

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye  
Marshall Johnson  
Ken Nickolai  
Phyllis A. Reha  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of NPCR, Inc. d/b/a Nextel  
Partners for Designation as an Eligible  
Telecommunications Carrier Under 47 U.S.C.  
§214(e)(2)

ISSUE DATE: December 1, 2003

DOCKET NO. PT-6200/M-03-647

ORDER DENYING WITHOUT PREJUDICE  
NEXTEL'S APPLICATION FOR ETC  
DESIGNATION

**PROCEDURAL HISTORY**

On April 25, 2003, NPCR, Inc. d/b/a Nextel Partners (Nextel) submitted its original filing asking the Commission to designate it as an eligible telecommunications carrier (ETC) for the purpose of receiving support from the federal universal service fund.

On May 5, 2003, Citizens Telecommunications Company of Minnesota, Inc. (Citizens) and the Minnesota Independent Coalition (MIC) filed challenges to the completeness of Nextel's petition. Nextel responded to the challenges on May 12, 2003.

By May 15, 2003, the Commission had received comments from Citizens and the Minnesota Department of Commerce (the Department). The parties argued that Nextel's filing is inadequate.

On July 17, 2003, the Commission met to act on Nextel's petition. Following discussions with the other parties, Nextel agreed at the Commission meeting to file supplemental information concerning its service offerings, facilities and advertising plan. Nextel also agreed that the 180-day timeline would begin upon its making a supplemental filing. The Commission agreed to defer consideration of Nextel's ETC petition until the record was more fully developed.

On July 28, 2003, Nextel submitted a supplemental filing to the pending petition.

On August 18, 2003, the Department and Citizens filed comments.

On August 20, 2003, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS AND VARYING TIME PERIOD.

On August 28, 2003, MIC and Nextel filed reply comments.

The Commission met on October 23, 2003 to consider this matter.

## FINDINGS AND CONCLUSIONS

### **I. NEXTEL'S PETITION**

Nextel asked the Commission to designate it an eligible telecommunications carrier (ETC) so that it can receive financial support from the federal universal service fund. Nextel stated that the requirements for ETC designation are set forth in 47 U.S.C. § 214(e)(1)-(2), 47 C.F.R. § 54.101, and Minn. Rules, Part 7811.0100, subp. 15. The Company argued that it met all the requirements for designation. Specifically, Nextel asserted that (1) it is a common carrier as required by 47 U.S.C. § 214(e)(1), (2) it provides each of the supported services identified by the Federal Communications Commission (FCC), and (3) it will meet all service and advertising obligations of an ETC.

On May 12, 2003, Nextel replied to Citizens' and MIC's objections that Nextel's petition was incomplete for failure to provide certain information. Nextel maintained that its petition was complete because it provided the items listed in the relevant rule, Minn. Rules, Part 7811.1400, subp. 4. While Nextel acknowledged that in two previous ETC cases the Commission had requested the additional items cited by MIC and Citizens it argued that this did not mean that these items were now filing requirements. Nextel stated that although it was not required to do so, it would voluntarily provide some of the information mentioned by MIC and Citizens: information regarding its service offerings, facilities, and advertising plan.

On July 28, 2003, Nextel supplemented its petition. The Company 1) clarified that Nextel Partners and Nextel Communications jointly market the "Nextel" brand name throughout their national service area; 2) argued that while it does not offer a service comparable to other ETCs' universal service offering, all of its conventional service plans qualify for universal service funding because they contain the nine supported services and are priced to rural customers at the same competitive price charged by Nextel Communications in the metro areas; 3) described its Minnesota facilities and service area; 4) submitted its advertising plan and discussed its commitment to advertise its service offerings throughout its Minnesota service area; 5) provided its standard custom service agreement; and 6) reaffirmed its arguments why designating it an ETC will benefit the public.

