

**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. )**

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**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. 29292**

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On February 3, 2003 and April 28, 2003 respectively, IAT Communications, Inc. dba NTCH-Idaho, Inc. or Clear Talk and NPCR, Inc. dba Nextel Partners filed Applications requesting that the Commission designate them as "eligible telecommunications carriers" (ETC) in specific areas in southeastern Idaho. After reviewing the pleadings the Commission found it appropriate to process the Applications in a joint proceeding. Order No. 29240. In addition, the Commission decided to process the Applications by Modified Procedure under the Commission's Rules of Procedure. IDAPA 31.01.01.201-.204

On June 10, 2003, the Idaho Telephone Association (ITA) filed a Protest, objecting to the use of Modified Procedure to process this case. See Order No. 29240. ITA requested instead that the Commission schedule this joint proceeding for a full evidentiary hearing. Applicants Nextel Partners and Clear Talk filed responses on June 16 and 20, 2003, respectively. Each Company stated no opposition to ITA's request for an evidentiary hearing.

On June 17, 2003, Citizens Telecommunications Company of Idaho, Potlatch Telephone Company, CenturyTel of Idaho and CenturyTel of the Gem State (Citizens and the Protestants) filed joint Protests, Comments and a Motion for Stay.<sup>1</sup> Citizens' and Protestants' Motion for Stay was filed pursuant to Commission Rules of Procedure 203 and 324. IDAPA 31.01.01.203 and .324 and no oral argument was requested. ITA filed its response in support of

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<sup>1</sup> The Commission granted intervention to Citizens in this case. See Order No. 29248. The remaining companies, Potlatch Telephone Company, CenturyTel of Idaho and CenturyTel of the Gem State, state they did not attempt to intervene because Clear Talk and Nextel Partners have not sought ETC status in their service territories. However, they contend they are rural telephone companies and any Commission decision on these ETC Applications will affect them in the future.

Citizens' and Protestants' Motion for Stay on June 26, 2003. Nextel Partners and Clear Talk filed responses in opposition to the granting of a stay on June 26, 2003.<sup>2</sup>

After reviewing the pleadings regarding these matters, the Commission denies Citizens' and Protestants' Motion for Stay and grants ITA's request for an evidentiary hearing for the reasons discussed below.

## **REQUEST FOR STAY**

### **1. Request for Stay and ITA's Support**

Citizens and Protestants have requested a stay until such time as the Federal Communications Commission (FCC) issues a ruling in its Docket No. 96-45. They contend that a decision by the FCC is anticipated towards the end of 2003 or the beginning of 2004. Citizens and Protestants allege that not staying this proceeding could lead to several problems. For example, they contend that competitors requesting ETC status in Idaho might end up being judged by two entirely different sets of criteria—the existing test and a different test after the FCC issues its order. They posit this could result in an unfair advantage as to one or more competitive ETCs and/or a disadvantage to one or more incumbent local exchange carriers. In addition, they allege that the amount of any potential universal service support may change thereby affecting a decision to apply or withdraw. Finally, they allege that from the standpoint of efficiency and costs, changes at the FCC level may even make the Idaho proceeding unnecessary.

On June 26, 2003, ITA filed its support for Citizens' and Protestants' Motion. ITA alleges that Docket No. 96-54 amounts to a complete re-evaluation of both substantive and procedural requirements for participation in the Federal Universal Service Fund. ITA states that at least one FCC Commissioner has already raised the issue of whether applicants such as Nextel Partners and Clear Talk should receive ETC designations in rural telephone company study areas. *See* ITA Protest at 7. Under these circumstances, ITA states it is in the public interest for the Commission to stay these proceedings pending the FCC's decision.

### **2. Clear Talk and Nextel Partners' Responses**

Clear Talk alleges that pursuant to the Commission's Rules of Procedure the "Protestants" are not parties to this proceeding. *See* Response at 1-2, citing Commission Rules

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<sup>2</sup> The Commission notes that the pleadings filed by the parties and Protestants in this case also address substantive issues that cannot be resolved until the record is further developed.

of Procedure 31-37. Therefore, Clear Talk contends they are not entitled to “appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions” or otherwise participate in hearings or arguments. Thus, Clear Talk requests that the “Protest, Comments and Motion for Stay” filed on behalf of the Protestants be stricken from the record. Response at 2.

