

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. 29591**

On July 23, 2004, the Commission issued final Order No. 29541 in Case No. GNR-T-03-8 and Case No. GNR-T-03-16 denying Applications filed by two wireless telecommunications companies requesting designation as eligible telecommunications carriers (ETCs). The Commission concluded that IAT Communications, Inc. dba ClearTalk (ClearTalk) and NPCR, Inc. dba Nextel Partners (Nextel Partners) did not present sufficient evidence to establish their entitlement to ETC designation. On August 13, 2004, Petitions for Reconsideration were filed in each case by ClearTalk and Nextel Partners. The Commission finds that neither Petition for Reconsideration states adequate grounds for granting reconsideration, and the Commission accordingly denies reconsideration in Case No. GNR-T-03-8 and in Case No. GNR-T-03-16.

Idaho Code § 61-626 provides for the filing of petitions for reconsideration of a final order issued by the Commission, which is a prerequisite for filing an appeal from the order. The purpose for reconsideration is “to afford an opportunity to the parties to bring to the attention of the Commission in an orderly manner any question theretofore determined in the matter and thereby afford the Commission an opportunity to rectify any mistake made by it before presenting the same to this [Idaho Supreme] Court.” *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122 (1979). *See also, Eagle Water Company, Inc. v. Idaho Public Utilities Commission*, 130 Idaho 314, 317, 940 P.2d 1133 (1997). Consistent with the purpose of reconsideration, the Commission’s procedural rules require that petitions for reconsideration “set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or

not in conformity with the law.” IDAPA 31.01.01.331. The Commission is not persuaded by the Petition for Reconsideration filed by ClearTalk, or by the Petition filed by Nextel Partners, that its decision in Order No. 29541 is unreasonable, unlawful, erroneous or not in conformity with the law.

After setting forth the procedural and statutory background for the case, the Commission in Order No. 29541 discussed the standards for a state commission’s designation of a competitive telecommunications carrier as an ETC. *See* Order No. 29541 pp. 4-6. Most significant in this case, the Commission noted that Section 214(e)(2) of the 1996 Telecommunications Act “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 that “the Act gives state commissions discretion in how many carriers to designate in a given area.” Order No. 29541 p. 6. We noted that all of the study areas at issue are served by incumbent rural telephone companies, as well as other wireless carriers, and that “the Applicants have the burden of proof to demonstrate that the public interest is served by designating them as ETCs in these rural areas.” *Id.*

The Commission also discussed considerations that are part of evaluating the public interest in designating multiple ETCs in a rural area, including whether customers are likely to benefit from increased competition and whether designation of an additional ETC would provide benefits not available from incumbent carriers. *Id.* We also noted the Federal Communications Commission recently has applied “a more stringent public interest analysis for ETC designations in rural telephone company service areas,” weighing 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.” Order No. 29541 p. 6, quoting *Virginia Cellular, LLC Petition for Designation as an ETC*, 19 F.C.C.R. 1563, 1565 (2004). The FCC stated at least two reasons for the more stringent public interest analysis: a review of the rules and process for designating ETCs, especially in rural service areas, currently is underway by the Federal-State Joint Board on Universal Service, and increased concern about the impact on the universal service fund due to the rapid growth in the number of competitive ETCs. Regarding the ETC

process review currently underway, the FCC acknowledged it could potentially impact, among other things, the support competitive ETCs may receive in the future and the criteria used for continued eligibility to receive support. *In the Matter of the Application 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). Regarding the impact of increased demand on the universal service fund, the FCC noted, “although competitive ETCs only receive a small percentage of all high-cost universal service support, the amount of high-cost support to competitive ETCs is growing at a dramatic pace.” *Highland Cellular* p. 12-13. To illustrate, the FCC compared the first quarter of 2001, when three competitive ETCs received approximately \$2 million, to the fourth quarter of 2003, when 112 competitive ETCs received approximately \$32 million.

In evaluating the various factors that affect the public interest, the Commission’s goal is to determine “whether the potential benefits of ETC designation outweigh the potential harms.” Order No. 29541 p. 6. The Commission in Order No. 29541 provided a fairly detailed discussion of the evidence on potential benefits and harms that resulted in its conclusion that ClearTalk and Nextel Partners “failed in 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.” Order No. 29541 p. 1. The evidence created concerns regarding the companies’ ability or willingness to provide service throughout the entire study areas of the incumbent providers, the impact on the universal service fund, whether ETC designation would actually provide consumers with increased choices in these rural areas, and concerns about “cream skimming” that could “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.” Order No. 29541 p. 12. We will not repeat in this Order our discussion of the evidence, and will only briefly address a few arguments made by ClearTalk and Nextel Partners in their Petitions for Reconsideration.

