Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	
	)	
Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners	)	CC Docket No. 96-45
	)	
Application for Designation as an Eligible Telecommunications Carrier in the State of New York	)	

COMMENTS OF FRONTIER COMMUNICATIONS

Citizens Telecommunications Company of New York, Inc.; Frontier Communications of New York, Inc.; Frontier Telephone of Rochester, Inc., Frontier Communications of Seneca-Gorham, Inc.; Frontier Communications of AuSable Valley, Inc; Frontier Communications of Sylvan Lake, Inc. and Ogden Telephone Company (together "Frontier"), by their attorney, respectfully submit these comments regarding the Petition of Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners to be Designated as an Eligible Telecommunications Carrier ("Petition") in its commercial mobile radio service ("CMRS") license area in New York.

This matter is before the Commission because the New York State Public Service Commission has determined that it lacks jurisdiction to designate Nextel Partners, a CMRS carrier, as an eligible telecommunications carrier ("ETC") in New York.

I. Introduction and Background

Nextel Partners seeks to be designated as an ETC in its cellular license area in New York, which includes study areas served by Verizon and a number of other companies, including several Rural Telephone Companies ("RTCs"). Specifically with respect to Frontier, Nextel Partners provides CMRS in study areas 150072, 150110, 150121, 150122, 150128, 154532, 154533, and 154534. Frontier is an RTC in all of these study areas except study area 150121. Nextel Partners is licensed throughout the entirety of each of Frontier's study areas in New York.[1]

Because Nextel Partners seeks to be designated as an ETC in several RTCs' study areas, it must demonstrate that it meets the minimum criteria of Section 214(e)(1) and that designating it as an ETC in the RTCs' study areas "is in the public interest."[2]

II. A Rigorous Public Interest Analysis Is Required

In a joint separate statement to the Commission's July 14, 2003 Order on Reconsideration in this Docket, Commissioners Abernathy and Adelstein expressed concern that "the ETC designation process – and in particular the public interest analysis– has been undertaken in an inconsistent and sometimes insufficiently rigorous manner."[3] Indeed, a rigorous examination into the public interest is required to ensure that designation of a particular applicant as an ETC in a particular RTC's study area is in the public interest.

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1 Petition at pp. 5-6 and Attachment 1.

2 47 U.S.C. § 214(e)(2). Because Nextel Partners holds a CMRS license for the entirety of the RTCs' study areas for which it seeks to be designated as an ETC, the issue of redefining study areas pursuant to 47 U.S.C. § 214(e)(5) does not arise.

3 *Federal-State Joint Board on Universal Service,* Order on Reconsideration, CC Docket No. 96-45, FCC 03-170 (rel. July 14, 2003), Joint Statement of Commissioners Kathleen Q. Abernathy and Jonathan S. Adelstein at p. 2.

As is discussed in more detail below, the public interest is broader than just competition. It cannot be disputed that increasing competition is a goal of the 1996 Act. At the same time, it cannot be disputed that preserving and advancing universal service is a goal of the 1996 Act. Just so, Congress limited the tools available to competitors seeking to provide service in RTC's study areas[4] and created the public interest test, which does not apply in areas served by non-rural companies, to limit the availability of USF to additional ETCs in RTCs' study areas.[5] In a further effort to preserve universal service, Congress, with limited exception, required additional ETCs to serve the entirety of RTCs' study areas, which it did not require with respect to non-rural areas.[6]

The Act reflects a careful balancing by Congress of the goal of increased competition and the goal of advancing universal service. Moreover, it reflects an understanding that it does not always make sense to foster competition or to provide USF to more than one carrier in rural areas. This careful balance of goals and effort to preserve universal service forms the backdrop against which a rigorous analysis of the public interest must be undertaken.

