 P.3d 714, 719 (Utah S.Ct. 2002). Furthermore, the Act gives state commissions discretion in how many carriers to designate in a given area. 47 U.S.C. § 214(e). *See also TOPUC*, 188 F.3d at 417-18.

In evaluating the “public interest,” this Commission weighs whether the potential benefits of ETC designation outweigh the potential harms. *Virginia Cellular*, 19 F.C.C.R. at 1574. Until recently, the FCC evaluated the public interest by considering whether: 1) customers are likely to benefit from increased competition; 2) designation of an additional ETC would provide benefits not available from incumbent carriers; and 3) customers would be harmed if the incumbent carrier exercised its option to relinquish its ETC designation.¹⁰ More recently, the FCC found there was a need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. In *Virginia Cellular* the FCC opined:

We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.

¹⁰ *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an ETC Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, DA 02-3181, 17 F.C.C.R. 23532, 23540-42 (November 26, 2002).

19 F.C.C.R. at 1565. With this background, we turn to the evidence provided by the parties.

THE HEARING EVIDENCE

1. Clear Talk

Clear Talk originally requested that the Commission designate it as an ETC in the rural telephone company study areas of Albion Telephone Company, Citizens Telecommunications Company of Idaho, Filer Mutual Telephone Company, Fremont Telecom, Inc. and Project Mutual Cooperative Association, Inc.¹¹ Application at 3. However, at the evidentiary hearing the Company stated it was only seeking ETC designation in the rural exchanges and partial wire centers of Fremont Telecom, Project Mutual Telephone and Citizens in Idaho. Tr. at pp. 370, 379-80. *See also* Exhibit 1.

a. 214(e)(1) Requirements

In support of its Application Clear Talk offered two witnesses, Glen W. Ishihara and Larry Curry. Their direct testimony is virtually identical; thus, for purposes of brevity the Commission provides citations only to Mr. Ishihara's testimony.¹² The Company also called Mr. Curry on rebuttal. Mr. Ishihara is president of IAT Communications, Inc., a Delaware corporation, and chief financial officer of NTCH-Idaho, Inc, an Idaho corporation doing business in Idaho as Clear Talk. He stated that the Company is a "telecommunications carrier" and "common carrier" as defined in 47 U.S.C. § 153(10) & (49) and is authorized by the FCC to provide commercial mobile radio services under the brand name "Clear Talk" in certain FCC defined service areas in Idaho. Tr. at pp. 336, 346. Mr. Ishihara testified that Clear Talk has been serving Idaho consumers in these areas since 2001 and currently offers and provides the required nine services and functionalities identified by 47 C.F.R. § 54.101 that are necessary for ETC designation. Tr. at pp. 336, 346-56. He testified Clear Talk provides these services using its existing network and licensed CMRS spectrum. Tr. at p. 356. Clear Talk also planned to provide services with fixed wireless local loop equipment installed at a customer's location. Tr. at pp. 356-57. Mr. Ishihara claims this equipment is more powerful than a handset. Tr. at pp. 358-59.

¹¹ Clear Talk also requested that it be designated as an ETC in non-rural areas that are served by Qwest Corporation. On June 11, 2003, the Commission granted the Company's request. Order No. 29261.

¹² Mr. Curry's direct testimony is contained at pages 396-424 of the transcript.

Mr. Ishihara alleged if Clear Talk received a request for service outside its existing coverage area, it can attempt to provide service in several ways. Tr. at p. 360. A technician can install a high-gain antenna at the location, or the power at an existing cell site can be turned up or redirected, or antennae can be adjusted (e.g., azimuth and downtilt), or microwave equipment can be installed, or new cell sites could be built, or Clear Talk can contract for the use of another carrier's facilities. *Id.*

Mr. Ishihara asserted Clear Talk would advertise the availability of its support services and charges in a manner that fully informs the general public. Tr. at pp. 364-67. He also stated the Company would comply with all form and content requirements, if any, adopted by the FCC and this Commission. *Id.*

b. Public Interest

Mr. Ishihara alleged that designating Clear Talk as an ETC in Idaho will bring competition to rural, high-cost areas, and that competition is in the public interest. Tr. at p. 374. He also asserted that competition could induce the incumbents to introduce new innovative or advanced service offerings. Tr. at p. 375. He stated that failure to designate Clear Talk as an ETC would deprive consumers of competition, including increased choices, higher quality service, lower rates, expanded calling areas and mobility. Tr. at pp. 374, 376, 392. In regard to quality of service, Mr. Curry testified that the Company will make commitments to ensure high service quality including stipulating to comply with the Commission's Customer Relations Rules for the universal services it offers in Idaho.¹³ Tr. at p. 445.

On rebuttal, Mr. Curry testified that the Commission should also consider that Clear Talk has local switching for its services that provides for greater network security and reliability. Tr. at pp. 429-30. He stated Clear Talk provides jobs in Idaho to maintain these switches and to staff its customer care operations.¹⁴ Curry also asserted that designating Clear Talk as an ETC will allow more federal USF dollars to flow into Idaho. Tr. at p. 447. Finally, he alleged the

¹³ In post-hearing briefs, Clear Talk made additional commitments based on the FCC's decision in *Virginia Cellular*, 19 F.C.C.R. 1563 (2004).

