

Molly O'Leary, Esq. (ISB # 4996)
Richardson & O'Leary, PLLC
99 E. State Street, Suite 200
Eagle, Idaho 83616
(208) 938.7900 (Voice)
(208) 938.7904 (Facsimile)

molly@richardsonandoleary.com

Idaho Public Utilities Commission
Office of the Secretary
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AUG 13 2004

Boise, Idaho

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of IAT
Communications, Inc., d.b.a. NTCH-Idaho, Inc.
or Clear Talk, for Designation as an Eligible
Telecommunications Carrier.

CASE NO. Docket No. GNR-T-O3-08

**PETITION FOR
RECONSIDERATION AND
REHEARING OF IAT
COMMUNICATIONS, INC., d/b/a/
CLEAR TALK**

In the Matter of the Application of NPCR, INC.
d/b/a NEXTEL PARTNERS
Seeking Designation as an Eligible
Telecommunications Carrier that may receive
Federal Universal Service Support.

CASE NO. Docket No. GNR-T-O3-16

COMES NOW, IAT Communications, Inc. dba NTCH-Idaho, Inc or Clear Talk ("Clear Talk") and, through undersigned counsel, files this Petition for Reconsideration and Rehearing.

I.

PROCEDURAL HISTORY

Following a hearing on this matter before the Idaho Public Utilities Commission ("the Commission") on December 9th and 10th of 2003, the parties filed post-hearing briefs on January 23, 2004.

On January 27, 2004, NPCR, Inc. dba Nextel Partners ("Nextel"), filed a motion for the

Commission to take judicial notice of an order of the Arkansas Public Service Commission granting it Eligible Telecommunications Carrier (“ETC”) status in the exchanges of Southwestern Bell Telephone Company-Arkansas, and asked the Commission to admit the Arkansas commission’s order as Exhibit 111. On January 30, 2004, the Idaho Telephone Association (“ITA”) and Citizens Telecommunications Company of Idaho (“Citizens”) filed a joint motion requesting that the commission take official notice of the Federal Communications Commission’s (“FCC”) decision in, *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC*, CC Docket No. 96-45, FCC 03-0338 (2004). On February 12, 2004, ITA and Citizens filed a second joint motion requesting that the Commission take official notice of a February 10, 2004 Nebraska Public Service Commission order denying an ETC application filed by Nextel Partners. On March 9, 2004, this Commission granted Nextel’s motion, as well as the joint motions of ITA and Citizens. Order No. 29442.

On February 24th, 2004 Nextel filed a Supplemental Filing to Address the FCC’s *Virginia Cellular* Decision. April 2, 2004, Clear Talk also filed a supplemental brief to address the FCC’s *Virginia Cellular* Decision and to clarify the scope of its ETC request (“Clear Talk Supplemental Post-Hearing Brief”).

On April 7, 2004, ITA and Citizens filed a third joint notion requesting the Commission to take official notice of the Recommended Decision of the Federal-State Joint Board on Universal Service in Case No. 96-45, dated February 27, 2004. On April 19, 2004, ITA and Citizens filed a fourth joint motion requesting the Commission to take official notice of the FCC’s decision in, *In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*. This Commission granted ITA’s and Citizens’ third and fourth joint

motions on May 13, 2004. Order No. 29498.

On July 23, 2004, the Commission issued Order No. 29541 denying Clear Talk's Application. The Commission based its denial on the following rationales:

1. Clear Talk requested ETC designation only for the highest density, lowest cost exchanges and wire centers in its FCC-licensed service areas. Order No. 299541 at p. 17.
2. Clear Talk requested partial wire center designation in unidentified study areas of the incumbent rural telephone companies. Order No. 29541 at p. 18.
3. Clear Talk has been providing service in the rural areas it requests ETC designation since 2000 without USF subsidies. Order No. 29541 at p. 19.
4. Designating Clear Talk as an ETC would have a negative impact on the Universal Service Fund ("USF"). Order No. 29541 at p. 19.

II.

ARGUMENT FOR RECONSIDERATION AND REHEARING

Clear Talk believes that the Commission's decision is based on an inaccurate and incomplete review of the record before it, and is not supported by substantial evidence. Clear Talk will address each of the Commission's stated rationales for its decision, in turn, below.

A. Clear Talk Requested Designation As An ETC Throughout The Geographic Areas That Are Coterminous With Its FCC Basic Trading Area ("BTA") Licenses.

By law, Clear Talk cannot serve areas where it is not licensed by the FCC. Therefore, neither Clear Talk nor any wireless carrier can request ETC designation outside its BTA license area. The FCC has recognized this limitation as an exception to concerns regarding so-called "cream-skimming" or "cherry-picking". *Highland Cellular*, CC Docket No. 96-45, FCC 04-37 at ¶ 26, 2004 WL 770088 (2004).

