

ORIGINAL

RADEY | THOMAS | YON

Attorneys & Counselors at Law

POST OFFICE BOX 10967 (32302)
101 NORTH MONROE STREET, SUITE 775
TALLAHASSEE, FLORIDA 32301
www.radeylaw.com

850-425-6654 phone
850-425-6694 fax

Email: sclark@radeylaw.com

KAREN ASHER-COHEN
DONNA E. BLANTON
BERT L. COMBS
JEFFREY L. FREHN
CHRISTOPHER B. LUNNY
ELIZABETH McARTHUR
TRAVIS L. MILLER
JOHN RADEY
HARRY O. THOMAS
DAVID A. YON

May 22, 2003

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Ms. Blanca Bayo
Commission Clerk and
Administrative Services Director
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 030346-TP

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen (15) copies of Petition for Leave to Intervene of Northeast Florida Telephone Company and GTC, Inc. d/b/a GT Com.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Susan F. Clark

SFC:plk
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

NPCR, INC. D/B/A NEXTEL PARTNERS')	
Petition for Declaratory Statement Concerning)	
the Commission's Jurisdiction to Determine)	Docket No. 030346-TP
Nextel Partners' Entitlement to Eligible)	
Telecommunications Carrier Status in Certain)	Filed: May 22, 2003
Designated Areas in the State of Florida)	
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**PETITION FOR LEAVE TO INTERVENE
OF NORTHEAST FLORIDA TELEPHONE COMPANY
AND GTC, INC. D/B/A GT COM**

Northeast Florida Telephone Company ("Northeast Florida") and GTC, Inc. d/b/a GT COM ("GT Com"), by and through their undersigned counsel, and pursuant to Rules 25-22.039, 28-106.201(2) and 28-106.205, Florida Administrative Code, petition for leave to intervene in the above-styled docket, and as grounds therefor, state as follows:

PROCEDURAL BACKGROUND

1. The names, addresses and telephone numbers of the Petitioners are:

Northeast Florida Telephone Company
Attn: Deborah Nobles, Vice President of
Regulatory Affairs
505 Plaza Circle, Suite 200
Orange Park, Florida 32073
(904) 688-0029 (Telephone)
(904) 688-0025 (Telecopier)

GTC, Inc. d/b/a GT Com
Attn: Mark Ellmer
P. O. Box 220
502 Fifth Street
Port St. Joe, Florida 32457
(850) 229-7235 (Telephone)
(850) 229-8724 (Telecopier)

2. All pleadings, orders and correspondence should be directed to Northeast Florida's and GT Com's representatives as follows:

Benjamin H. Dickens, Jr., Esq.
Blooston, Mordkofsky Jackson & Dickens
2120 L Street, Northwest
Washington, DC 20037
(202) 828-5510 (Telephone)
(202) 828-5568 (Telecopier)

Deborah Nobles
Northeast Florida Telephone Company
505 Plaza Circle, Suite 200
Orange Park, Florida 32073
(904) 688-0029 (Telephone)
(904) 688-0025 (Telecopier)

GTC, Inc. d/b/a GT Com
Mark Ellmer
P. O. Box 220
502 Fifth Street
Port St. Joe, Florida 32457
(850) 229-7235 (Telephone)
(850) 229-8724 (Telecopier)

3. The agency affected by this Petition for Leave to Intervene is the Florida Public Service Commission ("Commission" or "FPSC"), 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399.

4. This proceeding was initiated by NPCR, Inc. d/b/a Nextel Partners' Petition for Declaratory Statement filed with the Commission on April 16, 2003. Nextel Partners is a commercial mobile radio service ("CMRS") provider providing wireless voice and data services in the State of Florida. Nextel Partners' Petition seeks a declaratory statement from the Commission determining that Nextel Partners is not subject to the jurisdiction of this Commission and is instead subject only to the jurisdiction of the Federal Communications Commission ("FCC") for the purpose of determining any entitlement of Nextel Partners to eligible telecommunications carrier ("ETC") status under Section 214(e) of the Communications Act of 1934, as amended.