¹⁴ Exhibit 3 attached to Mr. Curry's rebuttal testimony is entitled "Clear Talk Idaho Fact Summary." In it Clear Talk represents that the Company has 31 Idaho employees, 6 retail centers, 30 reseller locations, 3 Lucent switches, 70 antenna facilities built with four more under construction, 47 active sites and 38 collocators. The exhibit also states that Clear Talk projects it needs a total of 97 facilities to cover its licensed area.

wireless technology Clear Talk uses to provide service is less environmentally intrusive than its landline counterpart. Tr. at p. 449.

Based on the foregoing, Clear Talk asserted it meets the requirements necessary for the Commission to designate it as an ETC in rural telephone company service areas.

2. Nextel Partners

Nextel Partners is a separate corporation from Nextel Communications, although the latter through a subsidiary, is the largest shareholder of Nextel Partners. Tr. at pp. 10-11. Nextel Partners was formed in 1998 to provide service under the "Nextel" brand name in small and rural markets and launched service in Idaho in 2000. Tr. at p. 11. Nextel Partners presented the testimony and exhibits of two witnesses, Scott Peabody and Don J. Wood. On November 17, 2003, the Company filed the rebuttal testimony of the same two witnesses.

Mr. Peabody, a Director in Nextel Partners' Engineering Department, testified the Company is authorized by the FCC to provide commercial mobile radio service in areas served by rural telephone companies Albion Telephone Company, Filer Mutual Telephone Company, Farmers Mutual Telephone Company, Mud Lake Telephone Cooperative, Project Mutual Telephone, Rural Telephone Company and Citizens Telecommunications of Idaho. Tr. at p. 9-10. Although Nextel Partners already provides service in rural Idaho, it now seeks ETC status. Mr. Peabody testified that with the exception of Citizens' areas, Nextel Partners' authorized service area covers all of the study areas of the rural telephone companies listed above.¹⁵ Tr. at p. 34.

a. 214(e)(1) Requirements

Mr. Peabody said Nextel Partners is a "common carrier" and said the Company could provide each of the FCC-listed services and/or functionalities required by 47 U.S.C. § 214(e)(1). Tr. at pp. 19, 20, 22-26. In fact, he stated Nextel Partners already provides all of these services in Idaho except for toll limitation service to qualifying low-income consumers. Tr. at p. 21. He maintained Nextel Partners will make its universal service offerings using the same phones, antennae, cell sites, towers, trunk lines, mobile switching center and interconnection facilities used today. Tr. at p. 29. Mr. Peabody asserted the Company regularly deploys additional cell

¹⁵ For Citizens' service area, Nextel Partners seeks ETC designation conditioned on the Commission and the FCC redefining Citizens' service area to an exchange by exchange basis pursuant to 47 C.F.R. § 54.207(b). This is the process authorized by federal law to authorize service and ETC designation in only a portion of a rural LEC's study area.

sites and channels, as necessary to maximize signal coverage and service availability. Tr. at p. 30. He insisted Nextel Partners is well-equipped to respond to reasonable requests for service throughout its proposed ETC service areas. *Id.*

Mr. Peabody said Nextel Partners will advertise the availability of the supported services and the corresponding charges in a manner that fully informs the general public within the designated service areas. Tr. at p. 32. *See also* Exhibit 105.

b. Public Interest

In regard to the public interest, Mr. Peabody urged the Commission to presume that “competition benefits consumers, and citizens throughout the state are entitled to the benefits of competitive universal service.” Tr. at p. 50-51. He suggested that the Commission should determine “whether consumer benefits will be outweighed by demonstrated adverse impacts on consumers resulting from the designation.” *Id.* Mr. Peabody asserted competitive service providers are “hard to find” in rural areas and the incumbents have been successful in expanding their services provided and deploying advanced network infrastructure such as local service, long distance, cable, wireless, internet, and/or DSL services without any competition from other landline providers. Tr. at pp. 51-52. He argued wireless providers are the only chance to bring competition to these areas, which can only happen if Nextel Partners is able to compete on a “level playing field” by being designated as an ETC so that it can receive federal USF.¹⁶ *Id.* Moreover, he suggested that Nextel Partners’ service is more “universal” because it is mobile and provides consumers with a larger calling area than its landline counterparts. Tr. at pp. 54, 85.¹⁷ Tr. at p. 85.

Mr. Peabody also stated ETC designation will facilitate the continued role of Nextel Partners in providing communications services to public schools, libraries, and local and state government agencies. Tr. at p. 56. Mr. Peabody also argued the Company’s service is consistent with Congress’ basic universal service principle that rural consumers must be afforded access to telecommunications services reasonably comparable to those services provided in urban areas at comparable rates. Tr. at p. 56. Finally, he asserted that Nextel Partners provides high quality services and customer service. This is especially the case regarding service quality because of

¹⁶ Peabody also asserted Nextel Partners has been designated as a ETC in other states. Tr. at p.17.

¹⁷ The Company alleged it offers Direct Connect service, mobile wireless data service including access to the Internet, email and text messaging and in some locations mobile 911 and GPS location for subscribers. Tr. at p. 85.

the competition existing in the wireless market. He contended that if the Company did not meet its customers' expectations for wireless service, it would lose them to other wireless competitors. Tr. at pp. 54-55.

