

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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
NPCR, Inc. d/b/a Nextel Partners)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the states of Alabama, Florida, Georgia,)	
Pennsylvania, Tennessee, and Virginia)	
)	
Nextel Partners of Upstate New York, Inc.)	
d/b/a Nextel Partners)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the state of New York)	
)	
To: The Commission)	

OPPOSITION TO MOTION TO STRIKE

The Rural Local Exchange Carriers (Rural LECs)¹ oppose the Motion to Strike filed by NPCR, Inc. d/b/a Nextel Partners and Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners (collectively, Nextel Partners).² Nextel Partners asks the Commission to strike

¹ The Rural LECs include TDS Telecommunications Corp. (TDS Telecom); Ardmore Telephone Company; Castleberry Telephone Company, Inc.; Frontier Communications of the South, LLC; Frontier Communications of Alabama, LLC; Frontier Communications of Lamar County, LLC; Graceba Total Communications, Inc.; GTC, Inc.; Gulf Telephone Company; Interstate Telephone Company; Millry Telephone Company, Inc.; Mon-Cre Telephone Cooperative, Inc.; Moundville Telephone Company, Inc.; National Telephone Company, Inc.; New Hope Telephone Cooperative, Inc.; Ragland Telephone Company; Roanoke Telephone Company, Inc.; Union Springs Telephone Company, Inc.; and Valley Telephone Company, LLC.

² Nextel Partners' Motion to Strike, CC Docket No. 96-45 (Nov. 8, 2004) (Motion).

the Rural LEC's Reply³ on the ground that the Reply addresses the failure of the Nextel Partners' ETC petitions to meet the public interest test outlined in *Virginia Cellular*, an issue not highlighted in the Application for Review.⁴ The Commission should deny the Motion. The purpose of a reply is to respond to "matters raised in the opposition(s)."⁵ In this case, the Reply permissibly responded to the Opposition's contention that procedural concerns raised in the Application for Review should be rejected because the substantive facts supported the Nextel Partners' ETC designation.⁶

I. A REPLY MAY RESPOND TO STATEMENTS MADE IN THE OPPOSITION

Nextel Partners' Motion implicitly assumes that the Reply constitutes an untimely supplement to the Application for Review. This assumption rests on the erroneous premise that a reply is limited to matters raised in the initial pleading, and that the inclusion of any other issues transforms the reply into a supplement to that pleading. In fact, the Commission's rules state that a reply is "limited to matters raised in the *opposition(s)*,"⁷ not the initial pleading.

The Commission has repeatedly ruled that a reply may respond to statements made in an opposition even if the matter was not raised in the initial pleading. For example, in *Applications of The New Continental Broadcasting Co.*,⁸ license applicant New Continental filed a Motion to Reopen the Record accusing fellow applicant RAB of forging signatures on two

³ Reply to Opposition to Application for Review, CC Docket 96-45 (Oct. 27, 2004) (Reply).

⁴ Application for Review of the Rural Local Exchange Carriers, CC Docket 96-45 (Sept. 24, 2004) (Application for Review).

⁵ 47 C.F.R. §§ 1.45(c), 1.115(d).

⁶ Nextel Partners' Opposition to Application for Review, CC Docket No. 96-45 (Oct. 12, 2004) (Opposition).

⁷ *Id.* (emphasis added).

⁸ 93 F.C.C. 2d 1275 (1983).

affidavits. In its opposition, RAB asserted that the purported affiants had not signed the affidavits themselves because they were out of town, but that they had authorized another person to sign for them. In reply, New Continental submitted evidence that the affiants were in town and that they did not authorize the signatures. RAB moved to strike the reply for relying on new material. The Commission denied the motion, stating that “the material contained in the Reply is largely responsive to specific allegations raised in RAB’s Opposition[,]” and that “Continental was [not] obliged to anticipate” RAB’s arguments.⁹ Similarly, in *Alden CATV, Inc.*,¹⁰ WUHQ-TV submitted a pleading in a special relief proceeding explaining the relief it sought. Respondent WZZM-TV filed an opposition claiming that WUHQ failed to meet specific proof requirements for the relief requested. WUHQ replied with additional arguments and evidence. WZZM moved to strike the reply for raising “new matters.” The Commission denied the motion, stating that the reply had “merely countered the criticisms leveled by WZZM-TV at [WUHQ’s] lack of specificity.”¹¹