BACKGROUND ON WIRELESS CARRIER ETC STATUS

5. Pursuant to 47 U.S.C. §214(e)(1), a common carrier, including Nextel Partners, that is designated as an eligible telecommunications carrier is eligible to receive universal service support in accordance with 47 U.S.C. §254 throughout the service area for which the ETC designation is received so long as the common carrier offers the services required under federal law for federal universal service support, uses its own facilities or a combination of its own facilities and the resale of another carrier's facilities, and advertises the availability of the services and the charges therefor using media of general distribution. Under 47 U.S.C. §254(e)(2):

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. (emphasis supplied).

Subsection (6) of 47 U.S.C. §214(e) goes on to state, however:

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission (FCC) shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law.

6. These statutory ETC provisions of federal law were explained and interpreted by the FCC in its Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking in the Matters of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 15 FCC Rcd 12208, adopted June 8, 2000 and released June 30, 2000. In the Twelfth Report and Order, the FCC concluded that state commissions have the primary responsibility for the designation of ETCs under Section 214(e)(2).¹ The FCC noted that its authority under Section 214(e)(6) applies only when a carrier is not subject to the jurisdiction of a state commission.² Finally, the FCC cautioned that:

... carriers seeking designation from this Commission (the FCC) under Section 214(e)(6) for services provided on non-tribal lands must first consult with the relevant state regulatory commission on the issue of whether the state commission has jurisdiction to designate the carrier, even if the carrier asserts that the state commission lacks jurisdiction over the carrier.... [T]he carrier should first consult with the state commission to give the state a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes of carriers.³

7. In the case of the Florida Public Service Commission, although a CMRS provider is not a "telecommunications company" as defined by Florida law, CMRS providers are subject to fees assessed pursuant to the FPSC's universal service provisions prescribed by Section 364.025, Florida Statutes. See Section 364.02(12), Florida Statutes.⁴

¹Twelfth Report and Order, at ¶93.

²Twelfth Report and Order, at ¶106.

³Twelfth Report and Order, at ¶112-113.

⁴See also In re: Determination of funding for universal service and carrier of last resort responsibilities, 95 F.P.S.C. 12:375, 384, Order No. PSC-95-1592-FOF-TP issued December 27,

**NORTHEAST FLORIDA AND GT COM ARE ENTITLED
TO INTERVENE IN THIS PROCEEDING**

8. Rules 25-22.039 and 28-106.205, Florida Administrative Code, authorize intervention where the allegations in the petition to intervene “demonstrate that ... the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.”

9. It is a well-established principle of administrative law that a party is considered to have a substantial interest in the outcome of a proceeding if: (a) the party will suffer an injury in fact which is of sufficient immediacy to entitle it to a formal administrative hearing; and (b) the injury is of the type or nature which the proceeding is designed to protect. Agrico Chemical v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981).

10. Recent decisions of Florida appellate courts recognize that the 1996 amendments to Section 120.565, Florida Statutes, providing, among other things, that the agency provide notice of the filing of a petition for a declaratory statement and the resolution of the petition in the Florida Administrative Weekly:⁵

... accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties. Any substantially affected party can intervene in a declaratory statement proceeding before... (an) agency....

Chiles v. Department of State, Division of Elections, 711 So.2d 151, 155 (Fla. 1st DCA 1998);
approved in Florida Department of Business and Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 374, 381 (Fla. 1999) (“Investment Corp.);

1995.

⁵See Ch. 96-159, Sec. 17, Laws of Florida.

see also Order No. PSC-01-1531-PCO-SU issued July 24, 2001.⁶ The right to intervene and participate in a declaratory statement proceeding provides protection for “other concerned parties” such as Northeast Florida and GT Com who would be substantially affected by the relief sought in the requested declaratory statement.