Mr. Wood also testified on behalf of Nextel Partners regarding the "public interest" aspect of the Company's petition. Tr. at p. 157. Relying on his background as a consultant on economic and regulatory matters and his telephone company and IXC industry experience, he opined that designating Nextel Partners as an additional ETC in the affected rural telephone company service areas would have both short-term and long-term benefits. Tr. at pp. 161-64. With respect to the short term, he said consumers would have a choice of technology and suppliers, along with a "broader array" of services and pricing. Tr. at p. 169. In the long-term, Mr. Wood testified that the economic benefits of competition represent an equally important source of potential gain for consumers of telecommunications services in rural areas and for rural economic development. Tr. at pp. 170-71. The "availability of affordable and high-quality wireless service is extremely important in rural areas for health and safety reasons." Tr. at pp. 171-74. Lastly, he alleged the entry of competitive ETCs into a rural area could provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers. Tr. at p. 169. In sum, Mr. Wood concluded that designating Nextel Partners as an ETC would be in the public interest.

3. Idaho Telephone Association Testimony

ITA presented the testimony and exhibits of Daniel L. Trampush, who is employed as the director of telecommunications consulting for the firm of Moss Adams LLP. Mr. Trampush testified for both ITA and Citizens. Tr. at p. 480. Mr. Trampush asserted the ITA member telephone companies in this case and Citizens are "rural telephone companies" as defined in 47 U.S.C. § 153(37), and combined serve approximately 61,000 access lines in rural areas of Idaho. Tr. at p. 485. He maintained that low population density in the rural areas where the Applicants seek ETC designation translates into high average service costs. Trampush also testified that the incumbent ETCs are already serving these high cost areas and require support from federal and state universal funds to defray costs, keep rates affordable, and promote universal service. Tr. at pp. 493, 495-97. In these high cost areas there are still pockets of customers that comprise the incumbents' lowest cost and most profitable customers. Tr. at pp. 493-94. Thus, he argued it would be unfair to allow unregulated competitors to target only their

most profitable customers, while leaving the incumbents as the carrier of last resort for the very highest cost customers.¹⁸ *Id.* He asserted allowing this “cherry picking” or “cream skimming” would jeopardize the incumbents’ financial viability, provide an unjustified windfall to the Applicants, and prove detrimental to universal service goals by increased demands on federal and state USFs. Tr. at pp. 494-95.

Mr. Trampush contended that a recent survey conducted by ITA analyzing its member companies’ service densities and costs demonstrates the very rural and insular nature of the areas they serve. Tr. at p. 495. On average ITA members have only two access lines per square mile of service territory. Tr. at p. 495. He contrasted this with the findings of the Rural Task Force, which determined that, on average, rural carriers service 19 lines per square mile. *Id.* See *The Rural Difference, Rural Task White Paper 2*, January 2000, www.wutc.wa.gov/rtf. Mr. Trampush asserted that the lack of access line density and the requirement that ITA members provide ubiquitous coverage in these rural areas translates into high costs. He alleged that Citizens is similarly situated having 3.96 customers per square mile. Tr. at p. 497. He stated if the Citizens data is blended with ITA’s the average density would equal 2.4 access lines per square mile.

Mr. Trampush asserted neither Applicant can make the necessary demonstration to show it has the capability and commitment to meet the obligations as an ETC throughout its proposed service area, but for different reasons. Tr. at pp. 503-505. He contended Clear Talk’s requested service area for ETC designation is not coterminous with the entire study areas of Fremont Telecom and Project Mutual as it omits the Island Park exchange of Fremont and the Oakley exchange of Project Mutual. Tr. at pp. 505-507. Furthermore, Clear Talk only requested ETC status in one of 18 Citizens’ exchanges in the Company’s Idaho study area. Tr. at pp. 506-07. Mr. Trampush also asserted Clear Talk is seeking designation in certain partial wirecenters that the Company does not identify. *Id.* Consequently, Trampush argued that granting Clear Talk’s Application based on this evidence is improper under the law. *Id.* Finally, Mr. Trampush questioned Clear Talk’s financial ability to perform the ETC obligations pointing out that Leap Wireless, which owns 30% of Clear Talk, is now in bankruptcy. Tr. at p. 509.

¹⁸ Mr. Trampush states ITA members and Citizens are subject to state public utility regulation that carries with it an obligation to serve as a carrier of last resort. Tr. at p. 493.

Turning to Nextel Partners' Application, Mr. Trampush conceded it "probably" has the financial capability to provide ubiquitous service if it chooses to. Tr. at p. 510. However, he argued there is strong evidence showing the Company isn't willing to meet its obligations under the Act. Tr. at p. 510. First, he alleged Nextel Partners seeks ETC designation in two-thirds of Citizens' Idaho exchanges that are generally the most heavily populated and lowest cost exchanges. Tr. at pp. 511-12. He observed that in certain study areas the Company would have to build out to meet its ubiquitous service requirement but has offered no specific plans to accomplish this. Tr. at pp. 513-14. He alleged that Nextel Partners when asked could not describe the analysis it would employ when a consumer requests service in an area not currently served by the Company, but within the requested ETC designation area. Tr. at p. 515. He maintained that Nextel Partners is not serious about building out its network to meet new requests for service. Tr. at p. 515.

