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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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COMMISSION
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In the Matter of)
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Federal-State Joint Board on)
Universal Service)
)
NPCR, Inc. d/b/a/ NEXTEL PARTNERS)
)
Petition for Designation as)
Eligible Telecommunications Carrier)
in the State of Florida)

CC Docket No. 96-45

COMMENTS

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February 2, 2004

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COMMENTS

Frontier Communications of the South, Inc. (“Frontier”), GTC, Inc., d/b/a GT Com (“GT Com”), Smart City Telecommunications, LLC d/b/a Smart City Telcom (“Smart City”), and TDS Telecommunications, Inc., parent company of Quincy Telephone Company, (“TDS Telecom”) (collectively, the “Rural ILECs”) file these comments to urge the Commission to deny or delay consideration of the petition of NPCR, Inc. d/b/a Nextel Partners (“Nextel”) for designation as an eligible telecommunications carrier (“ETC”) entitled to receive universal service support in certain rural and non-rural telephone service areas in Florida.¹ Significant issues concerning the ETC designation process and its impact on the viability of the Universal Service Fund (“Fund”) currently are pending before the Federal-State Joint Board on Universal Service (“Joint Board”). Although the Commission recently granted ETC designation to a

¹ See NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, Petition, CC Docket No. 96-45, at 7-9 (Sept. 16, 2003) (Public Notice rel. Dec. 30, 2003) (“Nextel Petition”).

cellular carrier serving rural areas in Virginia,² the Rural ILECs agree with Commissioner Martin's dissenting opinion that the Commission should refrain from granting petitions for competitive ETC designation in rural areas until the issues before the Joint Board have been resolved. If the Commission does reach the merits of the *Nextel Petition* at this time, the Commission should deny the petition because it fails to satisfy the requirements set forth in *Virginia Cellular*.

I. INTRODUCTION AND SUMMARY

The *Nextel Petition* seeks ETC designation in certain rural and non-rural telephone service areas in the Florida panhandle. Nextel contends that it should be granted ETC designation because (1) it offers or will offer the nine services and functionalities required under Section 54.101(a) of the Commission's Rules and (2) the public interest would be served by affording universal service support to a wireless carrier offering "a valuable alternative to the existing telecommunications regime" in rural areas.³ The *Nextel Petition* also claims that granting Nextel ETC status would serve the public interest by allowing Nextel to "enhance and expand its network infrastructure to better serve consumers in underserved, high-cost areas of the State of Florida," by enabling Nextel "to compete with other carriers on a level regulatory playing field," and by "further promoting the extensive role Nextel Partners plays in the provision of communications services to Florida public schools, libraries and local, state and federal government agencies."⁴

² See *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004) ("*Virginia Cellular*").

³ *Nextel Petition* at 7-8.

⁴ *Id.* at 8.

The Rural ILECs provide high quality, reliable, locally-based wireline local exchange services in rural service areas in Florida, including the service areas in which Nextel seeks ETC designation. The Rural ILECs provide service throughout their territories, as “providers of last resort,” consistent with state regulations governing local service rates and quality of service. These services are supported by universal service funding based on the costs incurred by the Rural ILECs in providing service throughout these rural, high-cost areas.

The Rural ILECs urge the Commission to delay consideration of the *Nextel Petition* until after the Commission has resolved the competitive ETC designation and support issues currently pending before the Joint Board. The Commission has recognized the need to reevaluate the ETC designation process to ensure that it appropriately balances the Commission’s overriding goals of promoting competition in telecommunications services while ensuring universal service to all Americans. Commenters have raised strong concerns about the designation of competitive ETCs in rural areas, where universal service by necessity is (or should be) the paramount goal, and about the overall impact of such designations on the Universal Service Fund. Like Commissioner Martin, the Rural ILECs are concerned that a decision by the Commission on the *Nextel Petition* could pre-judge the on-going work of the Joint Board in evaluating these issues. Rather than decide this and other ETC designation petitions on a piecemeal basis while the Joint Board is undertaking its analysis, the Commission should address and resolve the legitimate concerns raised in the ongoing proceeding before it attempts to determine (as required by the statute) whether or not the public interest would be served by designating Nextel as a competitive ETC in Florida rural telephone service areas.

