

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.)**

**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. 29364**

On September 30, 2003, the Idaho Telephone Association (ITA) filed a Motion pursuant to Rule 56 of the Commission's Rules of Procedure and Idaho Rule of Civil Procedure 37(a) requesting a Commission Order compelling discovery responses to its Requests No. 4 and 14 from Clear Talk and Nextel Partners (Applicants). On October 7 and 14, 2003, respectively, Nextel Partners and Clear Talk filed memorandums in opposition to ITA's Motion. Neither the Applicants nor ITA requested oral argument on the Motion. After reviewing the written record in this case, the Commission denies ITA's Motion to Compel.

BACKGROUND

1. Production Requests and Motion to Compel

ITA stated that on August 8, 2003, it served nearly identical discovery requests on the Applicants. In late August 2003, the Applicants filed objections to a number of ITA's requests, including Requests No. 4 and 14. In early September, the Applicants filed their initial set of responses to the discovery requests not subject to objection.

ITA stated that the counsel(s) for the parties met in an attempt to informally resolve their discovery disputes. The parties were able to resolve the majority of these disputes including those concerning Request No. 14 that was directed to Clear Talk.¹ Accordingly, ITA's Motion is moot in regard to this request. However, ITA states that Clear Talk and Nextel have refused to respond to its Request No. 4. In Request No. 4 ITA asked each Applicant:

¹ ITA only sought to compel Clear Talk to respond to Request No. 14. ITA was able to obtain the financial information it wanted from Nextel because the Company is publicly held and had made filings with the SEC.

Please provide copies of the documents relating to [Nextel's/Clear Talk's] decision to file for ETC status in the state of Idaho, including but not limited to memorandums, board of director minutes, management presentations, correspondence and financial analysis and forecasts.

ITA's Production Requests at p. 2. Both Nextel and Clear Talk objected to Request No. 4. In its Objection filed August 22, 2003, Nextel stated:

Nextel Partners objects to this request as calling for information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information not previously disclosed in public documents, such information is confidential, privileged and a Trade Secret.

Nextel Partners' Objections at pp. 3-4. In its August 25, 2003 objection Clear Talk stated:

Clear Talk objects to this request as improper because it seeks information that is privileged, including attorney-client communications and attorney work product. Clear Talk objects to this request on the grounds that it seeks information, which is not relevant and/or is not reasonably calculated to lead to the discovery of admissible evidence, and is intended to vex, annoy or harass the responding party.

Clear Talk's Objections at p. 2.

In its Motion to Compel ITA argued that Request No. 4 is well within the scope of valid discovery. ITA respectfully requests that the Commission grant its Motion based on the written record and order the Applicants to provide a full and accurate response to its Request No. 4.

2. Nextel Response

On October 7, 2003, Nextel filed a response in opposition to ITA's Motion. Nextel alleged that ITA offered the Commission no legal or factual argument or authority to support its present Motion. Specifically, Nextel argued ITA has not demonstrated that this information is relevant to this proceeding. Rather, Nextel claimed this information is not relevant to the criteria that an applicant must meet in order to be designated as an ETC as defined by the federal Telecommunications Act of 1996. Accordingly, Nextel contends that there is no legal basis for reviewing an applicant's internal, decision-making process related to its filing of an ETC application.

Nextel also argued that the Texas State Office of Administrative Hearings recently rejected a nearly identical discovery request directed to Nextel. The Company stated that an

Administrative Law Judge held that the intervenor's failure to articulate how or why such discovery would be relevant to the issues presented in an ETC proceeding was dispositive. *See Application of NPCR, Inc. (d/b/a Nextel Partners) for Eligible Telecommunications Carrier Designation*, SOAH Docket No. 473-03-3673, PUC Docket No. 27709, Order No. 5 at 12-13 (Aug. 29, 2003). Based on the foregoing, Nextel requested that the Commission deny ITA's Motion to Compel.

3. Clear Talk's Response

On October 14, 2003, Clear Talk filed its Memorandum in Opposition to ITA's Motion to Compel. Like Nextel, Clear Talk argued that because ITA has provided no legal basis or argument in support of its Motion, it has failed to carry its burden to demonstrate that it should be granted. Thus, Clear Talk requested that the Commission deny ITA's Motion to Compel.

COMMISSION FINDINGS AND DECISION

The Commission's Procedure Rules 221-233 and Idaho Rules of Civil Procedure 26 and 37 give the Commission authority over the scope and procedure of discovery in cases coming before it. Rules 222 and 223 provide that all parties to a proceeding have a right of discovery of all other parties. Rule 225 provides that production requests may be taken in accordance with the Idaho Rules of Civil Procedure. This Rule also requires a party to object or explain why a discovery request will not be answered. IDAPA 31.01.01.225.03.

The general rule governing the scope of discovery is found in the Idaho Rules of Civil Procedure. Rule 26(b)(1) states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b) (emphasis added).

Applications filed by Companies requesting eligible telecommunications carrier (ETC) status are governed by federal and state law. Under the federal Telecommunications Act, state commissions may designate common carriers as ETCs. 47 U.S.C. §§ 214(e)(2) and 254(e).

Because the Applicants are seeking ETC designation only to obtain federal subsidies rather than state subsidies, the Commission's review of the Applications is guided by federal law. Section 214(e) of the Telecom Act requires a common carrier to: 1) offer the services that are supported by the federal universal service support mechanisms under 47 U.S.C § 254(c) throughout its ETC-designated service area; 2) use at least some of its own facilities in providing these services; and 3) advertise the availability and price of these services. 47 U.S.C. § 214(e)(1)(A) and (B). *See also* 47 C.F.R. § 54.201(d). The list of designated services a telecommunications carrier must be able to provide after designation as an ETC are: 1) voice grade access to the public switched network; 2) local usage; 3) dual tone multi-frequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services where available; 6) access to operator services; 7) access to interexchange service; 8) access to directory assistance; and 9) toll limitation. *See* 47 C.F.R. § 54.101(a).² Lastly, for applicants seeking ETC status in areas served by rural telephone companies, the state commission must make a finding that designating more than one carrier in that area is in the public interest. 47 U.S.C. § 214(e)(2).

ITA's only argument in support of its Motion to Compel is that Request No. 4 is well within the scope of valid discovery. However, ITA does not provide any explanation why this is so. More specifically, ITA does not explain how Request No. 4 is "reasonably calculated" to lead to material relevant to the subject matter of this proceeding as defined by federal statutes and Federal Communications Commission (FCC) regulations discussed above. *See* I.R.C.P. 26(b)(1). As a result the Commission does not find that ITA's Request No. 4, asking for information from the Applicants related to why they decided to file ETC Applications in Idaho, is reasonably calculated to lead to material relevant to this proceeding. Accordingly, the Commission denies ITA's Motion to Compel.

ORDER

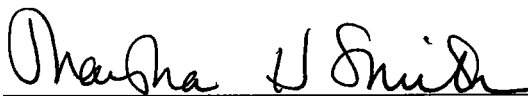
IT IS HEREBY ORDERED that the Idaho Telephone Association's Motion to Compel is denied.

² In order to receive federal universal funds an ETC is obligated to make available Lifeline and Link Up services to qualifying low-income customers. 47 C.F.R. §§ 54.405 and 54.411.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 23rd
day of October 2003.



PAUL KJELLANDER, PRESIDENT

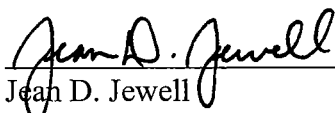


MARSHA H. SMITH, COMMISSIONER



DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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