### **II. THE LEGAL STANDARD**

Applications for ETC status are governed by federal and state law.<sup>1</sup> Section 214 of the Telecommunications Act of 1996 requires an ETC to offer certain designated services throughout

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<sup>1</sup> 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400. The fact that this Order analyzes and denies the petition based on provisions of the federal law does not negate the fact that there are also state standards and conditions to bring to bear on a petition for ETC status. For instance, while 47 U.S.C. § 214(e)(2) requires a public interest finding only when an applicant seeks ETC designation in an area served by a rural telephone company, Minn. Rules, Part 7812.1400, subp. 2 requires a public interest determination when a CLEC seeks ETC status in areas served by non-rural as well as rural telephone companies. See *In the Matter of the Petition of WETEC LLC dba Unitel Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5614/M-03-1051, ORDER (November 26, 2003).

its ETC-designated service area, use its own facilities or a combination of its own facilities and resale of another carrier's service in providing these services, and advertise the availability and price of these services.<sup>2</sup> While the list of designated services may change over time,<sup>3</sup> FCC rule § 54.101(a) currently designates the following services:

1. voice grade access to the public switched network
2. local usage
3. touch-tone service or its functional equivalent
4. single-party service
5. access to emergency services, including 911 and enhanced 911
6. access to operator services
7. access to interexchange services
8. access to directory assistance
9. toll limitation for qualifying low-income customers

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.<sup>4</sup>

An applicant for ETC status must make several showings before it is deemed eligible for ETC status under the Act. These requirements are found in 47 U.S.C. § 214(e). First, the applicant must be a common carrier. Second, the applicant must offer the services that are supported by federal universal service support mechanisms under 47 U.S.C. § 254(e). Third, the applicant must do so either using its own facilities or a combination of its own facilities and resale of another carrier's services. Fourth, the applicant must offer the identified services throughout the service area for which the designation is received. Fifth, the applicant must advertise the supported services and charges therefor throughout the service area for which the designation is received using media of general distribution.<sup>5</sup>

Once a state commission determines that an applicant meets these five requirements, the applicant is entitled to receive ETC status unless the applicant is seeking to serve exchanges in which the incumbent local exchange carrier is a rural telephone company. If the applicant is seeking ETC status in an area served by a rural telephone company, the state commission must make an additional finding that the designation is in the public interest.

### **III. COMMISSION'S ANALYSIS AND ACTION**

The Commission is required to confer ETC status on Nextel if it finds that the Company meets the requirements of 47 U.S.C. 214(e)(1)(A) and (B) and, since Nextel seeks designation in areas served by rural telephone companies, the public interest standard of 47 U.S.C. 214(e)(2).

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<sup>2</sup> 47 U.S.C. § 214(e)(1).

<sup>3</sup> 47 U.S.C. § 254(c)(1).

<sup>4</sup> 47 U.S.C. § 214(e)(6).

<sup>5</sup> These five requirements are established in 47 U.S.C. § 214(e)(1).

Having reviewed the record developed in this matter and heard the parties' oral arguments, the Commission finds that Nextel has failed to meet the service and advertising requirements of 47 U.S.C. § 214(e)(1), as explained more fully below.

**A. Requirement to “Offer Services” Throughout the Service Area**

An ETC must offer the services that are supported by federal universal support mechanisms under section 254(e)(1) throughout the service area for which the designation is received.<sup>6</sup> The FCC has advised in a Declaratory Ruling that a carrier requesting ETC status is not required to provide ubiquitous service at the time of its application.<sup>7</sup> In the same Ruling, however, the FCC clarified that applicants must support their assertions of ability and willingness to provide service throughout the service area with credible evidence:

We caution that a demonstration of the capability and commitment to provide service 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.<sup>8</sup>

In this case, Nextel has not adequately supported the assertion in its verified petition that it will meet all service obligations of an ETC. Nextel has acknowledged that there were large areas of its service area that it cannot serve at present. The Company presented no plan for expanding its service capabilities and simply stated that receipt of the universal service funding would change (in unspecified ways) the economic model that might (no guarantee or analysis to show reasonable likelihood) make expansion (of unspecified extent) into some (unspecified) areas possible. The extent to which the economic model would change was not specified. No guarantee of expansion or analysis was provided to demonstrate the likelihood of expansion. No areas were identified for expansion. At the same time, the Company stated that the cost of installing one additional signal tower was approximately \$250,000 to \$300,000 and that the annual revenue initially anticipated from the universal service fund is approximately \$100,000.