Mr. Trampush also argued that Nextel Partners is not committed based on his perception of Nextel's business objectives. Tr. at pp. 515, 518, fn. 10. He insisted that Nextel's business strategy is to target the very highest margin customers while largely ignoring the rest. Tr. at pp. 515-17. Mr. Trampush states a survey of Idaho rural telephone company and Nextel Partners' access line data corroborates this business strategy that he says is incompatible with ETC obligations as it would amount to cream skimming in rural areas of Idaho. Tr. at pp. 519-521.

Mr. Trampush asserted the Applicants' witnesses uniformly argue that the presumed benefits of competition with the incumbents are sufficient to satisfy the public interest test. Tr. at p. 523. If this were the case, Mr. Trampush argued, the public interest test would be meaningless. Tr. at p. 525. He alleged an equally important public interest goal is to preserve and enhance universal service as evidenced by the six major universal service principles contained in 47 U.S.C. § 254(b). Tr. at pp. 489-91. Thus, the Applicants must show some public interest benefit beyond the presumptive benefits of competition and he believes they have not done so. Tr. at p. 527. In considering the public interest, Mr. Trampush urged the Commission to determine what goals it is trying to accomplish with USF payments, the likelihood the goals will be met and if the results justify the costs. Tr. at p. 529. Supporting his position, Mr. Trampush cited comments of FCC Commissioner Adelstein who stated:

Whether granting ETC status to a competitor will bring benefits to a community that it does not already have and what effect it will have on the overall size of the fund, and thus on consumers bills, [are two important issues.] So, a threshold question is, does the benefit to consumers outweigh the ultimate burden on consumers.

Tr. at pp. 529-30. *Remarks of Commissioner Johnathan S. Adelstein* before the National Association of Regulatory Utility Commissioners on February 25, 2003.

Mr. Trampush next argued that the evidence in the record does not support the Applicants' belief that failure to subsidize their operations will deprive consumers of the benefits of competition. He cited the FCC's most recent CMRS Competition report that he claims found 94 % of the total U.S. population lives in counties with three or more mobile telephone service operators. Tr. at p. 531. He asserted this finding is corroborated by ITA's survey of its areas that found an average of 5 wireless carriers operating in them. *Id.* He further alleged that in many of these areas CMRS providers have been offering mobile service for 5 to 10 years without high-cost support. Tr. at p. 532.

Mr. Trampush insisted that wireless carriers are not direct competitors with the incumbent LECs for basic local exchange service as line counts for ITA members and Citizens have been essentially flat during the last three years. Tr. at p. 533. Thus, he believes wireless service is complementary to wireline service with respect to basic local service. Tr. at p. 535.

In conclusion, Mr. Trampush urged the Commission to deny these Applications contending that in this case it does not make sense to devote scarce federal USF money to promote wireless competition in rural areas. Tr. at p. 537.

4. Citizens' Testimony

Citizens also objected to designating either Clear Talk or Nextel Partners as ETCs in its study areas. Citizens offered the testimony and exhibits of its witness Lance A. Tade. Mr. Tade is employed by Citizens Communications as Manager of Regulatory Affairs. Tr. at p. 572. Mr. Tade urged the Commission to carefully consider whether to modify Citizens' study areas to accommodate Clear Talk and Nextel Partners because neither company is requesting ETC designation throughout the Company's entire study area. Citizens is concerned that granting secondary ETC status only over a portion of its study area fosters asymmetric regulation, or in other words, imposing restraints on the incumbent firm not also borne by its competitors. Tr. at p. 584. Granting the ETC requests could lead to each Applicant picking and choosing the

geographic extent of its obligations while at the same time requiring the rural incumbent to maintain its obligations over a wider geographic area. Tr. at pp. 584-85. Mr. Tade contended effective competition can only emerge when all carriers enjoy the same freedoms, bear the same responsibilities and endure the same restraints. *Id.* Thus, Mr. Tade argues both Applicants should be required to meet the obligations of an ETC throughout the rural telephone company study areas where it seeks ETC designation and to submit a plan for building out its network to this end. Tr. at p. 588. Mr. Tade also argued the Commission should require the Applicants to provide unlimited free local usage like it does Citizens and other rural LECs.¹⁹ Tr. at p. 592.

Mr. Tade urged the Commission to engage in a cost benefit analysis when looking at the public interest. Tr. at pp. 594-95. He argued the costs of having multiple ETCs include the growth in the size of the federal USF and the consequent increase in the interstate contribution factor required to finance that growth. *Id.* He maintained that as the contribution factor increases, political pressure will mount to cap the fund, and may cause USF draws to decline, thereby endangering the existence of affordable basic local exchange service in rural areas. Tr. at p. 597.

Mr. Tade also argued that many wireless carriers including Clear Talk and Nextel do not properly compensate rural ILECs for wireless calls terminated on ILECs local networks. Tr. at p. 599. If the Applicants are designated as ETCs, they will receive federal USF while still using the networks of the ILECs for free. Tr. at p. 600. Allowing the Applicants to use the incumbents' networks for free provides a disincentive for them to use USF to build out their own networks. *Id.*

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction to determine whether the Clear Talk and Nextel Partners Applications for ETC designation should be granted. 47 U.S.C. § 214; *Idaho Code* §§ 62-615(1) and 62-610D. We must determine whether the Applicants have met their burden to demonstrate that it is in the public interest to grant the Applications of Clear Talk and Nextel Partners. The Commission also examines whether Clear Talk and Nextel Partners have the capability and commitment to meet the obligations of an ETC throughout their requested service area under the Act.

