D.P.U. 95-59

Petition of Dispatch Communications of New England, Inc. d/b/a Nextel Communications, Inc. for exemption from the zoning by-laws of the Town of Sterling for the purpose of constructing and operating communications facilities.

---

APPEARANCES: Robert D. Shapiro, Esq.
Kenneth Ira Spigle, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02111

FOR: DISPATCH COMMUNICATIONS OF NEW ENGLAND. INC. d/b/a NEXTEL COMMUNICATIONS, INC.
Petitioner

Table of Contents


I. INTRODUCTION . . . . . Page 1

II. STANDARD OF REVIEW . . . . . Page 3

III. THE COMPANY'S POSITION . . . . . Page 6

IV. ANALYSIS AND FINDINGS . . . . . Page 10

V. ORDER . . . . . Page 25

## I. INTRODUCTION

On April 28, 1995, Dispatch Communications of New England, Inc. d/b/a Nextel Communications, Inc. ("Nextel" or "Company") filed with the Department of Public Utilities ("Department") a petition for exemption from the Town of Sterling Zoning By-Laws. The filing was made pursuant to the provisions of G.L. c. 40A, § 3, which authorizes the Department to exempt public service corporations from local zoning ordinances or by-laws if the Department finds that an exemption is required and the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

Nextel seeks to construct and operate a 125-foot, free-standing, single-mast mono-pole communications tower and an associated 8-by-14 foot equipment shelter in Sterling on a 20-by-40 foot privately owned parcel of land overlooking Route I-190 (Exh. NEX-3, at 7, 9; Tr. 2, at 6).[1] The affected parcel of land is located in a Rural Residential/Farming district[2] as defined by the Town of Sterling Zoning By-Laws (Exh. NEX-3, at 11).

On September 10, 1994, the Company petitioned the Sterling Zoning Board of Appeals ("ZBA") for a variance to permit construction of the proposed facility, since the operation of a communications or utility facility is not a permitted use or special use in this or any other Sterling zoning district (id. at 10, 11). At an October 18, 1994 public hearing, the Sterling ZBA voted to deny the petition (id. at 11). Nextel is seeking an exemption from sections 2.2, 2.3 and 2.5 of the

---

[1] The transcripts in this case have been designated Tr. 1 for the June 7, 1995 public hearing, and Tr. 2 for the June 14, 1995 evidentiary hearing, respectively.

[2] The Town of Sterling has four zoning district designations: Neighborhood Residence; Rural Residential/Farming; Commercial; and Light Industrial (Exh. NEX-2, Att. D).

Town's Zoning By-Laws regarding restrictions and prohibitions on permitted uses and heights in the Rural Residential/Farming district (id.; Tr. 2, at 37; Brief at 1).

Along with its petition requesting a zoning exemption, the Company filed a Motion for Partial Summary Judgment and a supporting Memorandum of Law ("Motion") on the issue of its status as a public service corporation.[3]

After due notice, the Department held a public hearing in Sterling on June 7, 1995, to receive public comments on the Company's petition. Rodolfo Mata, zoning project manager for Whalen & Company, Inc., a development agent for Nextel's New England system, and Douglas Smith, a radio frequency department engineering manager for Nextel, presented a summary of the petition. Area residents raised concerns regarding visual impacts, conflicts with the flight path of the Sterling airport, structural integrity of the proposed tower, absence of advantages to the Town of Sterling, proliferation of towers, future obsolescence of the proposed technology, opportunity for tower sharing by public service agencies, the unrepresentative number of abutters at the meeting, traffic impacts, and the lack of a compelling reason to override the ZBA decision (Tr. 1, at 29-33, 35, 41, 43, 45, 49, 51, 54-56). There were no intervenors.

An evidentiary hearing was held at the Department's offices on June 14, 1995. In support of its petition, the Company sponsored the testimony of Rodolfo Mata and Douglas Smith. The evidentiary record consists of 25 exhibits and six responses to Department record requests. The Company filed a brief on August 22, 1995.

## II. STANDARD OF REVIEW

---

[3] The Motion for Summary Judgment sought the Department's determination that, as a matter of law, it was entitled to a finding that it qualified as a public service corporation.

In its petition for a zoning exemption, the Company seeks approval under G.L. c. 40A, § 3, which in pertinent part provides:

> Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the [D]epartment of [P]ublic [U]tilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public...

Under this section, a company first must qualify as a public service corporation (see Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975), hereinafter "Save the Bay"). The company then must establish that it requires an exemption from the local zoning ordinance or by-laws and demonstrate that the present or proposed use of the land or structure is reasonably necessary for the public convenience or welfare.