In these circumstances and based on this record, therefore, the Commission finds that Nextel has failed to demonstrate that it is willing and able to serve “throughout the service area for which the designation is received . . .” as required of an ETC by 47 U.S.C. § 214(e)(1).<sup>9</sup>

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<sup>6</sup> 47 U.S.C § 241(e)(1).

<sup>7</sup> *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*, Declaratory Ruling, CC Docket 96-45, FCC 00-248, 15 FCC Rcd at 15175, Paragraph 17 (August 10, 2000) (Declaratory Ruling).

<sup>8</sup> Declaratory Ruling, Paragraph 24.

<sup>9</sup> In its July 31, 1998 Order in Docket No. P-5508/M-98-561, the Commission denied a petition for ETC status by Crystal Communications, a Minnesota competing local exchange company (CLEC), on the basis that the record in the case was insufficient to conclude that the applicant would offer the required services throughout the service area for which the designation

**B. Requirement to Advertise the Supported Services Throughout the Service Area**

An applicant must also be willing and able to **advertise** the availability of and the charges for the services that are supported by the federal universal service support mechanisms 1) throughout the service area for which ETC designation is sought and 2) using media of general distribution.<sup>10</sup>

In its petition filed April 24, 2003, Nextel stated that it would advertise the availability of the supported services and charges therefor using media of general distribution. Nextel stated that after being designated an ETC, it would continue to advertise its services in designated areas and work with the Department to develop an advertising plan consistent with what other ETCs implemented.

The Department objected that Nextel did not include an advertising plan nor had it provided detail regarding its plans specifically to advertise its universal service offering(s) and the availability of Lifeline and Link-Up for qualifying customers, either to advertise the availability of a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

In its May 12, 2003 reply to MIC's and Citizens' challenge to the completeness of its petition, Nextel stated that it would file supplemental information, including an advertising plan. On July 28, 2003, it filed supplemental information, including a document entitled Advertising Plan of NPCR, Inc.

On August 18, 2003, the Department argued that the advertising information provided by Nextel was inadequate. The Department stated that Nextel had failed to provide a plan to advertise a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

The Commission finds that Nextel fails to meet the advertising requirement of 47 U.S.C. § 214(e)(1)(B) because it has not submitted an advertising plan adequate to demonstrate its intent and ability to advertise the availability of the nine supported services throughout its proposed service area. In light of the Company's inability to serve throughout its requested area, as found above, Nextel's assertion that it will advertise throughout the area as required by law is not an adequate substitute for submitting an actual advertising plan whose scope and detail demonstrates the Company's intent and capability to advertise the availability of the nine supported services throughout its proposed service area.

Because the Nextel application fails the "advertise" requirement of 47 U.S.C. § 214(e)(1)(B) for reasons explained in the preceding paragraph, it is unnecessary to reach the further issue whether it

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was requested. *In the Matter of Crystal Communications' Petition to Become an Eligible Telecommunications Carrier*, Docket No. P-5508/M-98-561, ORDER GRANTING IN PART, DENYING IN PART, STATUS AS ELIGIBLE TELECOMMUNICATIONS CARRIER ( July 31, 1998), at page 5.

<sup>10</sup> 47 U.S.C. § 214(e)(1).

also fails that requirement because it did not include an advertising plan for a basic affordable universal service offering.<sup>11</sup>

### **C. Affordability: a Public Interest Consideration**

To date, Nextel has refused to offer, let alone advertise, a particular universal service offering as distinguished from any of its other service offerings. Nextel has asserted that requiring an applicant to offer a lower cost “affordable” rate would be impermissible rate regulation. Nextel argued that although offering and advertising such a service (a separate and distinct lower cost universal service offering) was the way that past applicants<sup>12</sup> have chosen to meet the “offer and advertise” requirements of 47 U.S.C. § 214(e), the law does not require that an applicant make such an offering in order to qualify for ETC status. In addition, Nextel asserted that there are no standards on what can be considered affordable and nothing in the record to indicate that Nextel’s offerings were not affordable.

