

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

PETITION FOR DECLARATORY RULING AND
NUNC PRO TUNC DESIGNATION OF
NEXUS COMMUNICATIONS AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER TO OFFER
WIRELESS SERVICE IN TENNESSEE

Filed electronically in the
Docket Office 4/28/2010

DOCKET NO. 10-00083

**PETITION FOR DECLARATORY RULING AND NUNC PRO TUNC DESIGNATION
OF NEXUS COMMUNICATIONS AS AN ELIGIBLE TELECOMMUNICATIONS
CARRIER TO OFFER WIRELESS SERVICE IN TENNESSEE**

Pursuant to 47 U.S.C. §214(e)2, T.C.A. §65-2-104 and §4-5-225, Nexus Communications, Inc. ("Nexus") petitions the Tennessee Regulatory Authority to declare that the Authority has jurisdiction under federal and/or state law to designate Nexus as an Eligible Telecommunications Carrier ("ETC") authorized to provide both wireline and wireless services in Tennessee and further, to declare nunc pro tunc that Nexus' ETC designation in Tennessee includes the authority to provide a wireless low-income offering in addition to a wireline low-income offering. In support of this petition, Nexus submits the following: ¹

1. On July 11, 2008, Nexus applied to the TRA for designation as an ETC for low-income universal service support throughout the service area of AT&T Tennessee.

¹ The statements of fact in this Petition and the descriptions of documents and various filings are verified by the attached affidavit of Nexus President Steven Fenker. Copies of any documents and filings described in the Petition will be provided upon request.

2. Upon finding that Nexus met all applicable federal requirements, the TRA issued an Order on October 27, 2008, granting the Petition and designating Nexus "as an ETC carrier in the AT&T Tennessee service area for the purpose of receiving low-income federal universal service support." Order at 4. The Order does not expressly mention "wireline" or "wireless" service. It does, however, include the findings that "Nexus has committed to provide additional competitive enhanced services to consumers" and that "Nexus does not restrict service offerings to basic service for Lifeline qualified consumers." Order at 3.

3. Since Nexus' approval as an ETC, Nexus has experienced a dramatic shift in Lifeline subscribers who have elected to forgo traditional landline services and are demanding access to wireless technology. Nexus' landline ETC subscribership has decreased by more than 51%, accompanied by a concurrent rise in demand for wireless service. These Lifeline customers have made clear that they believe that Lifeline customers should have the same access to mobile technology as other consumers.

4. The changing pattern of consumer demand for wireless service is further demonstrated by comments filed at the Federal Communications Commission ("FCC") by the National Consumer League, which observed that delays in providing Eligible Telecommunications Carrier (ETC) certification to prepaid wireless carriers may be delaying the expansion of Lifeline wireless service to low-income consumers.

5. The League's observation about delays in the expansion of wireless services to Lifeline customers is particularly relevant to Tennessee. According to USAC data, Tennessee ranks among the lowest nine states in the country in Lifeline penetration rates.

6. As a result of rising consumer demand for wireless Lifeline services, Nexus, on March 23, 2009, filed a petition with the TRA seeking clarification of the earlier Order. Nexus

asked, inter alia, that the Order be amended to specifically clarify that Nexus provides both "wireline and wireless" services in Tennessee.

7. On June 17, 2009, the TRA issued a second Amended Order granting, in part, Nexus' request for clarification. Although the Amended Order made no reference to wireless service, the Order still included the findings that, "Nexus has committed to provide additional competitive enhanced services to consumers" and that "Nexus does not restrict service offerings to basic service for Lifeline qualified consumers." The Amended Order does not mention wireless service and does not expressly address whether Nexus may offer wireless as well as wireline service to Lifeline customers.

8. On June 19, 2009, Nexus sent copies of both TRA Orders to the Universal Service Administrative Company ("USAC"). Based on the language of the Orders and Nexus' understanding of FCC Rule 47 C.F.A. §54.201(h), Nexus applied to USAC for a "wireless" Study Area Code ("SAC Code"). Two months later, on August 21, 2009, USAC issued Nexus a wireless code for Tennessee.²

9. Nexus believes that USAC's decision to issue both a wireline and wireless code is consistent with FCC Rule 47 C.R.F. §54.201(h) which states:

(h) A state commissions shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier.

10. Following the issuance of the Study Area Codes by USAC, Nexus met with the TRA staff and explained that (1) USAC had given Nexus approval to offer both wireline and wireless services in Tennessee, (2) Nexus believed that such authorization was consistent with

² Nexus applied for a wireline code on July 24, 2009, and received it two days later on July 31, 2009.