Thus, it is perfectly proper for a reply to respond to an opposition with arguments and evidence not presented in the initial pleading but that respond to arguments or allegations made in the opposition.

⁹ *Id.* at 1280 n.18.

¹⁰ 65 F.C.C. 2d 787 (1977).

¹¹ *Id.* at 790 n.5. See also *DeSoto Broadcasting, Inc.*, 13 FCC Rcd 2769, 2781 (1998) (denying motion to strike because reply “responded to issues raised in the oppositions and thus was proper under Section 1.45(b) of the Commission’s rules”); *KQED, Inc.*, 88 F.C.C. 2d 1159, 1167 n.12 (1982) (denying motion to strike because reply “does not address any issues not addressed in the licensee’s opposition”).

II. THE REPLY PROPERLY RESPONDED TO ARGUMENTS AND ASSERTIONS MADE IN NEXTEL PARTNER'S OPPOSITION

In this case, the Opposition repeatedly and emphatically asserted that the Rural LECs had conceded that the Nextel Partners' ETC petitions met the *Virginia Cellular* test.¹² Nextel Partners then used this purported concession to support its claim that upholding the Nextel ETC Order would serve the public interest. The Rural LECs had the right to challenge these misstatements. It is true that the Application for Review did not emphasize the *Virginia Cellular* analysis because the Rural LECs do not believe that continuing to apply the test at this time is in the public interest. However, that does not mean that the Rural LECs concede that the Nextel Partners ETC petitions met the test. In fact, as Nextel Partners is well aware, the Rural LECs vigorously argued before the Bureau that, even under the *Virginia Cellular* test, Nextel Partners did not meet the requirements for ETC designation.¹³

More fundamentally, the Opposition is grounded in the idea that it would be unreasonable for the Commission to grant the Application for Review and overturn the Nextel ETC Order when the grant of ETC designation to Nextel Partners was consistent with the public interest as defined by the Commission in *Virginia Cellular*.¹⁴ In response, it was entirely appropriate for the Rural LECs to draw the Commission's attention to the many ways in which the designation of Nextel Partners as an eligible telecommunications carrier does not appear consistent with the Commission's intention in *Virginia Cellular* to limit ETC designation to carriers submitting concrete evidence of a genuine commitment to provide truly universal service throughout the designated service area(s).

¹² See Opposition at 3, 4, 6-7, 8.

¹³ See Reply at 2-3.

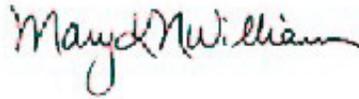
¹⁴ See Opposition at 4.

CONCLUSION

Because the Reply properly responded to arguments made in the Opposition, the Rural LECs urge the Commission to deny the Motion to Strike and to consider all the relevant facts in determining whether the Nextel ETC Order should be allowed to stand.¹⁵

Respectfully submitted,

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¹⁵ Even if the Commission were to find that the issue of Nextel Partners' compliance with the *Virginia Cellular* test was a "new matter" not entitled to be raised in the Rural LECs' Reply, the Commission would be justified only in striking the two pages of the Reply discussing that issue. See *Cellexis International, Inc.*, 13 FCC Rcd 22461, 22461 n.2 (1998).

CERTIFICATE OF SERVICE

I, Mary Newcomer Williams, hereby certify that on this 23rd day of November, 2004, I caused copies of the foregoing Opposition to Motion to Strike Reply to be served by first-class mail, postage prepaid, on the following parties to this proceeding:

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