In determining whether a company qualifies as a public service corporation under G.L. c. 40A, § 3, the Supreme Judicial Court ("Court") has stated that:

> among the pertinent considerations are whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

Save the Bay, 366 Mass. at 680.

In determining whether the present or proposed use is reasonably necessary for the public convenience or welfare, the Department must balance the interests of the general public against the local interest. Id. at 685-686; Town of Truro v. Department of Public Utilities, 365 Mass.

407 (1974) ("Truro"). Specifically, the Department is empowered and required to undertake "a broad and balanced consideration of all aspects of the general public interest and welfare and not merely [make an] examination of the local and individual interests which might be affected." New York Central Railroad v. Department of Public Utilities, 347 Mass. 586, 592 (1964) ("New York Central Railroad").

With respect to the particular site chosen by a petitioner, G.L. c. 40A, § 3 does not require the petitioner to demonstrate that its preferred site is the best possible alternative, nor does the statute require the Department to consider and reject every possible alternative site presented. Rather, the availability of alternative sites, the efforts necessary to secure them, and the relative advantages and disadvantages of those sites are matters of fact bearing solely upon the main issue of whether the preferred site is reasonably necessary for the convenience or welfare of the public. Martorano v. Department of Public Utilities, 401 Mass. 257, 265 (1987); New York Central Railroad, 347 Mass. at 591; Wenham v. Department of Public Utilities, 333 Mass. 15, 17 (1955).

Therefore, when making a determination as to whether a petitioner's present or proposed use is reasonably necessary for the public convenience or welfare, the Department examines: (1) the present or proposed use and any alternatives or alternative sites identified; (2) the need for, or public benefits of, the present or proposed use; and (3) the environmental impacts or any other impacts of the present or proposed use. See New York Cellular Geographic Service Area, Inc., D.P.U. 94-111, at 18-24 (1995) ("NYCGSA" or "NYNEX Mobile"); Massachusetts Electric Company, D.P.U. 93-29/30, at 21-24 (1995); Tennessee Gas Pipeline Company, D.P.U. 85-207, at 20-25 (1986).

After examining these three issues, the Department balances the interests of the general public against the local interest, and determines whether the present or proposed use is reasonably necessary for the convenience or welfare of the public.

Finally, the Massachusetts Environmental Policy Act provides that "[a]ny determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact." G.L. c. 30, § 61. Pursuant to 301 C.M.R. §11.01(3), these findings are necessary when an Environmental Impact Report ("EIR") is submitted by a company to the Secretary of Environmental Affairs, and should be based on the EIR. When an EIR is not required, G.L. c. 30, § 61 findings are not necessary. 301 C.M.R. § 11.01(3).[4]

## III. THE COMPANY'S POSITION[5]

Nextel asserts that it is a public service corporation under G.L. c. 40A, § 3 and the standard established in Save the Bay (Brief at 3).[6] Nextel states that because the Department has recently ruled that Commercial Mobile Radio Service ("CMRS") providers are public service corporations, it follows that Nextel, which uses a new technology to provide CMRS, but is subject to the same federal CMRS regulations as traditional cellular providers, should also qualify

---

4 The record indicates that no EIR was required for Nextel's proposed project (Exh. DPU-5).

5 In this section, we describe the Company's position on its status as a public service corporation. Because we decide the case on this issue, we do not cover the Company's arguments regarding the other requirements of G.L. c. 40A, § 3.

6 Nextel states that the term "public service corporation" is not defined in G.L. c. 40A, § 3, or in the regulatory statutes pertaining to providers of gas, electric or telecommunications services (Motion at 3).

for public service corporation status (id. at 10-11, citing NYCGSA, D.P.U. 94-111 (1995)). Nextel states that under 47 U.S.C. § 332, CMRS, as defined by the Federal Communications Commission ("FCC"), refers to a variety of mobile radio services, including traditional cellular service, specialized mobile radio service ("SMR"), and enhanced specialized mobile radio service ("ESMR"), among others (Exh. DPU-1).[7] The Company states that both traditional cellular providers and ESMR providers like Nextel are classified as CMRS and provide similar benefits to the public (Brief at 15). In addition, Nextel states that it clearly satisfies the definition of CMRS under 47 C.F.R. § 20.3(a) (id. at 10).[8]

In addressing how it qualifies for public service corporation status, the Company first argues that its petition is consistent with the purpose of the statute. Nextel asserts that "the zoning exemption available under G.L. c. 40A, § 3 is intended to assure utilities' ability to carry out their obligation to serve the public when this duty conflicts with local interests" (id. at 22, citing Planning Board of Braintree v. Department of Public Utilities, 420 Mass. 22, at 27 (1995) ("Braintree")). Nextel claims that without the "safety valve" of a zoning exemption, a utility's ability to carry out its obligation to serve the public could be threatened (id. at 20, 23).