11. Northeast Florida and GT Com each has a substantial interest in the outcome of this proceeding. Northeast Florida is a small local exchange company⁷ providing basic local telecommunications service and nonbasic service in Baker County, Florida. GT Com is also a small local exchange company providing basic local telecommunications service and nonbasic service throughout Calhoun, Franklin, Gulf, Liberty and Taylor Counties and portions of Bay, Gadsden, Jackson, Madison, Okaloosa and Walton Counties, Florida. Northeast Florida and GT Com each has a universal service obligation to provide basic local telecommunications services throughout its service territory.

12. In Order No. PSC-97-1262-FOF-TP issued October 14, 1997 (“Order No. 97-1262”),⁸ the Commission designated all incumbent local exchange companies (“ILECs”), including Northeast Florida and GT Com, as ETCs and ordered the ILECs to continue to serve as the carrier of last resort in their current certificated service areas. The Commission further held and provided notice to all

⁶In re: Petition for Declaratory Statement as to whether service availability agreement with United Water Florida, Inc. requires prior Commission approval as “special service availability contract” and whether contract is acceptable to Commission, by St. Johns County, 01 F.P.S.C. 7:232 (2001).

⁷See §364.052(1), Fla. Stat. (2002).

⁸In re: Establishment of eligible telecommunications carriers pursuant to Section 214(e) of the Telecommunications Act of 1996, 97 F.P.S.C. 10:355 (1997).

other carriers who wished to be designated as a “competitive” ETC (“CETC”) in the service of a rural ILEC, that any such carrier must file a petition with the Commission and demonstrate why it is in the public interest to have more than one ETC in the service area of that rural ILEC. The Commission also held that, if such a petition were approved, the CETC must serve the entire service area of the rural ILEC to be considered an ETC or make a showing as to why some other lesser area would better serve the public interest. Order No. 97-1262, at 4.

13. With respect to the potential designation of Nextel Partners as a CETC in the service area of Northeast Florida and/or GT Com, both 47 U.S.C. §214(e)(6) and Order No. 97-1262 recognize that any such designation must be predicated by a finding that the designation is in the public interest. As the existing ETCs in their respective service areas, Northeast Florida and GT Com have substantial interests that are affected by this public interest determination. Northeast Florida and GT Com have the legal right to assert and are substantially affected by this Commission’s assertion of jurisdiction over that public interest determination. Clearly, this Commission is in a far better position than the FCC to consider the local interests of the customers of these small ILECs as recognized as far back as 1997 when the Commission designated these companies as ETCs and served notice that any public interest determination predicated the presence of a CETC in a rural area would lie with this Commission.

14. Moreover, although Nextel Partners fails to address this issue in its Petition, Section 214(e)(6) could only apply to transfer the public interest determination to the FCC if this Commission lacks the authority under state law to designate a wireless carrier as a competitive ETC. Here, the Commission has already held, without limitation, that it has the statutory authority to designate competitive ETCs but only after the CETC files a petition and a hearing is held to address

competitive ETC service area and public interest considerations. That conclusion is buttressed by the Commission's express authority under Section 364.02(12), F.S., over CMRS providers for purposes of allocation of costs for ETC-like or universal service obligations under Section 364.025, F.S.⁹

15. Accordingly, for the reasons stated, Northeast Florida and GT Com are substantially affected by the relief sought in the declaratory statement. As previously confirmed by Florida appellate courts and this Commission, a declaratory statement proceeding is the type of proceeding designed to protect the interests of substantially affected parties such as Northeast Florida and GT Com. Intervention is particularly appropriate here inasmuch as Nextel Partners has disregarded the Commission mandate that the designation of a CETC in the service area of a rural ILEC be conducted only after a petition and formal hearing process where all affected parties will have the opportunity to present evidence on service area, public interest and other relevant issues. For these reasons, intervention should be granted.