¹⁹ Tade states for \$35.99 a month Nextel Partners customers receive 300 anytime minutes whereas for \$10.70 a month Citizens customers receive unlimited local usage. Tr. at p. 593.

1. Clear Talk

Clear Talk alleged that designating it as an ETC would be in the public interest because it would: 1) bring competition to rural, high-cost areas; 2) increase consumer choices for types of service and rates; 3) provide incentives for the incumbent to introduce new, innovative or advanced service offerings; 4) offer customers an expanded calling area for rural customers and mobility; 5) further the deployment of the Company's facilities-based network in Idaho; 6) provide jobs in Idaho to support its network and customer care functions; and 7) improve the quality of service. Despite these representations, the Commission finds that granting Clear Talk's Application would not be in the public interest for several reasons.

First, Clear Talk has requested ETC designation for less than the entire study areas of the affected rural telephone companies in this case. Tr. at pp. 367-68, 380, 418-19. In Fremont's study area, Clear Talk omits the Island Park exchange. Tr. at p. 344, Exhibit 1; *see also* Tr. at p. 507. In Project Mutual's area Clear Talk omits the Oakley, Norland and Minidoka exchanges. In Citizens' study area, the Company requests designation in the Aberdeen exchange only (1 of 18 Citizens' exchanges) and it is unclear because of Clear Talk's partial wirecenter request whether it intends to serve this entire exchange. *Id.* Clear Talk also seeks ETC designation in certain partial wirecenters where its FCC licensed boundaries do not extend over an entire wirecenter. Tr. at pp. 370, 420. The Company failed to identify how many partial wirecenter designations it requests or where they are located. *Id.*

A request for ETC designation for an area less than the entire study area of a rural telephone company generally raises concerns that an Applicant intends to "cream skim" in the rural study area.²⁰ Rural cream skimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area. This is a concern because universal service support is calculated based on a study area-wide average of a rural telephone company that serves customers in both high cost and low cost areas throughout its study area. As the FCC's Federal-State Joint Board on Universal Service noted in 1996:

Potential "cream skimming" is minimized because competitors, as a condition of eligibility, must provide services throughout the rural telephone

²⁰ *Recommended Decision, In the Matter of Federal-State Joint Board on Universal Service* CC Docket No. 96-45, 12 F.C.C.R. 87, 180 at ¶ 172 (1996) (stating that potential cream skimming is minimized when competitors, as a condition of eligibility for universal service support, must provide services throughout a rural telephone company's study area). *See also Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, 19 F.C.C.R. 1563, 1578 (2004).

company's study area. Competitors would thus not be eligible for universal service support if they sought to serve only the lowest cost portions of a rural telephone company's study area.

12 F.C.C.R. 87, 108 at ¶ 172 (emphasis added).

The Commission finds that the exchanges and partial wirecenters that Clear Talk omits from its request are in areas that are among the least populated in Idaho. Mr. Trampush testified about low access line density in the study areas of the affected rural telephone companies that translates into high costs to provide service for ITA members and Citizens. Accordingly, we conclude that the areas/exchanges and partial wirecenters omitted from Clear Talk's request are high cost areas to serve.

We also find that the population of these omitted exchanges and partial wirecenters compared to those that Clear Talk wishes to serve is widely disparate. For example, the Rupert exchange of Project Mutual has a greater population than the Company's Oakley, Minidoka or Norland exchanges combined. In addition, the St. Anthony exchange of Fremont Telecom is more than twice the size of the Company's Island Park exchange. Accordingly, Clear Talk's Application appears to request that it be designated as an ETC only in the potentially lowest-cost portions of the study areas of the affected rural telephone companies. The FCC in *Virginia Cellular* found that under similar circumstances, granting a carrier ETC designation for only its licensed portion of the rural study area may have the same effect on the ILEC as rural cream skimming.²¹ The FCC found:

[I]t would not be in the public interest to designate Virginia Cellular as an ETC in the study area of NTELOS. Virginia Cellular's licensed CMRS area covers only the Waynesboro wire center in NTELOS' study area. Based on our examination of the population densities of the wire centers in NTELOS' study area, we find that Waynesboro is the lowest-cost, highest-density wire center in the study area of NTELOS, and that there is a great disparity in density between the Waynesboro wire center and the NTELOS wire centers outside Virginia Cellular's service area. . . . Universal service support is calculated on a study-area-wide basis. Although NTELOS did not take advantage of the Commission's disaggregation options to protect against possible uneconomic entry in its lower-cost area, we find on the facts here that designating Virginia Cellular as an ETC only for the Waynesboro wire center could potentially significantly undermine NTELOS' ability to serve its entire study area. The widely disparate population densities in NTELOS' study area and the status of Waynesboro as NTELOS' sole low-cost, high-

²¹ See also *Highland Cellular*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004).

density wire center could result in such an ETC designation placing NTELOS at a sizeable unfair competitive disadvantage.