Clear Talk also argues that Citizens’ Motion must be denied because granting it would result in regulatory gridlock. In other words, staying all state proceedings based on the possibility that federal law might change because of a pending FCC proceeding that has similar issues is inappropriate. Clear Talk asserts that delivery of universal wireless service to rural Idaho consumers should not be delayed on mere speculation that the current law may change at some indefinite point in the future. Clear Talk alleges that it has already committed to providing universal services in the areas noted in its Application and has been granted ETC designation in Qwest-served exchanges in Idaho. *See* Order No. 29261. Clear Talk also contends that the only issue for the Commission to consider now is whether designation of Clear Talk as an ETC in rural exchange areas is in the public interest. Clear Talk further argues that the law is clear that the Commission does not need to wait for FCC action to make that determination. Finally, Clear Talk alleges that Citizens does not have standing to raise the argument that a subsequent change in FCC policy would lead to an unfair advantage to one or more competitive ETCs. Clear Talk requests that the Commission deny Citizens’ request for a stay.

Nextel Partners argues that Protestants’ protest and comments must be summarily rejected because they lack standing under Commission Rule of Procedure 203. Specifically, Nextel Partners contends that the Protestants admit they will not be affected by the granting of the Applications in this case because their service territories are not implicated. Thus, Nextel Partners asserts that they do not meet the requirement of Rule 203 that states in pertinent part that protests or comments may be filed only by “[a]ny person affected by the proposal of the moving party[.]”

Nextel Partners also states that the FCC has to date issued 25 Reports and Orders addressing universal service issues and has never suggested that a state commission stay its consideration of ETC applications pending future FCC pronouncements. To the contrary, Nextel Partners quotes language from the FCC’s *Twenty-Fifth Order on Reconsideration, Report and Order* in Docket No. 96-45 that encourages state commissions to continue to act expeditiously on

applications from companies requesting ETC status. *In the Matter of Federal-State Joint Board on Universal Service, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 03-115, 2003 WL 21195264, ¶ 26 (rel. May 21, 2003).

Nextel Partners also contends that the request for stay is based on speculative concerns that do not warrant delaying the processing of these Applications. Nextel Partners states that it is committed to complying with any and all obligations the FCC presently or in the future may require of an ETC in the provision of universal service. Consequently, the Commission should not delay this proceeding because the FCC may in some undefined way and at some unspecified time impose new or different criteria or obligations concerning the designation of federal ETCs. This, Nextel Partners alleges, would prevent any competitive provider from becoming eligible to receive support from the federal USF fund and therefore substantially frustrate the Act's twin goals of promoting competition and preserving and advancing universal service. In addition, Nextel Partners states that Citizens' and Protestants' feigned concern for its competitors is plainly disingenuous and should be ignored.

Finally, Nextel Partners alleges that under well-established Idaho law, the Commission must apply the substantive administrative rules in effect at the time a proceeding is commenced. *See Canal/Norcrest/Columbus Action Committee v. City of Boise*, 137 Idaho 377, 48 P.3d 1266 (2002). Thus, the Company contends that to the extent a subsequent FCC ruling may cause the Commission to commence its own rulemaking procedure to promulgate or modify its rules governing the designation of federal ETCs, such rules could not be retroactively applied and are therefore irrelevant to the Applications currently pending before the Commission. Nextel Partners concludes that the Commission should deny Citizens' and Protestants' Motion for Stay.

### **3. Commission Decision**

As a preliminary matter the Commission notes that Potlatch Telephone Company, CenturyTel of Idaho and CenturyTel of the Gem State did not seek to intervene in this proceeding. Accordingly, Protestants do not have the rights of a party pursuant to Commission Rule of Procedure 38. IDAPA 31.01.01.038. *See also* IDAPA 31.01.01.031.

In regard to the Motion to Stay, pursuant to Rule 324 of the Commission Rules of Procedure:

Any person may petition the Commission to stay any order, whether interlocutory or final. Orders may be stayed by the judiciary according to statute. The Commission may stay any order on its own motion.

