

ORIGINAL

McDEVITT & MILLER, LLP
Dean J. Miller (ISB No. 1968)
420 West Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702
Phone (208) 343-7500
Facsimile (208) 336-6912
joe@mcdevitt-miller.com

RECEIVED
FILED

2003 JUN 26 PM 2:56

IDAHO PUBLIC
UTILITIES COMMISSION

BRIGGS AND MORGAN, P.A.
Philip R. Schenkenberg (MN #260551)
2200 First National Bank Building
332 Minnesota Street
Saint Paul, Minnesota 55101
Phone (651) 808-6600
Facsimile (651) 808-6450
pschenkenberg@briggs.com

Attorneys For NPCR, Inc. d/b/a Nextel Partners

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. GNR-T-03-8

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. GNR-T-03-16

**NPCR, INC. D/B/A NEXTEL PARTNERS' MEMORANDUM IN RESPONSE TO THE
PROTESTS, COMMENTS AND MOTION TO STAY OF CITIZENS TELECOM. CO.
OF IDAHO, POTLATCH TELEPHONE CO., CENTURYTEL OF IDAHO AND
CENTURYTEL OF THE GEM STATE**

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners") submits this memorandum in response to the June 16, 2003 Protests, Comments and Motion to Stay of Citizens Telecommunications Company of Idaho ("Citizens"), Potlatch Telephone Company, CenturyTel of Idaho and CenturyTel of the Gem State (Potlatch Telephone, CenturyTel of Idaho and

CenturyTel of the Gem state are collectively referred to as "Protestants") purportedly filed pursuant to IDAPA 31.01.01, Subd. B, Part 1, Rules 203 (Protests and Comments) and 324 (Stay of Orders).

A. Protestants Lack Standing To Protest Or File Comments Under Rule 203; Rule 324 Is Inapplicable.

As a threshold matter, Protestants' June 16 protest and comments must be summarily rejected by the Commission because Protestants lack standing under Rule 203, which reads as follows:

Any person affected by the proposal of the moving party may file a written protest, support or comment before the deadline of the notice of modified procedure. Protests, supports and comments must contain a statement of the reasons for the protest, support or comment, but need not ask for a hearing. Persons desiring a hearing must specifically request a hearing in their written protests or comments. A copy of the person's protest, support or comment must be served on the representative of the moving party.

Id. (emphasis added).

Protestants freely admit they will not be affected by the granting of the Applications for Designation as Federal Eligible Telecommunications Carriers of either Nextel Partners or IAT Communications, Inc. d/b/a NTCH-Idaho, Inc. or Clear Talk ("Clear Talk") because "Protestants service territories have not been designated by [either carrier] as part of their current applications." Citizens/Protestants Brief at 2. Accordingly, because Rule 203 plainly requires that a party actually be affected by the proposal of the moving party before it may formally protest or comment on such proposal, Protestants have failed to establish sufficient standing to participate in these proceedings. Indeed, Protestants recognized as much in conceding that they do not have standing to formally intervene. *See* IDAPA 31.01.01, Subd. B, Part 1, Rule 71 (only parties with a direct and substantial interest in the proceeding may intervene).

Citizens' and Protestants' reliance on Rule 324 is misplaced. That Rule confers authority stay a final or interlocutory order pending reconsideration or review. *See* IDAPA 31.10.01, Rules 322, 333. Rule 324 is not a source of authority for a stay of proceedings.

B. Movants' Speculative Concerns Do Not Warrant Staying These Proceedings.

Likewise, Citizens' and Protestants' speculative arguments in support of their motion to stay the above proceedings until the FCC rules on Joint Board recommendations in Docket 96-45 should be summarily rejected. In sum, Citizens and Protestants complain that:

1. The FCC's ruling might result in applicants for competitive ETC designation being judged by two different sets of criteria depending upon when their applications are filed, which could then prejudice one or more competitive ETC or ILEC in some unspecified manner;
2. The FCC's ruling may change the amount of support that is available, which could then somehow affect an applicant's decision to apply or withdraw; and
3. The FCC's ruling may make these proceedings somehow unnecessary.

See Citizens/Protestants Brief at 2.

For the reasons discussed below, the Commission should reject Citizens' and Protestants' anti-competitive arguments and proceed to consider the merits of the pending Applications.