---

[7] Nextel's SMR system uses analog technology to provide two-way voice and data communications, including dispatch service, mobile telephone service, and paging service (Exh. DPU-1). Nextel's ESMR system involves the coordinated operation of several contiguous SMR systems using digital rather than analog technology, and a configuration of numerous low-power sites which employ significant frequency reuse (id.). Traditional cellular systems have provided mobile telephone services to third parties, employing analog technology (id.).

[8] Nextel states that it meets the definition of a CMRS because its service is (1) provided for profit, (2) interconnected to the public switched telephone network, and (3) available to the public or to a substantial portion of the public (Brief at 10).

Nextel explains that it is in the process of building out its existing systems in Massachusetts and New England (Exh. NEX-3, at 2). According to Nextel, its ability to serve the public with reliable, economic and innovative mobile communications services is dependent upon its ability to build out its network of integrated communications facilities, which must be located in a number of municipalities in order to provide reliable and adequate signal coverage on a regional basis (Brief at 31). Therefore, Nextel argues that it needs access to a zoning review process that balances its system requirements and public need or convenience against purely local land use considerations (id. at 34). Further, the Company claims that, in Braintree, the Court, in granting public service corporation status to a municipal utility, recognized that new providers "need to have the same tools" as incumbent providers in order to serve the public; Nextel asserts that the same rationale applies to new providers of CMRS (id. at 32, citing Braintree, 420 Mass. at 27).

Addressing its qualifications under the Save the Bay test, Nextel argues that it satisfies the first and third prongs by providing the benefit of CMRS service to the public under required government authorization. Nextel asserts that Congress and the FCC have recently found a public need for an increase in the number of providers of CMRS to enhance competition, reduce the need for rate regulation, create a broader choice of mobile services, and benefit the public (id. at 8, 15). Nextel further asserts that the goals of Congress include promoting investment in new and innovative wireless communication technologies (id. at 8). The Company claims that in the past, federal law has conclusively controlled the issues of need for, and technical operations of, mobile services (id. at 29, citing Yankee Celltell, D.P.U. 1621 (1984)). According to Nextel, the

Department has also found the construction of mobile communications systems to be in the public interest (id. at 5, 8, 15). Nextel states that the services which it plans to offer represent an improvement over, and would compete with, existing CMRS (id. at 28).

Nextel asserts that it is subject to the requisite degree of governmental control and regulation under the second prong of Save the Bay because it is subject to both a significant level of federal regulation and residual state regulation. According to Nextel, there is "extensive" federal regulation of its operations as a CMRS provider, including regulation of entry and licensing, technical standards and requirements, CMRS restraints and rates[9] (id. at 9, 11, 12, 28). Nextel explains that the FCC controls the number of channels assigned to each licensee, as well as construction and operations requirements regarding the timing of when the system becomes operational (Motion at 8). In addition, Nextel argues that, despite federal preemption, the Department has the power to reassert authority over the terms and conditions of mobile service providers, and that the Company therefore is subject to residual, if unexercised, state regulation (Brief at 13, 14). Nextel claims that this potential for future state regulation contributes to the "requisite level of governmental regulation" required by Save the Bay (id. at 9, 14).

As a matter of policy, Nextel also claims that it is the Department's goal to encourage the development of a competitive market as a means of reducing the need for extensive regulation of CMRS (id. at 4). According to Nextel, denial of public service corporation status would frustrate this goal, create a significant barrier to entry and deprive the Commonwealth of increased competition in this area (id. at 4, 18-20). The Company argues that an unwarranted and arbitrary

---

[9] Nextel states that as of August 1996, it will be subject to federal rate regulation as a common carrier (Brief at 11 n.6).

entry barrier of this magnitude would deprive Massachusetts residents and businesses of the service alternatives and lower prices associated with increased competition in the CMRS market (id. at 20). The Company explains that constraints on building out its network would drive up siting costs, adversely affecting rates (id. at 35). According to the Company, this would create a disincentive for CMRS providers to invest in Massachusetts, and strain the Company's ability to make infrastructure investments and compete with other CMRS providers (id. at 18). Nextel states that its ability to furnish CMRS to the public on a reliable basis and at a reasonable cost would be severely hindered by the denial of public service corporation status (id. at 20).