FCC Rule 54.201(h), and (3) Nexus would submit to the jurisdiction of the TRA regarding the enforcement of both state and federal rules concerning the offerings of wireline and wireless services to Lifeline subscribers.

11. Following those discussions, Nexus filed a letter with the Authority on November 25, 2009, explaining USAC's decision and repeating Nexus' understanding that Nexus has been properly designated as an ETC to offer both wireline and wireless service.

12. At this time, Nexus has not received any response from the Authority concerning the points raised in Nexus' filing of November 25, 2009. Nexus has, however, received a copy of a letter dated April 16, 2010, from TRA General Counsel Richard Collier to USAC stating that the Authority was researching the issues raised in Nexus' letter and that no decision had yet been made on those issues.

13. In a letter also dated April 16, 2010, USAC informed Nexus that USAC had unilaterally decided, without discussion with Nexus or the TRA's Legal Division, that Nexus was not authorized to provide both wireline and wireless service in Tennessee. When the letter was written, USAC was apparently not aware that the Authority's Legal Division is presently considering that very issue and has reached no decision on this matter.

14. Since mid-2009, Nexus has been providing telephone services to thousands of Lifeline subscribers in Tennessee, the great majority of whom are wireless subscribers in the Memphis, Tennessee, area. The decision by USAC, if not reversed, precludes Nexus from being able to continue to offer Lifeline service to those subscribers.

15. In order to be able to continue to offer Lifeline service to wireless subscribers, Nexus asks the Authority to declare nunc pro tunc that Nexus' ETC designation in Tennessee includes both wireline and wireless services.

16. Nexus submits that the TRA is authorized under federal law, FCC Rule 54.201(h), to declare that Nexus, as an ETC in Tennessee, is authorized to offer both wireline and wireless services.³

17. Nexus submits that the TRA is also authorized under state law to designate Nexus as an ETC for the purpose of offering both wireline and wireless services.

(a) The Authority has jurisdiction over a "competing telecommunications service provider" offering "any two-way communications service" unless the carrier is "otherwise exempted from this definition by state or federal law." T.C.A. §65-4-101(1).

(b) Any entity (i.e., any "individual, partnership, copartnership, association, corporation, or joint stock company") offering wireless service in competition with another wireless carrier "shall automatically cease to be treated as a public utility under this title." T.C.A. §65-4-101-(6)(F). This exemption does not, however, "effect, modify, or lessen" the TRA's jurisdiction "over public utilities that are subject to regulation pursuant to Chapter 5 of this title." Id.

(c) T.C.A. §65-4-101(6)(F) only applies to certain CMRS providers which are classified as "non utilities." ⁴ The statute does not deregulate wireless services nor does it deprive the TRA of jurisdiction over wireless service. To the contrary, the statute preserves the TRA's jurisdiction over the wireless service of a carrier which is regulated under Chapter 5 of Title 65.

³ The TRA has previously ruled that it may exercise jurisdiction over carriers where such jurisdiction has been delegated by federal law, notwithstanding the agency's lack of jurisdiction under state law. See "Application of Advantage Cellular Systems," Docket 02-01245, Order issued April 11, 2003 at footnote 1.

⁴ See "Application of Advantage Cellular Systems," Docket 02-01245, Order issued April 11, 2003, at 1-2.

- (d) A CMRS provider which offers wireless service in competition with another CMRS provider as described in subsection (6)(F) "cease[s] to be treated as a public utility" under Title 65. Nexus is not such an entity. Nexus is still a "public utility" under state law. The Authority has jurisdiction over all of the regulated services offered by Nexus.
- (e) No state statute exempts the wireless service of Nexus from the TRA's jurisdiction. The Authority's power over a wireless services when offered by a regulated telephone company have been expressly recognized. See Jackson Mobilephone v. Tenn. P.S.C., 876 S.W.2d 106 (Tenn.Ct.App. 1993) at footnote 4. The Authority's jurisdiction over wireless service is also implicitly recognized in subsection (6)(F) which states that an entity offering wireless service does not "cease to be treated as a public utility" until six months after the FCC authorizes another CMRS provider to offer wireless service in the same area.
- (f) The TRA thus retains state law jurisdiction over the wireless services of a carrier which is regulated as a public utility under Chapter 5. The TRA therefore has jurisdiction over both the wireline and wireless services of Nexus for the purposes of designating Nexus as an ETC offering wireline and wireless services in Tennessee.
- (g) Federal law has preempted state jurisdiction over many areas of wireless service, including rates and market entry. Federal law, however, expressly preserves state jurisdiction over wireless services for the purposes of designating a carrier offering wireless service as an ETC. See 47 U.S.C. §214(e).

