

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket 96-45
)	
NPCR, INC. d/b/a NEXTEL PARTNERS)	DA 04-998
)	
Supplement to Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the State of Alabama)	
_____)	

**NEXTEL PARTNERS' REPLY TO COMMENTS
OF TDS TELECOMMUNICATIONS CORP.**

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SUMMARY

Nextel Partners' Petition for Designation as an ETC, and the March 24, 2004 Supplement to its Petition, demonstrate Nextel Partners' eligibility for ETC status and that a grant of the Petition is in the public interest. Nextel Partners has effectively complied with all of the Commission's material and relevant requirements from the *Virginia Cellular Order*, and TDS has not identified any shortcoming in Nextel Partners' Petition and Supplement, nor has TDS raised any relevant issues in this proceeding that require resolution prior to a grant of Nextel Partners' Petition.

Nextel Partners' primary business focus is to bring high-quality state-of-the-art mobile telecommunications service to citizens in smaller and rural markets. In doing so, Nextel Partners provides its rural customers access to the same highly advanced national network operated by Nextel Communications, Inc. in the top-100 urban markets. Nextel Partners thus fully meets the Universal Service goal of delivering to rural citizens the same telecommunications choices and services that are available to citizens in the largest urban areas. This makes Nextel Partners ideally suited to function as an ETC.

Accordingly, the Commission should proceed expeditiously to grant Nextel Partners' Petition for ETC status.

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NPCR, Inc. d/b/a Nextel Partners (“Nextel Partners”), by its undersigned counsel, hereby submits its “Reply” to the Comments filed on May 7, 2004 by TDS Telecommunications Corp. (“TDS”)¹ in the above-captioned proceeding, which concerns Nextel Partners’ Petition for Designation as an Eligible Telecommunications Carrier

¹ TDS does not identify itself in its Comments, except to state that it is the “parent company of Butler Telephone Company.” TDS Comments at 1. However, research reveals the following profile for TDS:

TDS Telecommunications is the fixed-line telecom unit of Telephone and Data Systems (TDS). TDS Telecom operates **more than 100 incumbent local-exchange carriers (ILEC) operating in 28 states.** It also operates two competitive local-exchange carriers (CLEC), TDS Metrocom and USLink. **The company maintains more than 1 million local access lines** and accounts for about 25% of the revenues for parent company Telephone and Data Systems.

See *TDS Telecommunications Corporation Company Profile*, Yahoo Finance (emphasis supplied), <http://biz.yahoo.com/ic/130/130594.html>

(“ETC”) in the State of Alabama² as recently supplemented in compliance with the requirements of the Commission’s *Virginia Cellular Order*.³

I. BACKGROUND

Nextel Partners’ Supplement to its Petition was filed on March 24, 2004, and the Commission requested comment by Public Notice issued on April 12, 2004.⁴ In its May 7, 2004 Comments, TDS opposes Nextel Partners’ Petition, and contends that it should be denied or at least held in abeyance pending resolution of the issues placed before the Commission by the Joint Board’s *Recommended Decision*.⁵

As discussed in greater detail below, TDS’ comments are unsupported and fail to raise any valid issues in opposition to Nextel Partners’ Petition for ETC status in Alabama as supplemented on March 24, 2004. Accordingly, Nextel Partners’ Petition should be granted without further delay.

²Nextel Partners’ Petition for the Designation as an Eligible Telecommunications Carrier in the State of Alabama (hereinafter, the “Petition”) was filed on April 4, 2003 in Commission Docket No. 96-45.

³ *In the Matter of Federal-State Joint Board on Universal Service: Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004) (“*Virginia Cellular*”). In *Virginia Cellular*, the Commission set forth several requirements for ETC designation in rural areas, and stated that “[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission.” *Virginia Cellular* at ¶ 4.

⁴ FCC Public Notice, “Parties Are Invited to Comment on Supplemented Petitions for Eligible Telecommunications Carrier Designations,” CC Docket No. 96-45, DA 04-998, (released April 12, 2004).

⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 19 FCC Rcd 4257 (2004) (“*Recommended Decision*”).