## IV. ANALYSIS AND FINDINGS

The threshold issue in this case is jurisdictional: whether Nextel qualifies as a "public service corporation" under G.L. c. 40A, § 3. Nextel has moved for summary judgment on this issue. Summary judgment is properly granted when, upon review of the pleadings, depositions, answers to interrogatories, and admissions on file, there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. § 56(c); Altresco Lynn, Inc., D.P.U. 91-142/Commonwealth Electric Company, D.P.U. 91-153 (1991). While Nextel argues in its Motion that the Department's prior grant of such status to cellular service providers entitles it to the same status, we find that there are significant changes in the regulatory and business environment in which CMRS providers operate that make it necessary to reevaluate our precedent on the question of whether CMRS providers in general qualify for public

service corporation status. Under these circumstances, we find that Nextel is not entitled to a grant of summary judgment on the issue of its status as a public service corporation.[10]

In determining whether Nextel qualifies as public service corporation under G.L. c. 40A, § 3, we take into account the purposes of the statute, the test for public service corporation status under Save the Bay, and the precedent of the Department and courts on this issue. In the context of the Department's jurisdiction, the statute is intended to provide regulated entities, most often public utilities, with the ability to site necessary facilities in order to benefit the public, and to provide a broad and balanced consideration of all the public interests involved, including local and more general public interests. See Braintree, 420 Mass. at 27 (focusing on zoning exemptions as a means to enable utilities to fulfill their obligation to serve) (citations omitted); New York Central Railroad, 347 Mass. at 592.

---

[10] We also note that there are differences in Nextel's situation compared to the CMRS providers that have been granted public service corporation status that would make such a grant inappropriate as a matter of law without further analysis. Nextel's filing presents the first instance in which a CMRS provider has requested a zoning exemption under G.L. c. 40A, § 3, after the federal preemption of states from entry or rate regulation of such providers. The federal legislation in question, the Omnibus Budget Reconciliation Act (Pub. L. No. 103-66), preempted state and local entry and rate regulation of both commercial and private mobile radio services as of August 10, 1994. Although this law permits a state to continue to regulate other terms and conditions (such as billing disputes) of CMRS companies, the Department elected not to petition the FCC for authority to regulate rates, or to continue to regulate other terms and conditions, due to the competitiveness of the radio common carrier industry in Massachusetts. Radio Service Preemption, D.P.U. 94-73 (1994).

This case also presents the first instance in which a petitioner for public service corporation status has not been subject to some combination of state and federal regulation; Nextel is the first CMRS provider which is not and has not been subject to state regulation. Nextel's petition therefore presents an issue of first impression. However, these factual differences are secondary to the importance we place on reevaluating the Department's precedent on this issue.

The types of entities which have been granted public service corporation status under G.L. c. 40A, § 3, include investor-owned and municipal gas and electric utilities, pipelines, railroads, common carriers, and two cellular service providers. See, e.g., Truro, 365 Mass. at 408, 411; Tennessee Gas Pipeline Company and Berkshire Gas Pipeline Company, D.P.U. 91-197/91-204, at 10-11 (1992); Massachusetts Electric Company, D.P.U. 93-29/30, at 21 (1995); Braintree, 420 Mass. at 28; New York Central Railroad, 347 Mass. at 586; AT&T, D.P.U. 1245, at 7 (1983); Yankee Celltell, D.P.U. 84-72, at 4 (1984); NYCGSA, D.P.U. 94-111, at 20 (1995). Among the important attributes of the companies which have received this status are the following: the company is a utility or monopoly provider of services; the company has an obligation to serve; and the company is subject to a scheme of significant governmental regulation. See e.g., Attorney General v. Haverhill Gas Light Company, 215 Mass. 394 (1913); Truro, supra;[11] New York Central Railroad, supra; Braintree, supra; Save the Bay, supra. While a petitioner need not demonstrate that it possesses all of these characteristics to qualify for public service corporation status, it must demonstrate that its proposal comports with the goals of the statute and with the criteria of Save the Bay.

The test for public service corporation status under Save the Bay, 366 Mass. at 680, provides that:

> among the pertinent considerations are whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of

---

[11] See also Truro at 409 n.1 for a list of Court cases identifying the types of entity deemed a public service corporation.

> governmental control and regulation; and the nature of the public benefit to be derived from the service provided.