Clear Talk testified that it was requesting ETC designation for all exchanges and all wire centers within its BTA licensed areas. Tr. p. 368, L. 24 – p. 370, L. 4.; p. 418, L. 24, - p. 419, L. 1; p. 420, LL. 4-11. In addition, to clarify any misunderstanding regarding the scope of its

application, Clear Talk filed a supplemental map with its Supplemental Post-Hearing Brief. That map clearly shows that all of Project Mutual's exchanges are within Clear Talk's BTA 451, for which it has committed to provide universal service throughout. Clear Talk Supplemental Post-Hearing Brief at 4; Exhibit A to Clear Talk Supplemental Post-Hearing Brief; Tr. p. 368, L. 24 – p. 370, L. 4.; p. 418, L. 24, - p. 419, L. 1; p. 420, LL. 4-11. The supplemental map also clearly shows that all of Citizens' Aberdeen and Springfield exchanges are within Clear Talk's BTA 202, for which it has committed to provide universal service throughout. *Id.* The map also shows that Citizens' Carey exchange is within Clear Talk's BTA 451, for which it has committed to provide universal service throughout. *Id.* The map also clearly shows that all Fremont Telecom exchanges are within Clear Talk's BTA 202, for which it has committed to provide universal service throughout. *Id.* As the map clearly shows, there is no instance where Clear Talk has declined to accept the responsibilities of an ETC for an exchange and/or wire center that falls within its FCC-determined BTA license areas.

Furthermore, apart from the self-serving, unsubstantiated testimony of Daniel Trampush, who testified on behalf of ITA and Citizens, there is no evidence in the record as to the population densities of the exchanges and/or wire centers that are within Clear Talk's BTAs. Thus, there is no support in the record for the Commission's finding that, "the population of these omitted exchanges and partial wirecenters compared to those that Clear Talk wishes to serve are widely disparate." Order No. 29541 at 17.

Clear Talk did not bid on its federally auctioned BTA licenses based on some grand scheme to cherry-pick the highest density, lowest-cost exchanges of the rural ILECs' study areas. Tr. p. 386, L. 17 – p. 387, L. 9. Clear Talk requested ETC designation throughout its federally licensed BTAs without regard to the relative profitability of the individual exchanges and/or wire

centers. Thus, there is no evidence in the record that Clear Talk's application is based on or motivated by "cream skimming". *Highland Cellular* at ¶ 26.

B. Clear Talk Requests the Opportunity, Upon Rehearing, to Provide Additional Evidence Regarding the Partial Wire Center Issue.

Although Clear Talk stated in the Direct Testimony of Glenn Ishihara that, to the extent any of its BTAs do not include an entire wire center it was requesting partial wire center designation, it does not appear that there is, in fact, any issue regarding a partial wire center designation. Clear Talk respectfully request the opportunity, upon rehearing, to provide the Commission with additional evidence to clarify any remaining uncertainty regarding the partial wire center issue.

Furthermore, in the *Highland Cellular* decision, cited by the Commission, the FCC did not use Highland Cellular's request for partial wire center designation as a basis for a wholesale denial of its ETC application. Rather, it simply denied Highland Cellular's application for ETC designation for any partial wire centers. *Highland Cellular* at ¶ 34. The FCC based this decision on its belief that an ETC should be required to serve an entire community. *Id.* at ¶ 33. Clear Talk's BTAs are coterminous with county lines, which the FCC noted typically include entire wire centers -- the minimum geographic area for ETC designation identified by the FCC in *Highland Cellular. Id.*

C. Clear Talk Cannot Expand its Rural Idaho Coverage into Higher- Cost Areas Without USF Support

As previously stated, Clear Talk's Application for ETC designation throughout its BTAs is not motivated by a desire to lower its costs in the areas it already serves. Rather, it intends to advance its deployment of wireless services into higher cost areas that it could not otherwise serve. Tr. p. 441, LL 8 – 15; Tr. p. 472, L. 14 – p. 473, L. 20. Where necessary, Clear Talk will

deploy services via the facilities of other facilities-based carriers. Tr. p. 356, LL. 16 – 20. Clear Talk’s services will include wireless local loop service, where necessary, to provide stronger transmitting and receiving capabilities than traditional mobile handsets. Tr. p. 356, L. 21 – p. 360, L. 2. With USF support, Clear Talk is committed to providing service throughout its federally licensed BTAs. Tr. p. 360, LL. 5 – 24.

The Commission’s denial of Clear Talk’s Application based on the theory that Clear Talk is already providing the service, therefore it doesn’t need USF support, misconstrues the record and serves to deny Idaho citizens in higher-cost service areas the benefit of universal wireless service.