Nextel stated that, even though it offered no particularized lower cost universal service offering, each of its regular, nationally offered and advertised offerings provide all the required functionalities, i. e., the nine supported services listed by the FCC in 47 C.F.R. § 54.101(a). As a consequence, Nextel argued, offering its nationally offered set of services meets the “offer” requirement of 241(e)(1)(A) and advertising those services meets the “advertise” requirement of 241(e)(1)(B).

The Department countered that in the context of ETC designation for receipt of public funds requiring an applicant to offer at least one “affordable” (in the sense of “lower cost”) service that contains some level of local service does not constitute prohibited rate regulation. The Department cited 47 U.S.C. 254(i):

The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

The Department noted that the FCC rules permit a state commission to designate additional qualifying ETCs for areas served by a rural telephone company only if the state commission finds that the designation of more than one carrier is in the public interest. The Department noted that the FCC has not defined the public interest factors that the state Commission may or should consider when designating an additional ETC in a rural service area. According to the Department,

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<sup>11</sup> Not reaching the affordability issue at this time in the context of the advertising requirement is also appropriate because, as explained next in section C, affordability is a public interest consideration which is reached only if Nextel’s next application for ETC status meets the threshold ETC requirements of 47 U.S.C. 214(e)(1)(A) and (B).

<sup>12</sup> Western Wireless Corporation (fka Minnesota Cellular Corporation) in Docket No. P-5695/M-98-1285; Tekstar Communications, Inc. in Docket No. P-5542/M-01-1865; Midwest Wireless Communications, L.L.C. in Docket No. P-573/AM-02-686; and RCC Minnesota, Inc. and Wireless Alliance, LLC (filing jointly as affiliates of Rural Cellular Corporation) in Docket No. PT-6182, 6181/M-02-1503.

however, there can be no doubt that affordability is a public interest factor. The Department noted that state Commissions have been given the primary role in evaluating the affordability factor. The Department cited the following FCC statement:

We agree with the [Federal-State] Joint Board [on Universal Service] that states should exercise initial responsibility, consistent with the standards set forth above, for determining the affordability of rates. . . . As the Joint Board determined, the unique characteristics of each jurisdiction render the states better suited than the Commission to make determinations regarding rate affordability.<sup>13</sup> [Bracketed material added.]

Based on the parties' arguments and a review of the statutory and regulatory framework, the Commission finds that affordability is an appropriate public interest factor to consider during any public interest evaluation of an application from Nextel.

The public interest evaluation of an application such as Nextel's, however, is properly conducted **after** the applicant is found to have met the threshold statutory requirements of 47 U.S.C. § 214(e)(1).<sup>14</sup>

As noted previously in this Order, Nextel has not met all those requirements. Therefore, the public interest factors applicable to Nextel's application (which include affordability and service quality) are not ripe for consideration at this time. Accordingly, the Commission will make no findings at this time whether, for example, the public interest requires Nextel to provide, as the Department has argued, at least one affordable lower cost alternative service offering that includes some level of local calling.

#### IV. LOOKING AHEAD

The denial of Nextel's application will be without prejudice. In the event that Nextel refiles with new information that persuades the Commission that it meets the threshold requirements of

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<sup>13</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, "Report and Order," 12 F.C.C. Rcd 8776 (rel. May 8, 1997) ¶ 108 aff'd in part and reversed in part, *Texas Office of Pub Utility Counsel v. FCC* 183 F.3d 393 (5th Cir. 199) ¶ 118.

<sup>14</sup> Analysis under 47 U.S.C. § 214(e) of applications for ETC status in an area served by a rural telephone is a two step process. The first step is to determine whether the applicant meets the threshold statutory requirements of 47 U.S.C. § 214(e)(1)(A) and (B). If so, the second step is to determine whether the applicant satisfies the public interest standard of 47 U.S.C. § 214(e)(2). The two-step analysis followed by the Commission in this Order is consistent with the approach used by the Administrative Law Judge (ALJ) and by the Commission in the two most recent ETC applications: *Midwest Wireless Communications*, Docket No. PT-6182, 6181/M-02-1503 and *RCC Minnesota, Inc./Wireless Alliance*, Docket No. PT6153/AM-02-686.