We view this as a balancing test comprised of many factors, including the standards specified in Save the Bay, as well as any other "pertinent considerations."

In applying the Save the Bay test to cellular providers, the Department has addressed the Save the Bay factors of organization under a franchise from the State and the requisite degree of governmental control and supervision by citing the following facts: companies were regulated by the Department under G.L. c. 166 and/or c. 159 and were subject to control, supervision and regulation by the FCC (in cases prior to the 1994 federal preemption), or had been found to be a public service corporation before the 1994 preemption and were subject to control, supervision and regulation by the FCC (in post-preemption cases).[12] Regarding the Save the Bay factors of public benefit, and of providing a necessity or convenience to the general public, since 1983 the Department has relied on and concurred with a 1981 FCC finding that there was an "immediate public need" to construct an intrastate telephone system, or a cellular radio system.[13] See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, Docket No. 79-318, 86 FCC 469, 46 Fed. Reg. 27,655 at 664 (1981) ("1981 FCC Decision").

---

[12] See AT&T, D.P.U. 1245, at 5-7 (1983); AT&T, D.P.U. 1336, at 4-7 (1983); Yankee Celltell, D.P.U. 84-72, at 3-4 (1984); Cellular One, D.P.U. 89-111, at 6-7 (1989); NYCGSA, D.P.U. 90-12, at 10-11 (1990); NYCGSA, D.P.U. 93-206, at 19-20 (1994); NYCGSA, D.P.U. 94-44, at 16-17 (1995); NYCGSA, D.P.U. 94-111, at 18-20 (1995).

[13] See AT&T, D.P.U. 1245, at 5-6; AT&T, D.P.U. 1336, at 6; Yankee Celltell, D.P.U. 1621/84-158, at 3 (1984); Yankee Celltell, D.P.U. 84-72, at 3; Cellular One, D.P.U. 89-111, at 7; NYCGSA, D.P.U. 90-12, at 11; NYCGSA, D.P.U. 93-206, at 19; NYCGSA, D.P.U. 94-44, at 16; NYCGSA, D.P.U. 94-111, at 18.

In both its Brief and Motion, Nextel asserts that it is a public service corporation under Save the Bay (Brief at 3; Motion at 2). Nextel asserts that the Court, in Save the Bay, and the Department, in Cellular One, D.P.U. 89-111, have relied on a combination of federal licensing and the provision of a public necessity or convenience to demonstrate that a petitioner meets the first prong of this test (Brief at 7-8). Additionally, Nextel notes that in Save the Bay, the Court questioned whether the Commonwealth could discriminate against a company not organized under G.L. c. 164 but subject to federal regulation (Motion at 5, citing Save the Bay at 680 n.12). Further, Nextel asserts that it provides an essential service to the public which cannot be furnished ordinarily by a private business given the requirement of governmental licensing and regulation of spectrum (id. at 2, 9-10).

We acknowledge that Nextel is subject to federal entry regulation by virtue of its FCC license and grant of spectrum to construct and operate a wireless mobile telecommunications service in Massachusetts. Further, the service that Nextel provides could, as a general matter apart from the instant petition and site, be categorized as a convenience to the general public. We note that neither the Court nor the Department has addressed what is meant by the phrase "the ordinary channels of private business." While it is clear that Nextel could not operate without the federal grant of spectrum, there are significant differences between the services offered by Nextel as a CMRS provider and those of other types of public service corporations. Although Nextel's business clearly is rendered for public use, its service is not, for example, delivered pursuant to an obligation to serve. See Braintree, 420 Mass. at 27. Nextel rates are not on file under a tariff,

and its business practices, such as billing and collection and resolution of customer complaints, are not under the jurisdiction of federal or state regulators.

Regarding the issue of whether Nextel is subject to the requisite degree of governmental control and regulation, Nextel asserts that it is subject to extensive federal regulation, that this federal regulation alone satisfies the Save the Bay standard, and that it could also be subject to residual state regulation in the future (Brief at 9, citing Save the Bay, at 680; Motion at 6-10). While no Court case or Department Order has defined the "requisite" level of governmental control and regulation, this inquiry is particularly important given the purposes of G.L. c. 40A, § 3 and the significant powers which the Department exercises under the statute. As stated above, the statute provides a mechanism for regulated entities, most often public utilities, to site necessary facilities in order to benefit the public and provides a forum for a broad and balanced consideration of all the public interests involved, including local and more general public interests. Zoning is an exercise of the police power, whereby a municipality determines the character and pattern of land use within its borders in the interest of the public good and welfare. Under Home Rule, that power is vested in cities and towns, although the exercise is subject to Legislative limitation. Mass. Const. pt. 2, c. 1, § 1, art. IV: Mass. Const. Amend. art. 89. The Department authority to exempt certain land uses from local zoning ordinances must be exercised with due respect for municipal interest, given the substantial burden that an override can impose on municipalities -- although not at the sacrifice of the convenience and welfare of the general public.