II. DISCUSSION

A. **There is no justification for holding Nextel Partners' Petition in abeyance pending resolution of the issues from the Joint Board's Recommended Decision**

TDS contends that all of Nextel Partners' Petitions before the FCC should be held in abeyance until the Commission has resolved all of the "significant ETC designation issues" from the Joint Board's *Recommended Decision* in the Portability Proceeding.⁶ In particular, TDS asserts that the Commission's public interest framework set forth in the *Virginia Cellular Order* does not present a resolution of the issues pertaining to the effect of additional competitive ETCs on the growth of the Universal Service Fund. Given the pending status of this issue, TDS claims, it is not appropriate to evaluate all pending ETC petitions under the standards enumerated in the *Virginia Cellular Order*.⁷ TDS contends that the filing of the Nextel Partners' ETC petitions in several states calls into question the long-term sustainability of the USF.⁸ For this reason, TDS explains, the Commission must wait to evaluate all of Nextel Partners' ETC petitions until all outstanding issues posed by the Joint Board in its *Recommended Decision* have been addressed and the Commission "has established a framework for evaluating the overall impact on the Fund" of granting new ETC petitions.⁹

Contrary to TDS' assertions, general concerns pertaining to the growth of the USF do not justify the imposition of any further delays in the processing of the Nextel Partners' ETC petitions pending before the Commission. These petitions have already

⁶ TDS Comments at 1-2.

⁷ TDS Comments at 4.

⁸ *Id.*

⁹ *Id.*

been awaiting decision far beyond the six-month processing deadline the Commission assigned to itself for consideration of competitive ETC petitions.¹⁰ Existing law requires these petitions to be processed, and the Commission is bound to abide by *existing* rules and policies in all proceedings.¹¹

The Commission's *Virginia Cellular Order* clearly sets forth the requirements that a Petitioner must satisfy in order to be granted ETC status. In setting forth those standards, the Commission was aware of the important unresolved policy issues relating to Universal Service but determined that further delay in the consideration of ETC petitions was not in the public interest. Balancing the importance of moving to decision on pending ETC petitions with the unresolved policy issues the Commission held, "[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission."¹² The Commission elaborated:

[W]e note that the outcome of the Commission's pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Virginia Cellular and other ETCs may receive in the future. This Order is not intended to prejudge the outcome of that proceeding."¹³

¹⁰ In the *Twelfth Report and Order* in Docket 96-45, the Commission committed to attempt to resolve ETC designation petitions in a six-month time frame, recognizing that "excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas." *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264 (2000) ("*Twelfth Report and Order*").

¹¹ *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) ("Under the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.").

¹² *Virginia Cellular Order* at ¶ 3.

¹³ *Id.* at ¶ 12.

Thus, it is clear that in the *Virginia Cellular Order* the Commission rejected the approach now advanced by TDS that consideration of pending ETC applications be held in abeyance indefinitely while matters of policy such as the issues contained in the Commission's Portability Proceeding are ultimately resolved. Rather, the Commission adopted standards that allow it to move forward to decision on pending ETC petitions, while acknowledging that those standards are subject to amendment by future Commission actions.¹⁴

B. The Commission's *Virginia Cellular Order* does not require the aggregation of other ETC petitions for purposes of evaluating the effect of a particular ETC petition on growth of the Universal Service Fund

TDS claims that the Commission cannot consider Nextel Partners' Alabama ETC Petition, which TDS estimates will draw only \$696,000 annually, in isolation from other pending ETC petitions filed by Nextel Partners.¹⁵ TDS argues that the Commission must take into account the impact of granting all of Nextel Partners' petitions prior to allowing any of them to be granted.¹⁶ TDS' asserted position, however, is not consistent with applicable law pertaining to the designation of ETCs. The Commission's *Virginia Cellular Order* stresses that the public interest test it outlines is a "fact-specific exercise." Consistent with that approach, the impact of the grant of any particular ETC petition is

¹⁴ TDS' contention that Nextel Partners' filing in several states represents a significant departure from past practice is simply erroneous. As revealed by an examination of the Schedule HC03, Third Quarter 2004 FCC filings by the Universal Service Administrative Company ("USAC"), there are many competitive ETCs that have filed for and received ETC status in multiple states and study areas. Nor has TDS made any showing that grant of Nextel Partners' Petitions will harm the public interest.

¹⁵ TDS Comments at 5.

¹⁶ TDS Comments at 6.

considered on a case-by-case basis, on the record of that proceeding. The approach suggested by TDS would not properly take into account the costs and benefits to the public in *each* state where application is made.