IDAPA 31.01.01.324. Accordingly, the Motion for Stay filed by the Citizens and the Protestants is appropriate. In considering this Motion we thoroughly reviewed the record in this case, the statutory framework for review of ETC Applications and FCC Docket No. 96-45 as it pertains to ETCs.

The Idaho Legislature has given the Commission the “full power and authority to implement the federal telecommunications act of 1996[.]” *Idaho Code* § 62-615. The Telecommunications Act of 1996 provides that state commissions may designate common carriers as ETCs. 47 U.S.C. §§ 214(e)(2) and 254. In regard to FCC Docket No. 96-45, Citizens and Protestants correctly point out that the FCC is considering issues that relate to ETCs. Specifically, the FCC directed the Federal-State Joint Board on Universal Service (Joint Board) to “review certain of the Commission’s rules relating to the high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled.”<sup>3</sup>

As the moving party, Citizens and Protestants have the burden of demonstrating that their Motion for Stay should be granted. *See generally* Order No. 17436. The Commission finds in general that the Motion rests largely on speculative concerns related to the FCC proceeding. The Commission finds that these concerns are outweighed by the FCC’s actions in this Docket. The FCC has explicitly encouraged state commissions to continue to expeditiously process ETC Applications:

We decline to adopt a rule at this time that would require state commissions to resolve the merits of any request for designation under section 214(e) within six months or some shorter period. We conclude that such action is unnecessary at this time. In so doing, we note that a number of ETC designation requests pending at the time of release of the Twelfth Report and Order and Further Notice have been resolved by state commissions. We commend these state commissions for resolving those designation requests. We continue to encourage state commissions to act with the appropriate analysis yet as expeditiously as possible on all such requests. In addition, we note that a state's action on ETC designation requests may be reviewed under section 253 as a potential barrier to entry. Although we continue to

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<sup>3</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 8, 2002) (*Referral Order*).

encourage states to address such requests in a timely manner, we find no need for further action at this time.

*In the Matter of Federal-State Joint Board on Universal Service, Twenty-Fifth Order on Reconsideration, Report and Order*, FCC 03-115, 2003 WL 21195264 (rel. May 21, 2003) (emphasis added) (footnotes omitted). In addition to this encouragement, the Commission has not found directives in this Docket by the FCC or the Joint Board that order or suggest that states should stay consideration of ETC Applications.

Citizens and Protestants also correctly point out that comments and reply comments concerning the questions raised by the Joint Board and FCC were due on May 5, 2003 and June 3, 2003. *Proposed Rule, Federal Communications Commission*, 47 C.F.R. Part 54, 68 FR 10429-01 (March 5, 2003). However, no deadline has been established for the Joint Board to make its recommendations to the FCC. Furthermore, once recommendations are made no substantive change in the law will occur until the FCC enters its Order. It is unclear from the record in Docket No. 96-45 when or if an Order will be entered let alone what it will contain. Based on this uncertainty the Commission finds that it would be unfair to Nextel Partners and Clear Talk to stay these proceedings.

Based on the foregoing, the Commission finds that Citizens and Protestants have failed to carry their burden to demonstrate that these proceedings should be stayed. Accordingly, the Motion for Stay is denied.

#### **REQUEST FOR AN EVIDENTIARY HEARING**

##### **1. ITA's Protest**

In support of its protest and request for evidentiary hearing the ITA alleges that in order to be designated as an ETC a carrier must provide universal service offerings "throughout the service area for which the designation is received." *Protest* at 2, quoting 47 U.S.C. § 214(e)(1). ITA also contends that in areas served by rural telephone companies, "service area" means the company's "study area." *See* 47 U.S.C. § 214(e)(1). ITA states that a comparison of Applicants' coverage area maps with the rural telephone companies' service maps on file with the Commission demonstrates that they cannot meet the service area requirement for ETC designation. Thus, ITA argues that on the face of the pleadings each Application fails to meet the requirements for designation as an ETC in rural telephone company study areas. ITA contends these misstatements call Clear Talk's and Nextel Partners' Applications into question.

ITA also states that it has doubts that the Applicants are providing service within rural telephone companies areas in accordance with applicable legal requirements and Commission policies.