To the extent that the Commission reaches the merits of the *Nextel Petition*, the Commission should find, consistent with the “framework” enunciated in the *Virginia Cellular*

order, that Nextel has failed to demonstrate that the public interest would be served by designating Nextel a competitive ETC in the specified Florida rural service areas. Nextel's vague assertions about the value of its mobile services and its willingness to comply with "applicable law" upon designation as an ETC do not rise to the public interest showing demanded in *Virginia Cellular*.

II. THE COMMISSION SHOULD NOT GRANT NEXTEL ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS WHILE SIGNIFICANT ETC DESIGNATION ISSUES ARE PENDING BEFORE THE JOINT BOARD.

On February 7, 2003, pursuant to the Commission's Referral Order of November 8, 2002, the Joint Board released a public notice requesting comment on the rules relating to High-Cost universal service support and the criteria and procedures for designating ETCs ("*High Cost/ETC Notice*").⁵ A number of comments filed in response to the *High Cost/ETC Notice* urged the Commission to modify the criteria used in designating ETCs, particularly in rural service areas.

Several commenters urged the Commission to adopt specific criteria to give effect to the statutory requirement that any grant of competitive ETC designation in a rural service area be supported by a finding that the public interest would be served thereby.⁶ Commenters argued

⁵ *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission's Rules Relating to High-Cost Universal Service Support and The ETC Designation Process*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (rel. Feb. 7, 2003).

⁶ Section 214(e)(2) of the Communications Act, 47 U.S.C. § 214(e)(2), imposes different standards for designating ETCs in rural as compared to non-rural areas. In non-rural areas, a state commission or the Commission is obligated to grant ETC status to any petitioner demonstrating that it can meet the requirements of Section 214(e)(1). In rural areas, on the other hand, regulators have the *discretion* to grant ETC status in an area served by a rural telephone company *only* upon a finding that the public interest would be served thereby. Although some ETC designation orders have suggested that promoting competition alone is sufficient to serve the public interest, Congress clearly intended that factors other than promoting local exchange competition be taken into account in determining whether to grant ETC

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that the public interest criteria should balance the costs and benefits of a proposed ETC designation to maximize the benefits of federal funding, taking into account the fact that when multiple competitors are subsidized in a rural area that cannot support multiple carriers, the incumbent ETC may be unable to achieve the economies of scale necessary to serve satisfactorily all the customers in the area.⁷ Commenters thus urged the Commission to adopt a public interest test for competitive ETC designation that weighs any advantages to be derived from supporting a competitive entrant against the potential adverse effects on affordability and promotion of advanced services throughout the service area.⁸ Commenters also insisted that the public interest test should require a determination that the competitive ETC will actually provide universal service throughout the service area, in accordance with the same service quality standards imposed on incumbents, and will use support received from the Universal Service Fund for its intended purposes.⁹

Commenters also expressed concerns about the overall impact on the Universal Service Fund of designating multiple ETCs in high-cost areas. Some commenters projected that if the current ETC designation practices remain in effect, the demands on the High-Cost Fund

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status to petitioners serving rural areas. The National Telecommunications Cooperative Association ("NTCA") comments on the *High Cost/ETC Notice* note that where the Commission and states treat competition as "the preeminent goal to be promoted at the expense of all others," the public interest requirement is effectively read out of the statute. See National Telecommunications Cooperative Association Comments in CC Docket No. 96-45 (May 5, 2003) ("NTCA Comments").

⁷ See Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies in CC Docket No. 96-45, at 41 (May 5, 2003) ("OPASTCO Comments"); NTCA Comments at 21-22.

⁸ NTCA Comments at 20-23.

⁹ OPASTCO Comments at 44-46.

will soon grow to an unsustainable level.¹⁰ In light of these concerns, commenters specifically questioned the appropriateness of granting ETC status to established, national commercial mobile radio service (“CMRS”) providers, such as Nextel, that would receive windfall subsidies for their service while substantially increasing the burdens on the Universal Service Fund.¹¹

The Commission would be wise to await resolution of these issues, which are specifically implicated in the *Nextel Petition*, before making a decision on Nextel’s request for ETC designation in rural Florida service areas. Otherwise, the Commission risks making a decision that ultimately could be inconsistent with what the Joint Board and the Commission determine the public interest requires.¹² Although the Commission recently signaled an intention to address at least some ETC designation petitions while the Joint Board is still considering the proper public interest criteria to be used in evaluating those petitions,¹³ the Rural ILECs agree with Commissioner Martin that this is not the right approach, in part because it risks pre-judging the on-going work of the Joint Board on these issues.¹⁴

Making a decision on the *Nextel Petition* before the Joint Board completes its work would be particularly ill-advised in light of the unique concerns the *Nextel Petition* raises

¹⁰ See OPASTCO Comments at 10; Comments of Rural Independent Competitive Alliance in CC Docket No. 96-45, at 11 (May 5, 2003).