TDS argues that, if NPI is granted, other national carriers will find it necessary to apply for ETC status in order to compete, resulting in “exponential growth” of the USF.¹⁷ TDS reiterates the oft-asserted and shopworn argument from OPASTCO, asserting that if Nextel Partners is granted ETC designation in Alabama, then all CMRS providers everywhere will seek and obtain ETC designation.¹⁸ According to TDS, OPASTCO estimates that if all CMRS providers nationwide were to apply for and receive ETC status, the annual funding level of the High-Cost program would increase by approximately \$2 billion.¹⁹ However, neither OPASTCO nor TDS provides any evidence demonstrating that *all* CMRS providers intend to be designated as ETCs.²⁰ In fact, there has been no flood of wireless carriers seeking to obtain ETC designation *en masse* despite the fact that the opportunity to gain eligibility for USF support has been

¹⁷ TDS Comments at 6.

¹⁸ *Id.*, citing Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies in CC Docket No. 96-45 at 3 (May 5, 2003) (“OPASTCO Comments”).

¹⁹ See OPASTCO Comments at 3.

²⁰ Nextel Partners’ primary business focus is the provision of services in mid-sized and tertiary markets. This business focus makes Nextel Partners a natural and high-priority candidate for ETC designation. But not every CMRS carrier is interested in pursuing an active course of providing the required services for ETC designation and building out a network in high-cost areas. There is no reason to believe that wireless ETCs pose any greater risk than wireline ETCs to the survival of the Universal Service Fund.

available for many years.²¹ Accordingly, TDS' comments are purely speculative and cannot form the basis for Commission action.

C. The Commitments Made by Nextel Partners in its March 24, 2004 Supplement Satisfy the Requirements of the Commission's *Virginia Cellular Order*

TDS asserts that, on the merits, Nextel Partners' Petition and March 24, 2004 Supplement in Alabama do not meet the public interest criteria in the *Virginia Cellular Order*. TDS raises numerous arguments purporting to demonstrate the insufficiency of Nextel Partners' Supplement, none of which is supported by any evidence or legal precedent. TDS' contentions lack merit and should be rejected.

TDS claims that Nextel Partners' Supplement is inadequate because Nextel Partners "relies largely on the presumed benefits of competitive choice and mobility" and do not "offer the types of concrete commitments" made by Virginia Cellular such as the commitment to serve residences to the extent that they do not have access to the PSTN through the ILEC.²² This claim is erroneous for several reasons: first, competitive choice and mobility are in fact extremely important components of the Commission's public interest balancing test in the *Virginia Cellular Order*.²³ To assert that Nextel

²¹ In fact, as recently established in the record of WT Docket 02-381 by the Universal Service Administrative Company, by the end of 2002, there were only 44 wireless competitive ETCs in operation, with only 29 receiving High Cost Program support. Total subsidies paid to these wireless ETCs for the provision of Universal Service supported services amounted to less than \$63 million for all categories of High Cost Support combined. See March 25, 2003 Letter and Attached Spreadsheet from Linda J. Miller, Deputy General Counsel of Universal Service Administrative Company in WT Docket 02-381.

²² TDS Comments at 7.

²³ See *Virginia Cellular Order* at ¶ 13 ("...we find that the designation of Virginia Cellular as an ETC in certain areas served by rural telephone companies serves the public interest and furthers the goals of universal service by providing *greater mobility and a choice of service providers* to consumers in high-cost and rural areas of

Partners' Supplement is somehow insufficient because it "relies largely" on these important criteria is at the least disingenuous in light of the Commission's emphasis on these issues. Moreover, TDS' unsupported implication that there is some reason to believe that these benefits may not accrue if Nextel Partners is granted ETC status in Alabama lacks merit. However, TDS has not produced evidence for such a contention: it has not cited to any Commission case law or other competent legal authority. Nor has TDS presented facts or analysis that might call into question the likelihood that these benefits will accrue in Alabama.

Specific Commitments. Nextel Partners has made specific commitments to the Commission in its Supplement and has included discussions concerning: (i) adoption of the CTIA Consumer Code;²⁴ (ii) annual consumer complaint reporting per 1000 handsets;²⁵ (iii) commitments for service provisioning within designated areas, and a detailed methodology for serving customers requesting service that are within the designated areas but not within existing coverage at the time of their requests;²⁶ (iv) specific construction plans for improving service to designated areas and reaching out into unserved portions of the designated service territory;²⁷ (v) annual progress reports on use of USF monies;²⁸ (vi) advertising commitments, including the local publicizing of Lifeline and Linkup programs for low-income consumers;²⁹ (vii) wireless access for

Virginia.") (emphasis supplied).