Virginia Cellular, 19 F.C.C.R. at 1579-80 (citations omitted and emphasis added).

We find that similar to the *Virginia Cellular* case, even though Clear Talk will only be serving the lower cost areas of the study areas pertinent to its Application, it would still receive USF support based on the incumbent's total cost, including the high cost areas. Thus, Clear Talk will be able to keep its costs down by serving only the highest margin areas. We conclude that this is rural cream skimming and results in an unfair competitive advantage for Clear Talk over the incumbents. This could also undermine the incumbent's ability to serve the entire study area.²² We find that Clear Talk has not met its burden to demonstrate that it is in the public interest to grant its Application. Consequently, the Commission concludes Clear Talk's Application should be denied.

Second, Clear Talk requested partial wirecenter designation in unidentified study areas of the incumbent rural telephone companies. Without an identification of these areas, it is not possible for the Commission to determine whether Clear Talk will meet its obligations as an ETC. Furthermore, the request raises the same rural cream skimming concerns discussed above. Recently, the FCC has found that making designations for a portion of a rural telephone company's wirecenter would be inconsistent with the public interest. *Highland Cellular*, CC Docket No. 96-45, FCC 04-37, 2004 WL 770088 (2004). In the *Highland Cellular* decision the FCC reasoned that prior to designating an additional ETC in a rural telephone company's service area, the competitor must commit to provide the supported services to customers throughout a minimum geographic area. This minimum area was found to be a rural telephone company's wire center because rural carrier wire centers typically correspond with county and/or town lines. Requiring the competitive carrier to commit to a minimum geographic area would make it less likely that the competitor will relinquish its ETC designation at a later date. The FCC further

²² We note that the future of USF support is uncertain. Recently, the Federal-State Joint Board on Universal Service made the recommendation that the FCC limit the scope of high-cost support to a single connection that provides access to the public telephone network. The Joint Board reasoned that supporting a single connection is more consistent with the goals of section 254 of the Act than the present system, and is necessary to preserve the sustainability of the universal service fund. *In the Matter of the Federal-State Joint Board on Universal Service, Recommended Decision*, Docket No. 96-45, FCC 04J-1, 19 F.C.C.R. 4257, 4258-59 (Feb. 27, 2004). Although just a recommendation, the Commission finds that it certainly calls into question whether state commissions should continue to designate multiple ETCs in rural telephone company study areas until the FCC has ruled on this matter.

noted that consumers in rural areas tend to have fewer competitive alternatives than those in urban areas and such consumers are more vulnerable to carriers relinquishing ETC designation. The Commission finds that this reasoning is sound. Accordingly, we find that Clear Talk's lack of commitment to serve at least full wirecenters is problematic and thus its request is inappropriate in this case. We conclude for these reasons that granting Clear Talk's Application is again not in the public interest.

Third, in evaluating Clear Talk's ETC Application, the Commission examined the impact on USF. In *Virginia Cellular*, the FCC found it appropriate to consider the impact of multiple designations on USF when evaluating the public interest.²³ The FCC noted its increasing concern about the impact on USF due to the rapid growth in high cost support distributed to competitive ETCs that increases the size of USF and could increase consumers' costs to support USF. Although individually the amount any one carrier may cause to be added to the fund is small, it still cannot be ignored. We also find persuasive the dissenting comments of FCC Commissioner Martin in the *Highland Cellular* decision. He stated:

The main goals of the universal service program are to ensure that all consumers, including those in high cost areas, have access at affordable rates.

During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating "competition" in high cost areas. As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

Highland Cellular, FCC 04-37, 2004 WL 770088 (2004) (C. Martin, dissenting).

Designating Clear Talk as an ETC would have a negative impact on the USF. Moreover, it will not meet the goals of universal service because of the rural cream skimming and partial wirecenter issues discussed above. Finally, Clear Talk has been providing service in the rural areas it requests ETC designation since 2000 and has been doing so without USF subsidies. We believe that designating the Company as an ETC is unjustified.

²³ *Virginia Cellular*, 19 F.C.C.R. at 1578.

Based on the foregoing, the Commission finds that the costs of granting Clear Talk's Application clearly outweigh the benefits. Therefore, we find that it is not in the public interest to grant the Company's Application.

2. Nextel Partners

The Commission's analysis of Nextel Partners' Application centers on the Company's commitment to provide service throughout its proposed ETC designated area and whether it is in the public interest to grant its Application.

a. Capability and Commitment

In demonstrating its capability and commitment, a carrier requesting ETC status is not required to provide "ubiquitous" service throughout a study area prior to being designated as an ETC.²⁴ However, an applicant's demonstration must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.²⁵

Nextel Partners argued that it must be given a reasonable opportunity, subject to real world business limitations to enter the area. Tr. at p. 70 citing *Western Wireless*, 15 FCCR at 15173, ¶¶ 12-13; Tr. at pp. 71. In post-hearing briefing the Company also stated it would make service provisioning commitments consistent with those announced in the FCC's *Virginia Cellular* decision and make post designation reports to the Commission regarding its build out progress. However, at the hearing Nextel Partners admitted its coverage does not extend to several regions within the rural telephone company study areas where it requests ETC designation. Tr. at p. 100. In response to ITA discovery requests, Nextel Partners stated that it had no specific plans for building out its network in these areas in order to meet its ETC obligation. Tr. at pp. 514-15. Nextel Partners also did not know how long it would take to build out its network to provide service throughout its proposed designation area but speculated that it would take years rather than months. Tr. at p. 140. Furthermore, the Company did not have a plan to determine how it could provide service to requesting customers within its designated areas. Tr. at pp. 140, 514-15.