THE PETITION FOR DECLARATORY STATEMENT SHOULD BE DENIED

16. The potential designation of a competitive ETC in the service area of a small ILEC undermines the purpose of the federal Universal Service Fund ("USF") and high cost support for the provision of basic local telecommunications services. The federal USF provides high cost support to rural areas. The Universal Service Administrative Company distributes high cost universal

⁹Nextel Partners cites Order No. PSC-00-1243-PAA-TC for the proposition that CRMS providers are "not regulated by this Commission" under Section 364.02(12)(c), Florida Statutes, and "not subject to Commission rules." See Nextel Partners' Petition, at fn. 2. Nextel's reliance on this Order is meaningless as the order does not address the Commission's express authority over CMRS providers for universal service fees assessed pursuant to Section 364.025, Florida Statutes. See §364.02(12), Fla. Stat. (2000).

service funds to the ILECs on a per line basis. The per line universal service fund draw of the ILECs in a particular study area is based on the ILECs embedded costs. Both Northeast Florida and GT Com receive a per line universal service fund payment out of the federal USF.

17. When a CETC is designated in the study area of an ILEC, the CETC receives the same per-line support as the ILEC. Therefore, CETCs receive federal universal service support based on the embedded costs of the ILEC, not their own costs. However, wireless CETCs do not have the same quality of service standards or the same universal service and carrier of last resort obligations that are currently imposed on wireline ILECs. Meeting these regulatory obligations has required the wireline ILECs to make significant infrastructure investments in rural high-cost areas of Florida that might not have otherwise been served. The actual investment in infrastructure by the ILECs is the main element in determining the amount of federal high-cost support each ILEC receives.

Because the wireless CETCs do not have the same regulatory obligations as the wireline ILECs, it is very likely that the wireless CETC would receive support greater than its actual embedded costs of providing the supported services, creating an uneconomic incentive for wireless carriers to be designated as a CETC in the study area of ILECs such as Northeast Florida and GT Com. This uneconomic incentive to be designated as an ETC by wireless carriers is further exacerbated by the fact that the per line support for a rural ILEC's study area increases as a CETC takes lines from the ILEC. The ILEC's embedded costs remain the same, but the number of lines over which those costs can be spread has decreased.

Wireless carriers have already built networks in the rural ILEC's high cost study areas without contributions from federal universal service support. Again, this is possible because the

wireless carriers do not have the additional regulatory burdens of meeting the same quality of service standards, universal service and carrier of last resort obligations as the ILECs. Nextel Partners has offered nothing in its Petition outlining how it would enhance its network to ensure the provision of the requisite services with the additional funds it would receive as a CETC. The FPSC is best situated to examine these facts and determine whether the public interest factor has been met.

18. The Commission should deny Nextel Partners' Petition for Declaratory Statement for a number of reasons, including:

a. In Order No. 97-1262, the Commission determined that any non-ILEC who wished to receive ETC status in the service area of a rural LEC must file a petition with the Commission requesting ETC status and propose an appropriate service area for the fulfillment of ETC status. The petitioner is required to demonstrate that designation of the petitioner as a CETC in a rural area is in the public interest. These requirements were intended to be met and could only comport with due process requirements by conducting a formal administrative hearing wherein the petitioner and all substantially affected parties would have notice and the opportunity to present evidence on the CETC's proposed service area, the potential for uneconomic competition, public interest considerations, and other relevant issues. See Order No. PSC-99-1194-FOF-TL issued June 9, 1999 (petition for declaratory statement denied because questions posed in the petition required the filing of a petition under Section 364.051(5), Florida Statutes, and the opportunity for a Section 120.57(1) evidentiary hearing).¹⁰ Nextel Partners' request for a declaratory statement violates the procedures contemplated by Order No. 97-1262 and precludes the Commission's ability to ensure due process

¹⁰In re: Petition for a declaratory statement by GTC, Inc. d/b/a GT Com regarding Section 364.051, F.S., F.P.S.C. 6:151 (1999).