²⁴ Nextel Partners' March 24, 2004 Supplement at 2.

²⁵ *Id.* at 3.

²⁶ *Id.* at 4.

²⁷ *Id.* at 5-6 and Exhibit 2.

²⁸ *Id.* at 6.

²⁹ *Id.* at 7.

customers in situations where they do not have access to a landline telephone;³⁰ (viii) wireless access to emergency services, especially beneficial to consumers in remote geographic areas;³¹ (ix) local calling areas that are far larger than any offered by the rural ILECs operating within Nextel Partners' Designated Areas.³² Accordingly, it is inaccurate to imply as TDS does that Nextel Partners' reliance upon competitive choice and mobility in its Supplement renders the Supplement insufficient, or that Nextel Partners' Supplement lacks "concrete commitments" that are necessary to grant of the Petition.³³

E-911. TDS also argues that, although Nextel Partners cites "wireless access to emergency services" as a public interest benefit identified in *Virginia Cellular*, Nextel Partners itself does not commit to comply with state and federal 911 and E-911 mandates.³⁴ First, TDS is flatly wrong in its assertion that Nextel Partners did not "commit" to 911 and E-911 compliance. Nextel Partners *did* explain its compliance with 911 and E-911 requirements in its Petition, and stated in no uncertain terms that it "will

³⁰ *Id.* at 7-8.

³¹ *Id.* at 8.

³² *Id.* at 8 and Attachment 3.

³³ TDS' complaint that Nextel Partners' Supplement does not include the same commitment voiced by Virginia Cellular to serve residential customers to the extent that they do not have access to the public switched network, is erroneous. Nextel Partners *did* discuss in its Supplement the advantage it can render to all customers that are in situations where they do not have access to a landline phone. *See* March 24, 2004 Supplement at 7-8. Nextel Partners has committed to provide USF-supported services upon designation as an ETC to customers within the designated service territory upon reasonable request. *See* Nextel Partners' March 24, 2004 Supplement at 3, § 3. Moreover, the commitment by Virginia Cellular referred to by TDS pertained to special circumstances evidenced in the record of that particular proceeding. *See Virginia Cellular Order* at n.88.

³⁴ TDS Comments at 8.

implement E911 consistent with the Commission’s Rules and Orders.”³⁵ Second, TDS is apparently unaware of the very close working relationship between the Public Safety community and the Nextel companies; Nextel Partners has an absolutely *stellar* reputation in that sector, and is a market leader for 911 and E-911 compliance. Finally, as TDS itself should know, compliance with federal 911 and E-911 requirements is not optional or voluntary: it is *mandatory and enforceable*.

Local Usage. TDS also asserts that, unlike Virginia Cellular, Nextel Partners does not “commit to offer a variety of local usage plans at a range of prices and including a large volume of minutes.”³⁶ This assertion is irrelevant. For one thing, Nextel Partners’ service plans are nationwide in scope and available from many sources, including its website. There are numerous different plans, each including local usage, at different prices. This is an obvious feature of Nextel Partners’ service, and is driven by its continuing commitment to good customer relationships. Nextel Partners’ service plans are market-driven, competitive and they change from time to time with market conditions and advances in technology. In addition, in the *Virginia Cellular Order*, the Commission did not make inclusion of this “commitment” now advanced by TDS part of its framework for evaluating the public interest aspects of an ETC petitioner’s eligibility. What the Commission *does* require with respect to local usage is the commitment to meet any minimum local usage requirement ultimately imposed by the Commission.³⁷ Nextel Partners has made the requisite commitment.³⁸

³⁵ See Nextel Partners Petition at 7, § II.B.5.

³⁶ TDS Comments at 8.

³⁷ See *Virginia Cellular Order* at ¶¶ 18-20.

³⁸ See Nextel Partners Petition at 3, § 2.

Commitment to Service. TDS further asserts that, although Nextel Partners commits to using USF support to improve its network facilities and reach areas it does not currently serve, it does not represent that “it will use the support to serve sparsely populated areas” as does Virginia Cellular.³⁹ Again, TDS’ assertion is irrelevant, since the Commission has not made it mandatory for ETC petitioners to “commit” to build in “sparsely-populated areas.” This is simply a term used by Virginia Cellular when it was characterizing the build-out of its own system to reach customers currently outside its network coverage.⁴⁰ In fact, it is not even clear from the *Virginia Cellular Order* what the term “sparsely populated” means; nor does TDS even attempt to analyze how this term might apply, if at all, in the instant case. The record of this proceeding clearly demonstrates that Nextel Partners has presented a detailed construction plan with its Supplement, aimed at improving existing facilities and reaching out to areas outside current network coverage.