In its Petition, ClearTalk argues the Commission’s decision “is based on an inaccurate and incomplete review of the record before it, and is not supported by substantial evidence.” Regarding the Commission’s concern that “ClearTalk requested ETC designation for only the highest density, lowest cost exchanges and wire centers in its FCC licensed service areas,” ClearTalk contends its testimony establishes that it requested ETC designation for all

exchanges and all wire centers within its basic trading area (BTA), as identified in its FCC license. ClearTalk Petition pp. 3-4. ClearTalk identified exhibits and information in its supplemental post-hearing brief establishing ClearTalk's commitment to provide universal service throughout its FCC licensed area. In response, we only note here our concurrence with the FCC's recognition "that, for reasons beyond a competitive carrier's control, the lowest cost portion of a rural study area may be the only portion of the study area that a wireless carrier is licensed to serve. Under these 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." *In the Matter of the Application 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).

ClearTalk also takes issue with the Commission's concern that designating ClearTalk as an ETC would have a negative impact on the universal service fund. ClearTalk contends the Commission improperly focused on an undefined and unquantified negative impact on the federal USF without giving any weight to the overall economic benefit of increasing the flow of USF support into rural Idaho. Although impact on the universal service fund by itself is not a reason to deny ETC designation to a competitive wireless carrier, we share the FCC's concern about the dramatically increasing demand competitive carriers are placing on the fund, and also believe that concern justifies a more stringent review of ETC applications in rural service areas. It is in part a concern about increasing demand for USF funds that has created the need to review the criteria for designating ETCs in rural areas, and likely will result in changes to the process and criteria for designating competitive ETCs.

In its Petition for Reconsideration, Nextel Partners noted the Commission concluded Nextel Partners did not provide sufficient information to satisfy the public interest requirement for granting ETC status. To address the Commission's concern, Nextel Partners addressed three considerations: (1) Nextel Partners did not produce a build-out plan for review by the Commission; (2) the Commission questioned whether Nextel Partners would be using federal funds to serve consumers in truly rural areas; and (3) Nextel Partners' regulatory status as a commercial mobile radio service provider regulated by the FCC limits the Commission's authority to monitor service concerns.

To address the Commission's uncertainty about Nextel Partners' plan to build into remote areas, Nextel Partners identified three cell sites it plans to construct and the Company hopes will be activated by the end of the year. An attachment to Nextel Partners' Petition shows the three cell sites under construction and provides additional evidence that was not known in December when the case was presented to the Commission. Nextel Partners also identified six cell sites, costing approximately \$1.2 million to construct, the Company asserts it cannot justify building within the next three years unless it receives ETC funding. Nextel Partners stated that if it is designated an ETC, it will dedicate all universal service funds to constructing and operating the cell sites. Nextel Partners stated it is prepared to promptly file testimony affirming the above commitments, if reconsideration is granted by the Commission.

The Commission has reviewed the issues identified by Nextel Partners in its Petition for Reconsideration, as well as the relevant evidence and analysis set forth in Order No. 29541, and is not persuaded the Commission's decision regarding Nextel Partners is unreasonable, unlawful, erroneous or not in conformity with the law. As previously noted, the Commission in its final Order provided a detailed discussion of the evidence and resulting concerns regarding approval of Nextel Partners' application, and that discussion will not be repeated here. Both Nextel Partners and ClearTalk proposed to present additional evidence on reconsideration to address the concerns identified by the Commission, but we do not believe that reconsideration is appropriate solely to present evidence to strengthen the parties' cases. We are concerned the limited time available for reconsideration by statute may not provide the other parties in the case adequate time to analyze and respond to the new evidence. Of course, Nextel Partners and ClearTalk are free to re-apply for ETC status in these rural areas and present new evidence to address the issues identified by the Commission in Order No. 29541.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by ClearTalk in Case No. GNR-T-03-8 is denied.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Nextel Partners in Case No. GNR-T-03-16 is denied.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in Case No. GNR-T-03-8 and Case No. GNR-T-03-16 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

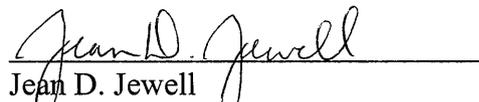
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 10th day of September 2004.


PAUL KJELLANDER, PRESIDENT

Concurring and Dissenting Opinion Attached
MARSHA H. SMITH, COMMISSIONER


DENNIS S. HANSEN, COMMISSIONER

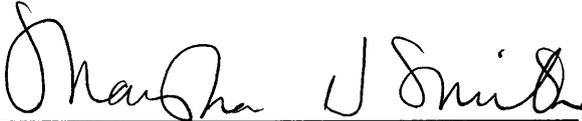
ATTEST:


Jean D. Jewell
Commission Secretary

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**CONCURRING AND DISSENTING OPINION
OF
COMMISSIONER MARSHA H. SMITH
CASE NOS. GNR-T-03-8 AND GNR-T-03-16
ORDER NO. 29591**

Although I continue to concur with the result reached by the majority regarding ClearTalk's Application, I also remain convinced that Nextel Partners has presented sufficient evidence to merit approval of its ETC Application. Nextel Partners has adequately demonstrated a commitment to extend its service area and also identified specific facility improvements it would undertake with federal USF funds. For the reasons stated in my Concurring and Dissenting Opinion, Order No. 29541, I would grant the Petition for Reconsideration and approve Nextel Partners' Application for ETC designation in these rural areas.



MARSHA H. SMITH, COMMISSIONER