18. Since Nexus itself as an ETC has an affirmative obligation to provide to those low income constituents who request a wireless low income offering in addition to a wireline low income offering, Nexus asks that the TRA declare that it has jurisdiction over Nexus' wireless services pursuant to federal and/or state law, and that pursuant to such jurisdiction, the TRA declare nunc pro tunc that Nexus' ETC designation in Tennessee includes the authority to provide a wireless low income offering in addition to a wireline low income offering.

19. Not only will the TRA's declaration serve the public interest by increasing participation of qualified consumers in the Lifeline and Link Up programs in the State of Tennessee, but it will also increase the amount of federal USF dollars available to Tennessee constituents. Telephone subscribers in Tennessee contributed \$146,065,000 toward the total amount of Universal Service Fund contributions received in 2008 but received only \$108,143,000 in support resulting in a \$37,922,000 shortfall in USF funding coming back into the State of Tennessee. Thus, it would seem equitable that a greater share of USF federal funding continue to be made available to Tennessee, and more specifically to eligible low-income Lifeline and Link Up Tennessee subscribers, thereby increasing the amount of federal USF dollars flowing directly into Tennessee.

20. If the TRA fails to affirm Nexus' ETC status included the authority to provide a wireless low income offering in addition to a wireline low income offering, thousands wireless Lifeline subscribers in the Memphis area face the threat of interruption of their ETC wireless service;

21. In the absence of relief, Nexus also faces the threat of irreparable injury, having invested significant capital expenditures associated with enrolling and provisioning thousands of wireless Lifeline subscribers in the State of Tennessee.

22. Denial of relief to Nexus will further harm low income Tennessee residents by potentially denying an additional competitor into the marketplace that will offer a competitive Lifeline offering to eligible income-challenged Tennessee residents;

23. The threatened injury to Nexus by the TRA's denial outweighs any harm to any other party or entity;

24. Preservation of the status quo is in the public interest and allows Nexus to continue to service to Lifeline subscribers using either wireline or wireless technology depending upon the Lifeline consumer's choice.

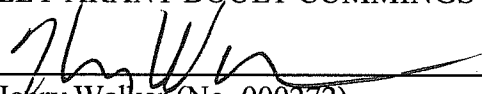
25. Because of the danger that service to Nexus wireless subscribers may be interrupted in the absence of TRA action, Nexus asks that the Authority act on this Petition and:

- (a) Immediately notify USAC of the pending petition and ask USAC to take no action that might disrupt low income reimbursements to Nexus' wireless subscribers until the Authority has had time to consider and rule on this Petition; and

- (b) Issue an order declaring that Nexus' ETC designation in Tennessee includes the authority to provide a wireless low income offering in addition to a wireline low income offering, effective as of the date of the TRA Order dated October 27, 2008;

Respectfully submitted,

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FRANKLIN COUNTY)
) SS:
STATE OF OHIO)

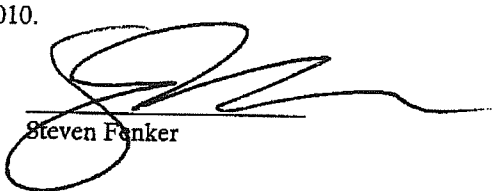
1. I am over twenty one years of age.
2. I am the President and authorized representative of Nexus Communications, Inc., ("Nexus") which is based in Franklin County, Ohio. Nexus' business headquarters is 3629 Cleveland Ave., Suite C, Columbus, Ohio 43224.
3. On July 11, 2008, Nexus as a Competitive Local Exchange Carrier ("CLEC") applied for designation as an ETC in the State of Tennessee for low-income universal service support throughout the service area of AT&T Tennessee.
4. On October 27, 2008, the TRA issued an Order designating Nexus as an ETC in the AT&T Tennessee service areas.
5. Although the Order does not expressly mention either "wireline" or "wireless" service the Order did include the finding that "Nexus has committed to provide *additional competitive enhanced services* to consumers." [emphasis added] Order at 3.
6. The Order also included the finding that "Nexus *does not restrict* service offerings to *basic service* for Lifeline qualified consumers." [emphasis added] Order at 3.
7. Nexus interpreted the October 27, 2008 as authorizing Nexus as an ETC to provide a low income wireless offering to eligible Tennessee constituents requesting a wireless low income offering in addition to a wireline low income offering.
8. Since Nexus is a CLEC that provides a wireless offering in addition to its main focus of providing local residential exchange services, Nexus began to see a strong lack of subscriber demand for wireline services and a resultant increase in demand for wireless services.
9. Nexus eventually experienced a more than 51% decrease in enrollment in local exchange services due to lack of demand for wireline services.
10. As a result of overwhelming increase in demand for wireless Lifeline services, Nexus, on March 23, 2009, filed a petition with TRA seeking clarification of the earlier Order. Nexus asked, inter alia, that the Order be amended to specifically clarify that Nexus provides both "wireline and wireless" services in Tennessee.
11. On June 17, 2009, the TRA issued a second Amended Order which, inter alia, although specifically omitting the word "wireless", did find that "Nexus has committed to provide *additional competitive enhanced services* to consumers" and that "Nexus *does not restrict* service offerings to *basic service* for Lifeline qualified consumers." [emphasis added] Order at 3-4.
12. Nexus interpreted the TRA's June 17, 2009 Amended Order as not specifically denying any authority to Nexus, and Nexus believed that had it been the TRA's contention to