²⁴ *Western Wireless Corporation Petition for Preemption*, 15 F.C.C.R. 15168, 15169 at ¶ 2 (2000).

²⁵ *Id.* at 15178, ¶ 24.

Based on this evidence the Commission finds that the Company has failed to demonstrate a solid commitment to provide service throughout its designated areas. To demonstrate a commitment to serve an entire area for which it seeks designation, the Commission expects an applicant to provide some evidence that it has a generalized plan to meet the needs of consumers in rural areas and the goals of universal service. *Western Wireless* does not prevent the Commission from requiring an applicant to prepare and submit to it a tentative, general business plan to this end. In *Virginia Cellular*, the carrier committed to use USF support to construct cellular sites outside its existing service area within 18 months of being designated an ETC. *Virginia Cellular*, 19 F.C.C.R. 1571 at ¶16. Based on its business experience in these areas since 2000, Nextel Partners should have been able to do this. Instead, it appears that the Company has not done so and will create a business plan only after it receives designation and receives USF subsidies for access lines it already serves—access lines the Company was able to obtain without the aid of USF support. Instead of a commitment, Nextel Partners offered a condition. The Company's case is simply not enough to convince the Commission that Nextel Partners is committed to serving the needs of consumers in rural areas of Idaho throughout the areas it requests ETC designation.

b. Public Interest

To determine whether it would be in the public interest to grant Nextel Partners' Application, the Commission used the factors the FCC has employed in making similar determinations. First, although increased competition is an important factor in this analysis, by itself it is not enough to satisfy the public interest test in rural areas. *Virginia Cellular*, 19 F.C.C.R. at 1565. With this in mind the FCC has evaluated the public interest considering: 1) whether customers are likely to benefit from increased competition; 2) whether designation of an additional ETC would provide benefits not available from incumbent carriers; 3) whether customers would be harmed if the incumbent carrier exercised its option to relinquish its ETC designation; 4) the impact of multiple designations on the universal service fund; 5) the unique advantages and disadvantages of the competitor's service offering; 6) any commitments made regarding quality of telephone service provided by competing providers; 7) and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. *Virginia Cellular*, 19 F.C.C.R. at 1565; *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible*

Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order ¶¶ 22-25 (November 26, 2002). With this background, we examine the evidence provided by the parties.

In general, Nextel Partners asserted that it is in the public interest to designate it as an ETC because of the increased competition, innovative services and enhanced consumer choices that the Company can bring to the areas in which it seeks designation. Nextel Partners also argued that without USF support it will not be able to extend its network into the most rural areas of Idaho and this will deprive consumers from receiving the benefits they will receive from competition and universal service.

The Commission finds that it is not in the public interest to grant Nextel Partners ETC status. First, Mr. Peabody admitted that he did not know what evidence supported his contention that Nextel Partners needed to receive support in order to extend service to many of the rural areas in Idaho. Tr. at p. 97. In addition and most importantly, the record shows that Nextel Partners is not committed to providing universal service throughout the study areas and exchanges where it seeks designation. Thus, the Commission is concerned that any universal service support the Company would receive would not be used to provide service to those customers in the most rural areas of Idaho. Instead, Nextel Partners' commitment up to this point has been that it will provide service once it receives the funds. That is insufficient. Granting Nextel Partners ETC designation when it is not committed to these same principles is not in the public interest. To do so would not only be contrary to the principles of universal service but would also negatively impact USF. This would be a poor precedent to set at a time when high-cost support distributed to competitive ETCs is growing at a dramatic pace. *See Virginia Cellular*, 19 F.C.C.R. at 1577.

Second, the Commission finds that ETC designation will not directly provide consumers with increased choices in rural areas. The evidence in the record demonstrates that some consumers in these areas already have increased choices for telecommunications services. Since 2000, Nextel Partners has been providing service in rural areas in Idaho. *Id.* In fact, Nextel Partners can provide the required universal services in Idaho. Tr. at p. 21. The Company has accomplished this without ETC designation or the federal universal support that would follow. The record demonstrates that several other wireless carriers have also accomplished the same feat under similar circumstances in these rural areas in Idaho. Tr. at pp. 531-32. Thus, the

Commission concludes that consumers in these rural areas are already benefiting from increased choices for telecommunications service. Designation would allow Nextel to receive USF support for the access lines that it already successfully serves without USF support. The Commission further finds that designating Nextel Partners would not necessarily provide further benefits for the costs that such designation would impose on USF especially when the Commission believes the Company is not committed to serving its entire proposed designation area. As we previously mentioned, we find that designating additional ETCs in rural areas puts additional stress on the USF and the public interest is not served in this case by subsidizing multiple carriers in rural high cost areas.