¹¹ See NTCA Comments at 23-24.

¹² To the extent that the Commission’s decision on the pending issues adopts public interest criteria that Nextel does not satisfy, and Nextel as a result loses its ETC designation in the Florida service areas (a possibility contemplated in the comments of the National Association of State Utility Consumer Advocates on the *High Cost/ETC Notice*), the public would be harmed by the resulting service disruption if the carrier were to pull out of the rural market after losing ETC status.

¹³ *Virginia Cellular* at ¶ 4 (stating that the decision enunciates a framework that will apply to “all ETC designations for rural areas pending further action by the Commission”).

¹⁴ *Virginia Cellular*, Dissenting Statement of Commissioner Kevin J. Martin at 2.

about the overall impact of competitive ETC designations on the Universal Service Fund. In *Virginia Cellular*, the Commission found, without elaboration, that the grant of ETC designation to Virginia Cellular, a regional carrier, would not “dramatically burden” the Universal Service Fund.¹⁵ However, the Commission did express “increasing concern” about the impact on the Universal Service Fund of the rapid growth in high-cost support distributed to competitive ETCs, and noted that these issues are currently being addressed by the Joint Board.¹⁶ The Commission expressed the “hope that the . . . pending rulemaking proceeding . . . will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.”¹⁷ In the absence of such a framework, the Commission cannot effectively determine whether the public interest as a whole will be served by granting competitive ETC designation to Nextel, an established national carrier that has sought ETC designation in a number of service areas across the country. As OPASTCO has noted, if a petition for ETC designation by a large, multi-state CMRS provider such as Nextel were granted, other CMRS providers would feel compelled to seek ETC designation as well to remain competitive.¹⁸ This could result in a large-scale increase in the size of the Universal Service Fund – more than \$2 billion annually if all wireless carriers nationwide were granted ETC status.¹⁹ The Commission has acknowledged both that (1) this potential impact must be taken into account in determining whether the public interest would be served by designating a competitive ETC in a rural

¹⁵ *Virginia Cellular* at ¶ 31.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See OPASTCO Comments on Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, CC Docket No. 96-45, at 2-3 (Jan. 9, 2004).

¹⁹ *Id.* at 3.

telephone company's service area,²⁰ and (2) the pending rulemaking will provide the framework for analyzing that impact.²¹ Accordingly, the Commission must await resolution of the pending rulemaking before considering whether the public interest would be served by granting the *Nextel Petition*.

III. NEXTEL DOES NOT MAKE THE REQUIRED PUBLIC INTEREST SHOWING.

If the Commission decides to address the *Nextel Petition* before resolution of the pending ETC designation issues, it must do so under the public interest framework enunciated in *Virginia Cellular*.²² That is, the Commission must "weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the

²⁰ *Virginia Cellular* at ¶ 28 ("In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, *the impact of the designation on the universal service fund*, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.") (emphasis added).

²¹ *Id.* at ¶ 31.

²² Without even reaching the public interest standard, the Commission could find, as did the Minnesota Public Utilities Commission in a recent order, that Nextel has failed even to demonstrate that it provides the services required of an ETC under Section 214(e) of the Communications Act. On December 1, 2003, the Minnesota Commission denied Nextel's petition for ETC designation in certain rural areas in Minnesota because Nextel had not provided sufficient evidence that it would serve the entire area for which it sought support and had not demonstrated specific plans to advertise the availability of the supported services throughout the proposed service area. *NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Order Denying Without Prejudice Nextel's Application for ETC Designation, Docket No. PT-6200/M-03-647 (MN PUC Dec. 1, 2003). The *Nextel Petition* is similarly devoid of specifics in this regard. The Minnesota Commission also noted that Nextel had refused to offer a specific universal service offering, as distinguished from its other offerings, at an "affordable" rate. The Minnesota Commission expressed the opinion that a competitive ETC's offering of an affordable universal service package would be relevant to the public interest inquiry required under Section 214(e)(2) of the statute. Nextel has not committed to offer or advertise an affordable universal service package in Florida.

designated service areas within a reasonable time frame.”²³ Under this standard, as applied in *Virginia Cellular*, the claims made in the *Nextel Petition* do not support a finding that the public interest would be served by granting the requested ETC designation.