Advertising. TDS contends that Nextel Partners’ commitment to advertise USF supported services is at a “lower level” than that of Virginia Cellular and the plans to advertise Lifeline and Linkup are insufficiently detailed.⁴¹ However, it is unclear what this assertion means, or how TDS defines a “level” of advertising. As TDS itself catalogued, Nextel Partners has committed to advertising USF supported services by means of newspapers, television, radio, and the Internet.⁴²

³⁹ TDS Comments at 8.

⁴⁰ See *Virginia Cellular* at ¶ 16.

⁴¹ TDS Comments at 9.

⁴² *Id.* at 8-9.

As Nextel Partners emphasized in its Supplement, it will “advertise the availability and terms and conditions of Lifeline and Linkup programs so that eligible consumers can determine whether they are eligible to receive discounts and/or subsidies from these programs in conjunction with their Nextel Partners service.”⁴³ Nextel Partners additionally committed to “provide notices for posting at local unemployment, social security and welfare offices” in Alabama.⁴⁴ Finally, Nextel Partners stated that it would “locally publicize the construction of new facilities and relevant expansions of service coverage, so that consumers may be advised when Nextel Partners service is improved, or becomes available to customers in their localities.”⁴⁵ As demonstrated by these commitments, Nextel Partners will take all appropriate measures to advertise and make its services available to customers, including USF-supported services upon designation as an ETC. Indeed, these advertising initiatives are *almost precisely the same* as those undertaken by Virginia Cellular.⁴⁶ Accordingly, TDS’ contentions regarding the sufficiency of Nextel Partners’ advertising commitment lacks merit and should be rejected.

Benefit analysis. Finally, TDS argues that Nextel Partners does not “weigh the purported benefits of its ETC designation against the potential harm to consumers in the affected rural study areas,” and does not guarantee quality service to all portions of the designated service area.”⁴⁷ TDS asserts that, as a result, Nextel Partners could target only

⁴³ See Nextel Partners’ Supplement at 7, § 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Virginia Cellular Order* at ¶ 25.

⁴⁷ *Id.* at 9-10.

more populous areas while leaving the remote areas to be served only by the ILEC.⁴⁸ These arguments are inapposite. Nextel Partners' Petition and Supplement detail the many benefits that will accrue to Alabama consumers upon grant of ETC status in this proceeding.⁴⁹ On the other hand, TDS has not identified any palpable or cognizable "harm" to the public from designating Nextel Partners an ETC.⁵⁰

Service Quality. As to service quality, unlike the ILECs TDS operates, Nextel Partners is a competitive carrier that must provide excellent service to customers or risk losing their business. Nextel Partners is not rate-regulated, and has no assurance from state and federal governments and ratepayers that it will earn profits or even cover its expenses. As such it has an inherent incentive to perform its business to the highest standards. Nextel Partners' record of excellence is well-recognized in the industry, and Nextel Partners has a very small "churn rate" for its customers. To provide further assurance of its commitment to provide quality service within its designated territories, Nextel Partners has made detailed showings in its Supplement concerning its build-out, regulatory oversight, and procedures to respond to requests for service. Nextel Partners has also adopted the CTIA Code, which provides further guidance on the manner in which Nextel Partners will handle its customer relationships. TDS' implication that Nextel Partners is not fully committed to providing the highest-quality service to all of its customers is unfounded.

⁴⁸ *Id.* at 9.

⁴⁹ *See, e.g.*, Nextel Petition at 6-8 and March 24, 2004 Supplement at 7.

⁵⁰ As was the case with respect to Virginia Cellular, the impact on the \$3 Billion USF High Cost Fund of designating Nextel Partners an ETC in Alabama, even assuming that TDS' estimate of a \$696,000 annual draw, is minimal.

In sum, Nextel Partners has comprehensively addressed the issues raised by the Commission in its *Virginia Cellular Order*, and TDS' assertions to the contrary are nothing more than unsupported remarks that are entitled to no credence.

III. CONCLUSION

Because all applicable legal and public interest requirements have been met, Nextel Partners requests that the Commission promptly grant Nextel Partners' Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama.

Respectfully submitted,

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