III. Designation Of Nextel Partners As An ETC In Frontier's RTC Study Areas Is Not In The Public Interest

Nextel Partners offers the same argument as many other CMRS ETC applicants with respect to the public interest issue. The argument, distilled to its essence, is that designating the applicant as an additional ETC in an RTC's study area creates competition, competition is in the public interest, therefore designating the applicant as an additional ETC in the RTC's study area

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4 *See*, *e.g.*, 47 U.S.C. § 251(f).

5 47 U.S.C. § 214(e)(2).

6 47 U.S.C. § 214(e)(5).

is in the public interest. This argument is both legally and factually flawed. Moreover, the public interest test involves more than just an examination of competition.

A. Nextel Partners' Public Interest Argument is Legally Flawed

Nextel Partners' public interest argument renders the public interest test completely meaningless because the result is a tautology: designating additional ETCs in RTCs' study areas is always in the public interest. If this were truly the case, there would be no need to inquire whether designating an additional ETC in an RTC's study area is in the public interest. Congress, however, specifically required such an inquiry. Therefore, it cannot be that designating additional ETCs in RTCs' study areas always is in the public interest. To avoid rendering the public interest test a nullity (and thereby violating a canon of statutory construction), it is necessary to engage in a factual analysis to determine on a case-by-case basis whether designating a specific applicant as an ETC in a specific RTC's study area is in the public interest.[7]

B. Nextel Partners' Public Interest Argument is Factually Flawed

Nextel Partners rests its public interest argument on the assertion that it competes with the RTCs, and points to the benefits of competition as demonstrating that designating it as an ETC in the RTCs' study areas is in the public interest. Like many CMRS ETC applicants before it, Nextel Partners offers no specific facts to demonstrate that it competes with any of the RTCs with whom it alleges it competes. It provides no facts specific to Frontier's study areas to demonstrate that it competes with Frontier or whether the benefits of competition are realized as

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[7] As part of its Section 214(e)(2) public interest inquiry, the Commission should consider the fact that Congress has consistently limited the application in rural areas of tools intended to promote competition to those specific occasions when it can be demonstrated that competition promotes the public interest and does not place undue burdens on the RTC. *See*, *e.g.*, 47 U.S.C. § 251(f)(1).

a result of its provision of service in Frontier's study areas. Absent such a showing, the Petition must be denied.

Moreover, Nextel Partners' assertion that it competes with Frontier is incorrect. Nextel Partners does not compete with Frontier for local exchange services or supported services.

Nextel Partners provides a service that is complementary to that offered by Frontier. Nextel Partners' service is not viewed by consumers or by Frontier as a substitute, and the fact that it is available in Frontier's study area brings to consumers none of the benefits of true competitive entry.

Frontier has experienced true competitive entry as a result of competitive local exchange carriers ("CLECs") entering some of its exchanges. As a result, Frontier is experiencing a reduction in the number of lines it serves those exchanges. In other exchanges, however, Frontier is experiencing line growth.

Frontier has implemented several strategies to combat CLECs. Among other things, Frontier has reduced prices and modified its service offerings. Consumers have benefited from the reduced prices and improved service offerings.

These are examples of the kinds of competitive responses that should be expected from Frontier if Nextel Partners offered services in competition with Frontier, and also of the kinds of benefits that flow from competition. Frontier, however, has not responded similarly to Nextel Partners, and similar benefits have not resulted from Nextel Partners providing service in the same areas as Frontier.

Frontier does not specifically address Nextel Partners' service in its strategic planning and marketing efforts. The reason is simple – the availability of CMRS in areas served by Frontier has no competitive effect. The vast majority of customers are buying both wireline service from Frontier for use in their homes and business, and buying wireless service from Nextel Partners or other mobile service providers for mobile use. A small but significant number of customers are, however, canceling their Frontier service in order to take competing service from CLECs. Just so, except for the areas entered by CLECs, Frontier has experienced and continues to experience growth in the number of access lines it serves.