First, Nextel has not provided any details to support its bald assertions that the competitive choice it offers would bring unique or significant benefits to subscribers in the Rural ILECs’ service areas. Nextel states that its service will offer “a larger calling area” (although it does not state whether this larger calling area will be provided at rates comparable to the ILECs’ local service rates); “the benefits of mobile telephony” (which are not explained); GPS location assistance for 911 calls “where requested by the PSAP” (without stating whether any PSAPs in the designated rural service areas have requested such assistance); and a competitive incentive to incumbent LECs to improve their existing networks (without examining the question of whether the dilution of the ILECs’ universal service support would reduce the resources available to make such improvements).²⁴ Unlike *Virginia Cellular*, Nextel has not committed to serve residents to the extent they do not have access to the public switched telephone network through the ILEC or stated an intention to provide wireless telecommunications services to geographically isolated residents.²⁵ Nor has Nextel provided evidence that residents of the rural areas it seeks to serve would benefit from mobile telephone service because they drive long distances to work, school or stores.

Although Nextel has acknowledged some of the unique *disadvantages* of wireless service, including the fact that “[w]ireless service is inherently affected by conditions unique to

²³ *Virginia Cellular* at ¶ 28.

²⁴ *Nextel Petition* at 8.

²⁵ *See Virginia Cellular* at ¶ 29.

wireless service and which conditions do not affect wireline service providers,” such as “[g]eography, atmospheric conditions and man-made radiofrequency and physical structure interference” that may reduce a wireless carrier’s coverage area,²⁶ it has not, as did Virginia Cellular, offered to mitigate concerns about coverage area or dropped calls by “using universal service support to build new towers and facilities to offer better coverage.”²⁷ Instead, Nextel commits only to “respond to” requests for service in the Florida service areas, and then indicates (by citing in a footnote the potential factors that could limit its coverage area) that it will not in fact provide service in response to all such requests.²⁸ Nextel also does not commit to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, to provide the Commission with information about consumer complaints it receives in the Florida service areas, or to take any other steps to ensure the quality of its service.²⁹

Finally, the *Nextel Petition* fails to address at all the question of the overall impact of Nextel’s designation as a competitive ETC on the Universal Service Fund. As noted above, this impact could be significant and harmful to the public interest. If the Universal Service Fund is depleted by support paid to competitive carriers, consumers could face higher universal service contributions *and* higher local service rates (and less satisfactory service) if support levels are reduced. Nextel has not demonstrated that its designation as a competitive ETC would offer benefits sufficient to overcome these costs.

²⁶ *Nextel Petition* at 6 n.8.

²⁷ *Virginia Cellular* at ¶ 30. Instead, Nextel suggests that it will use universal service support to expand its role in providing communications service to public schools, libraries and government agencies. But there is no indication that these entities are in high-cost or rural areas or otherwise are the intended beneficiaries of high-cost universal service funding.

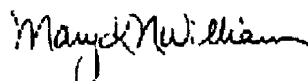
²⁸ *Nextel Petition* at 6.

²⁹ *Virginia Cellular* at ¶ 30.

IV. CONCLUSION

Parties commenting in the pending Joint Board proceeding have raised legitimate and significant concerns about the public interest implications of granting ETC designation to entities like Nextel seeking support for services offered in rural telephone companies' service areas. The public interest demands that the Commission delay any decision on the *Nextel Petition* until these pending issues are resolved. If the Commission reaches the merits of the *Nextel Petition*, it should find that Nextel has not made a meaningful showing that the public interest would be served by grant of the petition.

Respectfully submitted,



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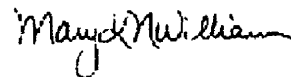
February 2, 2004

CERTIFICATE OF SERVICE

I, Mary Newcomer Williams, hereby certify that on this 2nd day of February, 2004, I caused one copy of the foregoing comments to be served by first-class mail, postage prepaid, on the following:

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