1. Citizens' and Protestants' Arguments are Purely Speculative

Citizens and Protestants rely on unsubstantiated concerns that a subsequent FCC ruling may (1) alter the criteria applied to an applicant for ETC designation, (2) alter the amount of support available, or (3) even make these proceedings unnecessary. These claims should be summarily rejected as purely speculative.

The Telecommunications Act of 1996 (the "Act") fully contemplates that the FCC and Federal-State Joint Board ("Joint-Board") will continue to review and address the universal service support mechanisms over time:

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services . . . The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

See 47 U.S.C. 254(c)(1) - (2).

Indeed, in response to various recommendations of the Joint-Board, the FCC has, to date, issued twenty-five 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. For example, on May 21, 2003, the FCC issued its Twenty-Fifth Order on Reconsideration, Report and Order, and Further Notice of Proposed Rulemaking to address certain Lifeline and Link-Up issues. Instead of recommending that states stop designating ETCs, the FCC stated:

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 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 Report and Order, FCC 03-115 ¶ 26 (rel. May 21, 2003) (emphasis added) (footnotes omitted). This

Commission should follow the urging of the FCC and resolve the issues raised on the pending Applications.

Further, Citizens and Protestants ignore the fact that Nextel Partners has committed itself 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. *See* Nextel Partners' Application Seeking Designation as an Eligible Telecommunications Carrier, ¶ 19.

Consequently, the Commission should not delay its consideration of the pending Applications in these proceedings on the basis that the FCC may – in some undefined way, and at some indefinite time – impose new or different criteria or obligations concerning the designation of federal ETCs. Indeed, to do so would prevent any competitive provider from becoming eligible to receive support from the federal Universal Service Fund ("USF") and, therefore, would substantially frustrate the Act's twin goals of promoting competition and preserving and advancing universal service. *See* PubLaw 104-104, 110 Stat 56 (1996); *see also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (the purpose of the Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .").

2. The Commission Should Ignore Citizens' and Protestants' Anti-Competitive Arguments

Citizens' and Protestants' feigned concern for the welfare of its competitors is plainly disingenuous and should be ignored. Having already been designated as ETCs, Citizens and

Protestants each receive substantial USF support.¹ Yet they now complain that otherwise eligible competitive carriers should be deprived of competitively-neutral support pending an FCC ruling that is not expected for at least another six to twelve months². Indeed, while Citizens and Protestants express concern that future ETC applicants may be subjected to "two entirely different sets of criteria [which] could result in an unfair advantage as to one or more CETCs and/or disadvantage as to one or more ILECs," they fail to acknowledge that they, themselves, were designated as ETCs under rules and/or criteria that may be different than those applicable to current applicants. Nor do they suggest that their own ETC designations be suspended or revoked pending the FCC's future ruling, even though it could just as easily affect their own provision of universal service or receipt of USF support.

The Commission should not apply a double-standard. Rather, the Commission is compelled by the Act's pro-competitive objectives to consider the pending Applications pursuant to existing Commission and FCC rules and reject the self-serving arguments of carriers seeking to stifle competition.

3. The Commission Must Apply the Substantive Rules in Force at the Time These Proceedings Were Commenced

Under well established Idaho law, the Commission must apply the substantive administrative rules in effect at the time a proceeding is commenced. *See, e.g., Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 137 Idaho 377; 48 P.3d 1266 (2002)

¹ According to the Universal Service Administrative Company's ("USAC") Projected High Cost Support figures for the First Quarter of 2003, Citizens will receive over \$1.8 million in USF funding per quarter. CenturyTel-Gem State will receive \$324,651 per quarter; CenturyTel of Idaho \$631,094; and Potlatch \$109,847. USAC's quarterly FCC reports can be viewed at <http://www.universalservice.org/overview/filings>.

² Citizens and Protestants incorrectly state that a FCC decision is expected toward the end of 2003 or the beginning of 2004. In fact, the Joint Board Recommended Decision is anticipated in that time frame. It is unknown how much additional time will be required for review by the FCC.