If anything, Nextel Partners competes, on a limited basis, against wireline toll providers, such as interexchange carriers ("IXCs").[8] Customers do sometimes substitute CMRS service for wireline toll services to make calls within the boundaries of their CMRS calling plan that would be toll calls using a wireline phone. This in no way suggests or demonstrates that Nextel Partners competes against LECs for local exchange or supported services, however. Instead, it demonstrates that customers may choose to use up wireless minutes for which they are obligated to pay, whether used or not, in wireless calling plans before incurring additional charges for toll calls.

Finally, in this regard, the notion that designating Nextel Partners as an ETC will bring new competition to Frontier's study area is also inaccurate. Nextel Partners is already providing service there. Giving Nextel Partners USF therefore will not bring a new competitor to Frontier's study area.

In sum, the facts are that Nextel Partners does not compete with Frontier for local exchange or supported services in the study areas at issue in New York, and that giving USF to Nextel Partners will produce none of the benefits that result from true competitive entry.

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[8] To the extent that the RTCs provide intraLATA toll services, Nextel Partners could be viewed as competing with them for such toll services.

C. Designation Of Nextel Partners As An ETC Will Harm The Public Interest

Designation of Nextel Partners as an ETC in the RTCs' study areas will harm the public interest by allowing cream skimming to occur, creating a windfall for Nextel Partners, and further growing the size of the universal service fund.

1. Cream Skimming

This issue is normally raised in the context of redefining study areas, and Frontier is aware that the Commission has previously stated in that context that cream skimming is not a problem with respect to CMRS carriers that are seeking to be designated as ETCs to serve only the area for which they hold a CMRS license. Regardless of whether a wireless additional ETC serves a portion or the entirety of an RTC's study area, and regardless of whether USF is disaggregated, cream skimming remains a problem with wireless ETCs. This is not necessarily the result of any intent by the wireless ETC to cream skim. Lack of intent, however, does not reduce the negative impact on USF and the public interest that results from the occurrence of cream skimming.

"Cream skimming" generally refers to the problem of an additional ETC serving low cost areas while receiving USF that is based on averaged costs to serve the entire study area. The harm in this, of course, is that the ETC receives too much USF relative to the costs to serve the low cost area where it provides service without incurring the additional expense of also serving the high cost areas. Generally, disaggregating USF solves this by apportioning USF among cost zones so that the amount of USF that flows to each cost zone reflects the costs to serve that zone.

Disaggregation does indeed solve the cream skimming problem as long as the billing address and the service address are the same, which is hardly ever the case with mobile service. Customers rarely use their mobile phones at home, which is likely to be the billing address. To the extent that Nextel Partners customers who live in high cost areas primarily use their phones in low cost areas, which is most often the case in RTCs' study areas,[9] Nextel Partners will receive too much USF relative to the costs to provide service in the area where the service is actually provided. USF can even be exported out of the intended study area if Nextel Partners' customer uses her mobile phone in a study area that is different from the one where she lives. Because USF is aimed at defraying the costs of maintaining a network to make service universally available within a study area, it is not in the public interest to allow this to occur.

2. Windfall

The availability of federal USF monies to CMRS carriers is a relatively new phenomenon. CMRS carriers generally obtained their licenses and began providing service without expectation of receiving USF. Accordingly, they have developed pricing plans that presumably recover their costs plus a profit. Giving a wireless carrier, such as Nextel Partners, USF on top of its existing prices simply results in a windfall unless there is a corresponding reduction in price, a specific requirement for incremental investment, or some combination of the two.

As a result of regulatory oversight and rate regulation of incumbent LECs, USF acts to reduce incumbents' prices for services that meet governmentally-imposed quality standards, especially in high-cost areas that otherwise are not economic to serve. This is consistent with the goals of universal service enumerated in Section 254. Providing a windfall to a carrier, however, does not advance universal service and is not in the public interest. Instead, it further grows the size of the fund, which is already a serious issue, and further strains the federal universal service mechanism.