Next, ITA contends that the Telecommunications Act of 1996 requires a finding by the Commission that designation of additional ETCs in rural telephone companies' service areas is in the public interest. 47 U.S.C. § 214(e)(2). ITA contends that both Applicants point to competition with incumbent local exchange providers as the primary advantages to be derived from their Applications. However, ITA alleges that there has been no showing by either Applicant that, in the case of rural telephone company study areas, additional competition needs to be subsidized by the federal Universal Service Fund or that such subsidization would be in the public interest. ITA contends that the available evidence is to the contrary. Thus, ITA contends granting the Applicants' request for ETC status in rural telephone companies' service areas would be contrary to the public interest.

Based on the foregoing, ITA requests that the Commission order a full evidentiary hearing, including discovery, to determine whether the Applicants should be granted ETC status requested in the rural telephone companies' service areas as designated by the Applications.

## **2. Clear Talk's and Nextel Partners' Response**

On June 16, 2003, Nextel Partners filed a response to ITA's protest. First, the Company does not oppose ITA's request for a hearing, and states that it looks forward to the opportunity to demonstrate to the Commission why its Application should be granted. Second, Nextel Partners states that it strongly disagrees with ITA's claims that Nextel Partners' Application is deficient and with its assertion of what standard the Commission must apply to it.

On June 20, 2003, Clear Talk filed its response to ITA's protest. Clear Talk does not oppose ITA's request for a hearing and welcomes the opportunity to demonstrate its ability and intent to fulfill the role of an ETC in the service areas in southeast Idaho that it has listed in its Application. Clear Talk, like Nextel Partners, also strongly disagrees with ITA's arguments regarding its ability to meet the qualifications necessary to be designated as an ETC by the Commission in the specific areas listed in its Application.

## **3. Commission Decision**

The Commission finds that ITA's protest and request for evidentiary hearing raise valid questions of both fact and law that are disputed by Nextel Partners and Clear Talk. The Commission finds that further development of the record is necessary to resolve these disputes

and ultimately reach a decision on the merits of Clear Talk's and Nextel Partners' Applications. In addition, the record needs further development because these Applications raise questions of first impression in Idaho. Thus, to develop the record more fully the Commission finds that it must hold an evidentiary hearing on the merits of these Applications rather than by processing this case by Modified Procedure (i.e., by written submissions). Accordingly, the Commission grants ITA's request for an evidentiary hearing.

In order to establish a schedule for this joint proceeding the Commission directs counsel for the Commission Staff to arrange an informal conference/teleconference with the parties. At this conference the Commission directs the parties to establish and then submit to the Commission a proposed schedule for addressing all relevant matters in this case.

#### **ORDER**

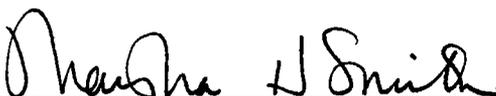
IT IS HEREBY ORDERED that Citizens' and Protestants' Motion for Stay is denied.

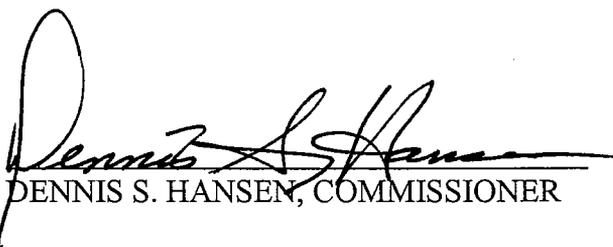
IT IS FURTHER ORDERED that the Idaho Telephone Association's Request for an Evidentiary Hearing is granted.

IT IS FURTHER ORDERED that the Commission directs counsel for the Commission Staff to arrange an informal conference/teleconference with the parties. At this conference the Commission directs the parties to establish a proposed schedule for addressing all relevant matters in this case. Once the parties agree upon a schedule the Commission directs counsel for the Commission Staff to submit it for our review and possible adoption.

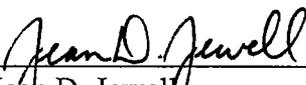
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21<sup>st</sup>  
day of July 2003.

  
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PAUL KJELLANDER, PRESIDENT

  
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MARSHA H. SMITH, COMMISSIONER

  
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DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
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Jean D. Jewell  
Commission Secretary

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