Finally, the Commission has concerns about the commitments the Company has made regarding the terms and quality of service. Nextel Partners repeatedly represents that its not regulated by the Commission and does not desire to have the Commission's Customer Relations Rules apply to them. Nextel Partners alleged that it believes as a matter of basic business practice it meets or exceeds the standards contained in these rules. Tr. at p. 77. The Company has also made certain commitments consistent with those made in the FCC's *Virginia Cellular* case and stated it would voluntarily comply with the Cellular Telecommunications and Internet Association ("CTIA") Consumer Code.²⁶ CTIA is the international organization of the wireless industry for carriers, manufacturers, and Internet product and service providers and is "dedicated to expanding the wireless frontier." www.ctia.org. By complying with this Consumer Code Nextel Partners is entitled to display CTIA's "Seal of Wireless Quality Consumer Information." http://files.ctia.org/pdf/Media_Kit_Q&A.pdf. It appears that the only consequence for Nextel Partners if it does not comply with this Code is that it will not be entitled to use CTIA's seal.

Despite the Company's representations, the Commission is still concerned that the Company wants to make quality of service commitments only on its terms. If the Commission

²⁶ The Association's webpage states:

CTIA vigorously represents its members with policymakers in the Executive Branch, the Federal Communications Commission, Congress and the States. CTIA works with its members to shape the issues they care about—from minimizing regulatory mandates to influencing spectrum management, from enhancing security to reining in taxation, and from expanding the wireless Web to defending network performance.

www.ctia.org.

were to accept this, it would have very little and most likely no authority to address consumer issues that may arise in the future concerning the terms and quality of service that Nextel Partners would provide. Furthermore, the Commission finds that the CTIA Consumer Code is merely meant to provide guidelines for the provision of wireless service and in reality gives consumers very little recourse if a carrier fails to follow its terms. The Commission finds that this lack of accountability is troubling and not in the public interest, particularly when the Company could receive a substantial sum of money from USF after ETC designation.

Based on the foregoing, the Commission finds that the costs in granting Nextel Partners request for ETC designation outweigh any benefits that it says will be provided. In addition, we find that the Company is not committed to meeting the obligations of an ETC throughout the service area it seeks ETC designation. Accordingly, we deny the Company's Application.

ORDER

IT IS HEREBY ORDERED that Clear Talk's Application for eligible telecommunications carrier designation is denied.

IT IS FURTHER ORDERED that Nextel Partner's Application for eligible telecommunications carrier designation is denied.

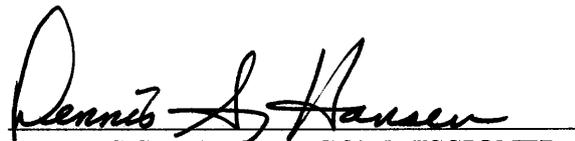
THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in these Case Nos. GNR-T-03-8 and GNR-T-03-16 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in these cases. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* §§ 61-626 and 62-619.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 23rd
day of July 2004.

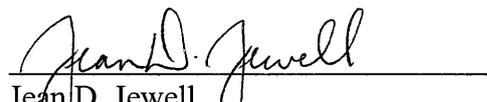

PAUL KJELLANDER, PRESIDENT

See Separate Statement Concurring in Part
and Dissenting in Part

MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

ATTEST:

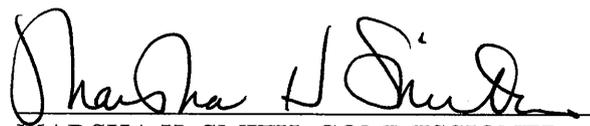

Jean D. Jewell
Commission Secretary

O:GNRT038_GNRT0316_jh10

**CONCURRING AND DISSENTING OPINION
OF
COMMISSIONER MARSHA H. SMITH
CASE NOS. GNR-T-03-8 AND GNR-T-03-16
ORDER NO. 29541**

I write separately to explain why I concur in part and dissent in part to today's Order. I concur in that portion of the Order denying Clear Talk's Application because it requested ETC designation for less than the entire rural study areas and because it requested partial designation in unidentified rural study areas. These points alone are sufficient to deny Clear Talk's Application. Although I share the majority's concern that granting these Applications may adversely impact the federal USF, this concern is an insufficient basis to deny the Application. While this Commission may not approve of a support system that awards USF to multiple ETCs, this is the system that is in place today. The FCC has asked the Joint Board to examine the issue of high cost USF support in competitive areas and the FCC may adopt a "different framework for the public interest analysis of ETC applications." However, we must consider the public interest of ETC designation with the standards currently in place.

I must respectfully dissent to that portion of the Order denying Nextel Partners' Application. Unlike the majority, I believe Nextel Partners' representations made in its Application and post-hearing brief are sufficient to grant ETC status. Nextel Partners indicated that it would make the same commitments to provide service outside its existing service areas as the wireless carriers made in the FCC's *Virginia Cellular* and *Highland Cellular* cases. Such commitments were sufficient to meet the public interest standard in those two cases and should be sufficient here. Nextel Partners' dilemma is that it needs ETC status to obtain federal USF support to expand in high cost rural areas, but cannot get ETC status without expanding into such areas. Because the majority has denied Nextel Partners' Application, we do not reach the issue of redefining Citizens' study area.


MARSHA H. SMITH, COMMISSIONER