("In Idaho 'an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit.") (citing *Payette River Property Owners Ass'n v. Board of Comm'rs of Valley County*, 132 Idaho 551, 555, 976 P.2d 477, 481 (1999) and *South Fork Coalition v. Board of Comm'rs*, 117 Idaho 857, 860-61, 792 P.2d 882, 885-86 (1990)). In contrast, subsequent changes in procedural rules are applicable to existing proceedings. See, e.g., *University of Utah Hospital v. Pence*, 104 Idaho 172, 657 P.2d 459 (1982).

Thus, to the extent a subsequent FCC ruling may cause the Commission to commence its own rulemaking procedure to promulgate or modify the Commission's 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 in these proceedings. Accordingly, the Commission must proceed to consider the applicants' petitions for designation as federal ETCs under the substantive rules in effect on the date each was filed with the Commission.


CONCLUSION

The Commission should not delay its consideration of Nextel Partners' and Clear Talk's pending Applications based on purely speculative predictions concerning what, if anything, the FCC might do in the future. Under well established Idaho law, the Commission must apply the law and rules in effect at the time these proceedings were commenced. The Commission should therefore deny the pending motion to stay these proceedings.

Dated: June 26, 2003

Respectfully submitted,

NPCR, INC. d/b/a NEXTEL PARTNERS

By:  _____

McDEVITT & MILLER, LLP

Dean J. Miller
420 West Bannock Street
P.O. Box 2564-83701
Boise, Idaho 83702
Phone (208) 343-7500
Facsimile (208) 336-6912

BRIGGS AND MORGAN, P.A.

Philip R. Schenkenberg (MN #260551)
Matthew Slaven (MN #288226)
2200 First National Bank Building
332 Minnesota Street
Saint Paul, Minnesota 55101
Phone (651) 808-6600
Facsimile (651) 808-6450

COUNSEL FOR APPLICANT
NPCR, INC. d/b/a NEXTEL PARTNERS

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2003, I caused to be served true and correct copies of *NPCA, Inc. d/b/a Nextel Partners' Memorandum In Response To The Protests, Comments And Motion To Stay Of Citizens Telecom. Co. Of Idaho, Potlatch Telephone Co., Centurytel Of Idaho And Centurytel Of The Gem State*, by the method(s) indicated below, upon:

Sean P. Farrell, General Counsel
IAT COMMUNICATIONS, INC.
703 Pier Avenue, Suite B; PMB 813
Hermosa Beach, California 90254
sfarrell@cleartalk.net
Attorney for IAT Communications, Inc.

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Mary S. Hobson
STOEL RIVES LLP
101 So. Capitol Blvd., Suite 1900
Boise, Idaho 83702
mshobson@stoel.com
Attorneys for Qwest Corporation

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Molly O'Leary
RICHARDSON & O'LEARY
99 East State Street, Suite 200
P.O. Box 1849
Eagle, Idaho 83616
molly@richardsonandoleary.com
Attorney for IAT Communications, Inc.

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Robert M. Nielsen
ATTORNEY AT LAW
P.O. Box 706
Rupert, Idaho 83350
*Attorney for Project Mutual Telephone
Cooperative Association, Inc.*

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Conley E. Ward, Jr.
GIVENS PURSLEY, LLP
227 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
cew@givenspursley.com
Attorney for Idaho Telephone Association

Hand Delivered
Federal Express
U.S. Mail
Telecropy

John Hammond, Deputy AG
ID PUBLIC UTILITIES COMMISSION
472 West Wasington Street
P.O. Box 83720
Boise, Idaho 83720-0074
jhammon@puc.state.id.us
Commission Staff

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Clay Sturgis, Senior Manager
MOSS ADAMS LLP
601 Riverside, Suite 1800
Spokane, Washington 99201-0063
clays@mossadams.com
Attorney for Idaho Telephone Association

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Morgan W. Richards
MOFFAT THOMAS BARRETT ROCK & FIELDS
101 So. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701
mwr@moffatt.com
Attorney for Citizens Telecommunications of Idaho

Hand Delivered
Federal Express
U.S. Mail
Telecropy

Lance A. Tade, Manager
State Government Affairs
CITIZENS TELECOMMUNICATIONS OF IDAHO
4 Triad Center, Suite 200
Salt Lake City, Utah 84180
ltade@czn.com
Attorney for Citizens Telecommunications of Idaho

Hand Delivered
Federal Express
U.S. Mail
Telecropy