- deny Nexus the authority to provide a wireless low income offering in addition to a wireline low income offering, the Amended Order would have specifically stated as such.
13. Nexus sent copies of both TRA Orders to the Universal Service Administrative Company ("USAC") allowing USAC the opportunity for an in-depth review of the Original Order in addition to the Amended Order.
 14. Nexus, on the same day the Amended Order was issued on July 19, 2009, submitted to USAC a Study Area Code ("SAC Code") request form. Nexus clearly identified the technology type as "wireless."
 15. USAC after a two month review of the application and an analysis of both Orders, finally issued Nexus a separate "wireless" SAC Code on August 21, 2009
 16. In the interim Nexus sought from USAC a "wireline" SAC Code. On July 29, 2009 Nexus submitted to USAC a Study Area Code ("SAC Code") request form for technology type "wireline." USAC after only a two day review of the Original Order issued Nexus a separate "wireline" SAC Code on July 31, 2009.
 17. Without being issued a "wireless" SAC Code by USAC Nexus would have been unable to begin offering a wireless low income offering in the State of Tennessee.
 18. Following the issuance of the Study Area Codes by USAC, Nexus met with the TRA staff and explained that (1) USAC, like Nexus had interpreted the TRA's Orders that Nexus was authorized Nexus to offer both wireline and wireless services in Tennessee, (2) Nexus believed that such authorization was consistent with FCC Rule 54.201(h), and (3) that Nexus would, to the extent necessary, voluntarily agree that the TRA may enforce as applied to Nexus, both state and federal rules concerning the offerings of wireline and wireless services to Lifeline customers.
 19. As additional affirmation that Nexus interpreted the TRA's Orders to allow Nexus to offer and wireless services as an ETC, Nexus voluntarily sent a letter to TRA Chairman Sara Kyle on November 25, 2009 noting that "as a state certified carrier," Nexus "is fully subject to the Authority's jurisdiction."
 20. Nexus having not received any response from the Authority concerning whether the agency agrees or disagrees with Nexus' interpretation of FCC Rule 54.201(h) and after the discussions with staff, Nexus continued to invest in its wireless low income offering in the State of Tennessee and continued to expand its offering to thousands of eligible low income Tennesseans.
 21. Subsequently, on Friday April 16, 2010, USAC expressly informed Nexus via letter that, based on information provided by a TRA staff person, USAC had decided unilaterally that Nexus was not, in fact, authorized to provide both wireline and wireless service in Tennessee. USAC did not address FCC Rule 54.201(h).
 22. Nexus now asks the Authority to declare Nunc Pro Tunc that Nexus that Nexus' ETC designation in Tennessee includes authority to provide a wireless low income offering in addition to a wireline low income offering.
 23. Absent a timely Order from the TRA, Nexus will be unable to continue to offer Lifeline service to those thousands of wireless subscribers already enrolled in the program.
 24. Absent a written notification from the TRA to USAC, requesting USAC to take no action that might disrupt low income reimbursements to Nexus' wireless subscribers until the

Authority has had time to consider and rule on this petition, Nexus will be unable to continue to offer Lifeline service to those thousands of wireless subscribers already enrolled in the program.

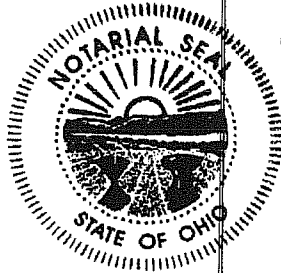
FURTHER AFFIANT SAYETH NOT

Dated this 28th day of April, 2010.


Steven Fenker

Signed before me and in my presence, having provided identification, a Notary Public in and for the State of Ohio, this ____ day of April, 2010


NOTARY PUBLIC



MUWAFEK ABDULLAH
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
April 25, 2014
Recorded in
Franklin County