to all affected parties through a formal hearing process.¹¹

b. Rule 28-105.001, Florida Administrative Code, states that “[a] declaratory statement is not the appropriate means for ... obtaining a policy statement of general applicability from an agency.” Section 120.52(15), Florida Statutes, defines a “Rule,” in pertinent part, as “each agency statement of general applicability that implements, interprets, or prescribes law or policy” Florida appellate courts have consistently held that “[i]f an agency is presented with a petition for a declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking.” Investment Corp., 747 So.2d at 374, citing Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So.2d 928 (Fla. 1st DCA 1990) and Agency for Health Care Administration v. Wingo, 697 So.2d 1231 (Fla. 1st DCA 1997) . See also Order No. PSC-98-0078-FOF-EU issued January 13, 1998 (Commission denied petition for declaratory statement on the ground that the interpretation of law sought by the petitioner - - that exempt wholesale generators are proper applicants under the Power Plant Siting Act - - would be a statement of general applicability interpreting law and policy).¹² Here, the relief sought filed by Nextel Partners amounts to a policy statement of general applicability, i.e., that CMRS providers are not subject to the jurisdiction of the Commission for the purpose of determining designation as a CETC. Such relief is properly sought through the rulemaking process.

¹¹Under Rule 28-105.003, Florida Administrative Code, the only hearing that may be held in response to a petition for a declaratory statement is an informal, non-evidentiary hearing pursuant to Sections 120.569 and 120.57(2), Florida Statutes.

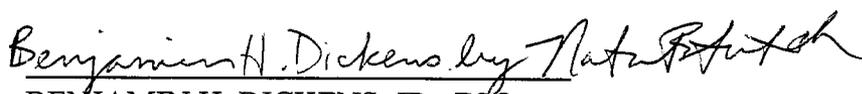
¹²In re: Petition for Declaratory Statement by Duke Energy New Smyrna Beach Power Company, L.L.P. Concerning Eligibility to Obtain Determination of Need Pursuant to Section 403.519, F.S., Rules 25-22.080 and .081, F.A.C., and Pertinent Provisions of the Florida Electrical Power Plant Siting Act, 98 F.P.S.C. 1:318 (1998).

c. Finally, as noted by the Commission in Order No. PSC-02-1459-DS-EC issued October 23, 2002,¹³ Rule 28-105.001, Florida Administrative Code, provides that a petition for declaratory statement may be used only to resolve questions or doubts regarding the application of a statute, rule or agency order. Nextel Partners' Petition fails to allege an uncertainty regarding a Commission statute, rule or order. The Petition fails to meet the pleading requirements for purposes served by a petition for a declaratory statement.

WHEREFORE, Northeast Florida and GT Com respectfully request that the Commission enter an order:

- A. Granting this Petition for Leave to Intervene; and
- B. Denying the Petition for Declaratory Statement filed by NPCR, Inc. d/b/a Nextel Partners.

Respectfully submitted,


BENJAMIN H. DICKENS, JR., ESQ.
Blooston, Mordkofsky Jackson & Dickens
2120 L. Street, Northwest
Suite 300
Washington, DC 20037
(202) 828-5510 (Telephone)
(202) 828-5568 (Telecopier)

¹³In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc., pursuant to Section 366.04, Florida Statutes, 02 F.P.S.C. 10:342 (2002).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Leave to Intervene of Northeast Florida Telephone Company and GTC, Inc., d/b/a GT Com was furnished by Hand Delivery and U.S. Mail to the following this 22nd day of May, 2003:

Christiana Moore, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850

Catalano & Plache, PLLC
Ronald J. Jarvis
3221 M Street NW
Washington, DC 20007

Nextel Partners
Brent Eilefson
10120 West 76th Street
Eden Prairie, MN 55334

Nancy B. White, Esq.
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301

Benjamin H. Dickens Jr.
BENJAMIN H. DICKENS, JR., ESQ.