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9 CMRS is most likely to be used in the lowest cost zones of rural areas because those are the centers of employment, healthcare, shopping, and education.

3. Fund Growth

The Commission currently is reexaming its rules to address the unprecedented growth in the size of the federal high cost fund. This growth is already a serious issue, and continued growth further strains the federal universal service mechanism. Each time an additional ETC is designated in a study area served by an RTC, the fund grows by the amount of the additional ETC's draw. Ultimately, consumers bear the cost. Increased costs to consumers threaten the very goals that universal service is aimed at achieving.

Among other things, universal service is intended to ensure that consumers in rural and high-cost areas receive quality services at rates comparable to those charged in urban areas. In many rural study areas, these goals can only be achieved through USF receipts because the costs to serve these areas are so high. Continued, predictable USF receipts are critical to ensuring investment to maintain and to upgrade critical infrastructure in rural study areas.

Threats to the universal service mechanism and to receipt of universal service funds by ETCs serving rural areas are important issues to be considered in determining whether designating additional ETCs in an RTCs' study areas is in the public interest.

IV. If Nextel Partners Is Designated As An ETC In The RTCs' Study Areas, It Should Be So Designated Only With Respect To The Existing Rules

As the Commission is aware, numerous changes to the USF mechanism and changes to the services supported by universal service are being considered. Among the changes under consideration are whether to condition ETC status on the applicant providing equal access. This is a significant issue with respect to designating Nextel Partners and other CMRS carriers as ETCs because they do not provide equal access currently, despite the fact that Frontier and the other RTCs are required to provide it. If equal access were made a supported service, Nextel Partners would no longer meet even the minimum qualifications to be an ETC.

Other changes include whether to reduce the amount of USF the incumbent ETC receives when an additional ETC serves a line in the incumbent's study area. This is an especially complex issue with respect to designating CMRS carriers as ETCs because CMRS is not a substitute service and the incumbent could be left in a position of being required as carrier of last resort to serve a customer for which it no longer receives USF. The issue is even more fundamental because incumbents' USF is based on the costs of their respective networks, which remain regardless of how many customers are signed up. In any event, if the incumbent's USF receipts are reduced when an additional ETC is designated, the public interest calculus will change dramatically.

Under the circumstances, any designation of Nextel Partners as an ETC should be based on the current rules and the Commission should expressly state that the designation is not a determination of whether Nextel Partners should be an ETC under any modified rules.

V. SUMMARY

Designating Nextel Partners as an ETC in Frontier's study areas is not in the public interest. Its circular argument that designating additional ETCs in RTC's study areas is always in the public interest should be rejected. Moreover, Nextel Partners does not compete with Frontier and is not a new entrant, so designating Nextel Partners as an ETC will not promote or increase competition in Frontier's study areas. Nor will it bring the benefits of competition to consumers in Frontier's study areas.

Finally, any designation of Nextel Partners as an ETC in Frontier's study areas should be expressly based on a finding that it satisfies the rules as they currently exist and should be effective only as long as the rules remain unchanged. If the rules change as a result of the rulemakings and Joint Board deliberations currently underway, it is likely that the public interest calculus will change. A new determination would then have to be made as to whether designating Nextel Partners as an ETC in Frontier's study area would have to be made under the revised rules.

Respectfully Submitted,

Citizens Telecommunications Company of New York, Inc.; Frontier Communications of New York, Inc.; Frontier Telephone of Rochester, Inc., Frontier Communications of Seneca-Gorham, Inc.; Frontier Communications of AuSable Valley, Inc; Frontier Communications of Sylvan Lake, Inc. and Ogden Telephone Company

By: /s/ John B. Adams
John B. Adams, Esq.

Kraskin, Lesse & Cosson, LLC
2120 L Street, NW, Suite 520
Washington, DC 20037
Tel 202-296-8890
Fax 202-296-8893

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