Under Save the Bay, it is not enough that a company provides a public convenience, necessity or benefit; the company must also be subject to the requisite level of governmental

control and regulation to qualify for public service corporation status. Regulation provides the checks and balances on a company's operations to ensure that it is operating in the public interest. In this regard, it is worth noting that CMRS providers, such as Nextel, are not subject either to the utilities' obligation to serve or to the extensive regulation of non-CMRS common carriers. Moreover, CMRS providers do not possess natural monopoly characteristics which can warrant regulatory treatment different from that applied to competitive enterprises.

In this case, and generally in the CMRS field, federal preemption has left a scheme of minimal regulation. The Department recognizes that at the time it granted zoning exemptions in the last three cases involving a CMRS provider, i.e., NYCGSA, D.P.U. 93-206 (1994); NYCGSA, D.P.U. 94-44 (1995); NYCGSA, D.P.U. 94-111 (1995), it also was preempted from any form of regulation, and that the level of federal regulation of CMRS providers has not changed since that time. However, the CMRS provider in those cases had been certified by the Department and had been subject to our regulation of rates, terms, and practices at the time it initially received the public service corporation status. While the Department in those cases also cited to continuing FCC regulation and control over the CMRS providers, it did not address whether that FCC regulation, standing alone, would satisfy the Save the Bay test. Neither did it address the question of whether federal regulation, whatever its level, would satisfy the test in the absence of some level of state regulation.[14] In essence, NYNEX Mobile was grandfathered into

---

[14] Neither has the Court addressed a case in which the petitioner was not subject to some level of state regulation. Nextel is incorrect in its assertion that, under Save the Bay, "federal regulation alone was a sufficient basis for satisfying the 'public service corporation' standard" (Brief at 9). In fact, the Court referenced New England LNG's regulation under G.L. c. 164, §§ 2, 76, and 105A in determining that it was a public service corporation. Save the Bay, 366 Mass. at 682.

public service corporation status after the 1994 federal preemption. Nextel is not and has never been subject to state regulation. Nextel's Motion raises the jurisdictional question squarely. We must therefore determine if Nextel and other CMRS providers, by virtue of their federal regulation, are subject to the requisite degree of governmental control and regulation to qualify for public service corporation status. The Department, upon further examination, believes that the current limited scheme of regulation of CMRS providers, along with other pertinent considerations which are detailed below, must be taken into account in assessing the question of public service corporation status for these providers.

As Nextel acknowledges, the current federal regulation of CMRS providers consists of licensing and entry regulation and technical standards for construction and operation of facilities (Motion at 7-8; Exh. DPU-2(a); RR-DPU-5(b)). We have reviewed both the newly enacted Telecommunications Act of 1996 (February 8, 1996) and the Federal Communications Commission Order referenced by Nextel (id.). We find nothing to support Nextel's assertion that its rates and charges will be subject to FCC regulation in August 1996. Rather, it appears that the regulation to which Nextel may be subject as a common carrier is regulation for interconnection and access.[15] Thus, contrary to Nextel's assertions, this federal regulation is not regulation of

---

[15] The FCC Order expressly states that the FCC will forbear from enforcing the following sections of Title II: Sections 203 (governing the filing of rates and charges of interstate common carrier service), 204 (giving the Commission power to investigate a common carrier's newly-filed rates and practices and to order refunds), and 205 (governing the Commission's authority to investigate existing rates and practices). 9 FCC Rcd. 1411, paras. 174, 179, 180. Rates for interconnection apply to the rates local exchange carriers charge mobile service providers and not to the regulation of mobile services providers. Id. at paras. 227-239. In August 1996, "existing private services that are subject to reclassification as CMRS" may be subject to further regulation; however, companies which already provide CMRS, such as Nextel, would not be subject to additional

rates and charges in the traditional sense of rates paid by end users. Furthermore, Nextel and other CMRS providers are not subject to state regulation of any kind, post-preemption.[16] Finally, whatever limited local regulation there is of such providers would be reduced even further by a grant of public service corporation status. This lack of a comprehensive scheme of governmental regulation contrasts sharply with the extensive scheme of regulation that applies to other public service corporations, which can include oversight of entry, siting, rates and tariffs, financing, safety, and resolutions of consumer complaints at the federal and/or state level.[17] We conclude that the current governmental regulation of Nextel and other CMRS providers does not meet the level of requisite governmental control and regulation contemplated in Save the Bay. Under our analysis, we do not reach the question of whether some other level of federal regulation alone could be sufficient.