D. Bringing Additional Universal Service Funds into Idaho is in Idaho’s Public Interest

In its “public interest” analysis pursuant to Section 214(e)(2) of the Telecommunications Act of 1996, the Commission is charged with weighing the relative costs and benefits of granting ETC designation to more than one carrier in a rural study area. 47. U.S.C. § 214(e)(2). At a minimum, that analysis should consider the benefits to rural Idaho consumers of universal wireless service in high-cost areas that will otherwise go unserved, as well as the benefits to Idaho’s rural economies through the increased flow of USF support into rural Idaho. The Commission’s decision, however, focused on an undefined, unquantified but admittedly “small” 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 or the very tangible benefit of bringing wireless service to unserved, high-cost areas. Order No. 29541 at 19. Rather than engaging in any meaningful weighing of the costs versus the benefits of granting Clear Talk’s ETC Application based on evidence in the record, the Commission simply adopted the dissenting opinion of FCC Commissioner Kevin J. Martin in *Highland Cellular*. Order No. 29541 at 19.

On the other hand, Commissioner Smith, while acknowledging a concern regarding the growth in demands on the federal USF, correctly noted in her dissent that the Commission's Section 214(e)(2) charge is to weigh the costs and the benefits of granting Clear Talk's ETC Application based on the current state of the law, as the FCC majority did in *Highland Cellular*. *Highland Cellular*, CC Docket No. 96-45, FCC 04-37 at ¶ 25, 2004 WL 770088 (2004).

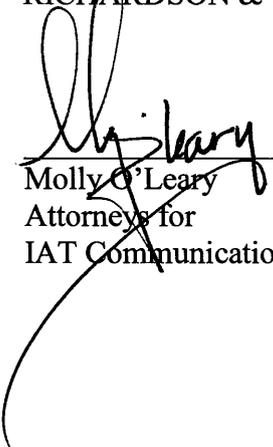
CONCLUSION

For the foregoing reasons, Clear Talk respectfully requests the Commission to reconsider its denial of Clear Talk's ETC Application, and requests an evidentiary hearing on any issue affecting Clear Talk's Application for which the Commission believes it currently has insufficient information.

In addition, Clear Talk reiterates its willingness to enter into a formal Stipulation to meet the competitive ETC designation standards enunciated by the FCC in *Virginia Cellular*. Clear Talk Supplemental Post-Hearing Brief at pp. 2 – 3.

RESPECTFULLY SUBMITTED, this 13th day of August, 2003.

RICHARDSON & O'LEARY, PLLC



Molly O'Leary
Attorneys for
IAT Communications, Inc. dba Clear Talk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2004, I caused a true and correct copy of the foregoing **PETITION FOR RECONSIDERATION AND REHEARING OF CLEAR TALK** to be served by the method indicated below, and addressed to the following:

Jean Jewell
Idaho Public Utilities Commission
472 West Washington Street
Post Office Box 83720
Boise, Idaho 83720-0074

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Dean J. Miller, Esq.
420 West Bannock
Post Office Box 2564-83701
Boise, Idaho 83702
(208) 336-6912 (Fax)
joe@mcdevitt-miller.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Philip R. Schenkenberg, Esq.
2200 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101
pschenkenberg@briggs.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Conley Ward
Givens Pursley LLP
277 North 6th Street, Suite 200
Post Office Box 2720
Boise, Idaho 83701
(208) 388-1300 (Fax)
<mailto:cew@givenspursley.com>

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Lance A. Tade, Manager
State Government Affairs
Citizens Telecommunications Company of
Idaho
4 Triad Center, Suite 200
Salt Lake City, UT 84180
ltade@czn.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Charles H. Creason, Jr.
President and General Manager
Project Mutual Telephone Cooperative
Association, Inc.
507 G Street
Post Office Box 366
Rupert, Idaho 83350

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Weldon Stutzman, Deputy AG
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83720-0074
(208) 334-3762 (Fax)
wstutzma@puc.state.id.us

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Clay Sturgis, Senior Manager
MOSS ADAMS LLP
601 Riverside, Suite 1800
Spokane, WA 99201-0063
clays@mossadams.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Morgan W. Richards, Esq.
P. O. Box 1632
Boise, Idaho 83701
mwrlaw@cableone.net

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

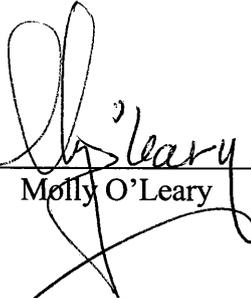
Mary S. Hobson
Stoel Rives LLP
101 S. Capitol Blvd, Suite 1900
Boise, Idaho 83702-5958
(208) 389-9040 (Fax)
mshobson@stoel.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Robert M. Nielsen
548 E Street
Post Office Box 706
Rupert, Idaho 83350

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- Electronic Mail

Signed: _____



Molly O'Leary