47 U.S.C. § 214(e)(1)<sup>15</sup>, the Commission will undertake the public interest evaluation of that application.

An applicant for ETC designation bears the burden of proof on all the federal and state requirements and considerations applicable to its application. Information adequate to meet the filing requirements on Minn. Rules, Part 7811.1400, subp. 4 is not necessarily adequate to meet the applicant's burdens of proof and persuasion on all issues relevant to the application. An applicant, therefore, is advised to build a complete record containing much information beyond the Commission's filing requirements.

In previous proceedings involving applications for ETC designation in areas served by rural telephone companies, the Commission has directed applicants to provide several specific items beyond what was required to meet the initial filing requirements.<sup>16</sup> With no attempt to be comprehensive, the Commission has listed in footnote 14 two informational items relevant to meeting the Phase 1 threshold requirements.<sup>17</sup> The Commission believes that the following information would be relevant to the public interest evaluation:

1. a detailed description of a basic universal service offering or affordable alternative or an explanation of why it would be in the public interest to give an applicant access to universal service funding if that applicant does not offer an affordable lower cost service that specifically preserves and advances universal service;
2. a tariff or price list showing the list, prices and terms of offered services including local usage levels and calling areas for which the applicant seeks universal service support, including the terms and rates for the basic universal service package, along with references to Lifeline and Link-Up and other services which may be added to the basic universal service package;

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<sup>15</sup> Information relevant to those determinations would include 1) an advertising plan specific to a basic universal service offering, the nine-supported services, and the availability of Lifeline and Link-Up for qualifying customers and 2) a list of facilities used to provide services in the area in which Nextel seeks certification.

<sup>16</sup> In addition, in its Order designating each of Minnesota's incumbent local exchange companies (ILECs) as ETCs, the Commission required each ETC to submit an advertising plan, including a description of available services and their rates; the geographic area where those services are available; the medium of publication of the advertising, including the names of, and geographic areas served by, the newspapers in the plan, and the size and the type of the advertising. *In the Matter of the Request by Members of MIC for Designation as an Eligible Telecommunications Carrier and Temporary Suspension of Certain Toll Restrictions* and *In the Matter of the Requests by Other Incumbent LECs for ETC Designations*, Docket No. P-999/M-97-1270, ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS (December 23, 1997).

<sup>17</sup> The Phase 1 threshold requirements appear in 47 U.S.C. § 214(e)(1)(A) and (B).

3. a customer service agreement that defines a service quality plan consistent with the Company's claim to provide high quality services, including dispute resolution policies, network maintenance policies, procedure for resolving service interruptions, any customer remedies offered, and Nextel's billing, payment, and deposit policies;
4. a list of and Nextel's commitment to its federal obligations regarding its service area;
5. information typically gathered from ETCs in the annual certifications;
6. description of the process the Company will use to track and make available to the Commission and the Department, upon request, the following: (a) held orders for customer premises equipment and for either the basic universal service plan or any services the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A) for more than 30 days and (b) customer complaints or disputes related to service quality, including reports of interrupted service for the basic universal service plan and for any service the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A).

This Order will not contain a directive for Nextel to include any particular information with its next application because to do so would be premature. Moreover, the Department, any intervening party, and Commission Staff can submit Information Requests to the Company for any information they deem relevant. As in previous proceedings, however, it is unlikely that the Commission will begin the 180 day processing period prescribed in Minn. Rules, Part 7811.1400, subp. 12 until the information referenced has been filed.<sup>18</sup>

### **ORDER**

1. Nextel's application for designation as an eligible telecommunications carrier (ETC) for the purposes of receiving universal service funding is denied without prejudice.

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<sup>18</sup> The Commission took this view in the two most recent ETC proceedings. See *In the Matter of the Petition by RCC Minnesota, Inc. and Wireless Alliance, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182/M-02-1503, ORDER REQUIRING ADDITIONAL FILING, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (November 4, 2002) at pages 4 and 9; and *In the Matter of the Petition by Midwest Wireless Communications, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. P-573/AM-02-686, ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (July 5, 2002) at pages 3-5 and 8.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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