---

regulation. Id. at paras. 280, 281.

16 Nextel argues that the Department could potentially reassert jurisdiction over the terms and conditions of Nextel's business and that this further establishes Nextel as a public service corporation (Brief at 13). However, in Radio Service Preemption, D.P.U. 94-73 (1994), the Department relinquished its authority over these areas.

17 For example, in Braintree Electric Light Department, D.P.U. 90-263, at 30 (1991), which was later upheld by the Court, the Department noted the following attributes and regulatory oversight of the municipal utility: it (1) purchases and sells power; (2) operates electric generation; (3) is the sole provider of retail electric service in Braintree, pursuant to filed rate schedules; (4) is subject to the same obligation to provide reliable service without undue discrimination as private utilities; (5) has a franchise to serve pursuant to G.L. c. 164, §§ 34, 55; (6) is regulated by the Department under G.L. c. 164 and 220 C.M.R. in terms of accounting, depreciation, rate schedules, rate discrimination, plant safety, power contracts, pole attachments, refusals to serve and termination of business; (7) was authorized to operate by legislative act; (8) is regulated by the Energy Facilities Siting Council under G.L. c. 164; (9) is subject to the New England Power Pool ("NEPOOL") Statute, G.L. c. 164A; (10) is required to pay sales tax; and (11) is treated as a utility facility under the Braintree zoning bylaws.

With respect to the "nature of the public benefit" consideration of Save the Bay, Nextel states that it offers services similar to those offered by other CMRS providers, and notes that the Department previously has found such services to be in the public interest (Brief at 15, citing NYCGSA, D.P.U. 94-111 (1995); Yankee Celltell, D.P.U. 84-93 (1984)). Further, Nextel argues that it will provide substantial public benefits in the form of innovative service offerings based on technological advances (Brief at 15, citing Exh. NEX-1, at 3-5; Brief at 3).

Nextel also asserts that the public will benefit from increased competition caused by its entry into the CMRS market (Brief at 15). The Company notes that the Department has articulated a policy of encouraging competition in the CMRS market as a means of reducing the need for regulation (Brief at 4, citing Radio Service Preemption, D.P.U. 94-73 (1994); Brief at 15). The Company argues that Congress and the FCC also have recently found a need for additional CMRS providers to increase choice and competition and reduce the need for rate regulation (Brief at 8, citing Report and Order, PR Docket No. 94-105). Nextel asserts that it would face a significant barrier to entry if it were denied public service corporation status and argues that such a denial would result in a regulatory disparity among competing CMRS providers and frustrate federal and state telecommunications policy (Brief at 4, 18-21).

When an entity requesting an exemption pursuant to G.L. c. 40A, § 3 is a utility, the issue of whether the nature of the public benefit satisfies Save the Bay is not controversial because the utility seeks the exemption to discharge its public duties. See e.g., Braintree Electric Light Department, D.P.U. 90-263, at 38. Certain non-utilities also provide public benefits that satisfy this test. For example, in both Save the Bay and Mezitt v. Department of Public Utilities, 354

Mass. 692 (1968), natural gas pipeline companies were found to meet this test by providing needed supplies of natural gas for distribution to the public in Massachusetts and New England.

Since its Order in Yankee Celltell, D.P.U. 1621, at 7, the Department has based its analysis of the need for and benefits of mobile radio in part on a 1981 finding by the FCC regarding the immediate public need for cellular radio. 1981 FCC Decision at 27,664; see AT&T, D.P.U. 1245, at 5-7 (1983); AT&T, D.P.U. 1336, at 4-7 (1983); Yankee Celltell, D.P.U. 84-72, at 3-4 (1984); Cellular One, D.P.U. 89-111, at 6-7 (1989), NYCGSA, D.P.U. 94-111, at 18 (1995). We recognize that Nextel provides services similar to, and perhaps superior to, those offered by other CMRS providers that previously have been designated as public service corporations. However, the nature of the public benefits offered by Nextel and other CMRS providers must be reassessed in light of changes in the CMRS industry over the past decade. In 1981, channel congestion and significant waiting lists for conventional mobile services led the FCC to conclude that there was a "pressing need" for the improved service that cellular systems could provide. 1981 FCC Decision at 27,663. The FCC therefore established policies, including policies that limited competition, in order to "achieve [the] objective of providing cellular service to the public in the shortest possible time." Id. This objective has been largely achieved; cellular service is broadly available in Massachusetts and throughout the United States. Further, as Nextel notes, the FCC recently determined that all CMRS providers are competitive or potentially competitive (Brief at 15, citing Third Report and Order, 9 FCC Rcd. 7988, at para. 95 (1994)). The Department also has recognized the increased number of CMRS providers and a corresponding reduction in rates since 1984 as indications of a competitive market. Radio Service

Preemption, D.P.U. 94-73, at 12-13. Further, the Department has found that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates. Id. at 14. Thus, the original "immediate need" for mobile radio services has been met. The benefit provided by further extension of CMRS is an incremental increase in the number of competitors.

The benefit of an incremental increase in competition must be balanced against the concerns expressed in the analysis above, and against other pertinent considerations not expressly set forth in Save the Bay, as part of "a broad and balanced consideration of all aspects of the general public interest and welfare." Among these considerations are concerns raised by recent changes in the CMRS industry.

First, the build-out of existing cellular systems, combined with an increasing number of entrants in the CMRS market, is likely to lead to a proliferation of proposals to construct CMRS towers within the Commonwealth. By using this statute, existing cellular companies and potential entrants would involve the Department with increasing frequency in the task of determining whether any number of proposed towers of any height,[18] on any location,[19] and for any company would be "reasonably necessary for the convenience or welfare of the public."[20] This level of

---

[18] We note that the type of facilities required for Nextel's service are well in excess of 100 feet in height. For example, the facilities proposed by Nextel in this docket include a 125-foot single mast mono-pole (Exh. NEX-3, at 9).

[19] G.L. c. 40A, § 3 does not appear to permit the Department to require companies to collocate with existing towers. See Wenham v. Department of Public Utilities, 333 Mass. 15, 17 (1955), and discussion under Section II, above.

[20] The Department notes that, at the present time, it has pending before it five petitions by two CMRS providers for zoning exemptions under G.L. c. 40A, § 3.

routine intrusion into the affairs of local government constitutes a cost, difficult to quantify, but nonetheless real, that can only be justified by extremely significant public benefits.

Second, while the Department has a clear policy in favor of promoting competition within the industries that it regulates,[21] it is not convinced that the increase of competition in the CMRS market necessarily depends on extending public service corporation status to CMRS providers, particularly in light of the judicial relief offered by the recently-passed Telecommunications Act of 1996. This Act specifies that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services," and provides for the appeal of such action to a Federal district court or a State court of competent jurisdiction. Telecommunications Act of 1996, Section 704. Thus, Nextel and other CMRS providers now have grounds for appeal of any zoning decision that effectively forestalls the build-out of their systems. Further, Nextel appears to have grounds for appeal if municipalities unreasonably discriminate between it and other CMRS providers, for example, by treating one company as a public utility while refusing such treatment to another.

After reviewing the purpose of G.L. c. 40A, § 3, and the legal standards and policy implications pertinent to its analysis, the Department finds that, on balance, Nextel and other CMRS providers do not meet the standard set forth in Save the Bay, and consequently do not

---

[21] This policy is consistent with Nextel's description of recent findings by the Congress and the FCC concerning the need for additional CMRS providers to enhance competition, reduce the need for rate regulation and expand the choices available to the public (Brief at 8, citing Report and Order, PR Docket No. 94-105 at paragraph 2).

qualify as public service corporations.[22] We also conclude that any public advantages of granting public service corporation status to Nextel and other CMRS providers are outweighed by the risks and costs of a significant number of overrides of local zoning by-laws.

Nextel has raised concerns about the regulatory disparity that might exist if it were denied access to the zoning exemption process while existing CMRS providers continued to benefit from it (Brief at 21). The Department notes that its analysis is not specific to Nextel. Further, any distinction between Nextel and other CMRS providers would appear to be a violation of Section 704 of the Telecommunications Act of 1996. Our findings here apply to all CMRS providers operating in Massachusetts.[23] Henceforth, the Department will deem no CMRS provider a public service corporation under G.L. c. 40A, § 3. Thus, all CMRS providers will be identically situated before the Department and before Massachusetts cities and towns in pursuing zoning matters.[24]

---

[22] Under G.L. c. 40A, § 3, once a petitioner qualifies as a public service corporation, the inquiry is whether a zoning exemption is required and whether the exemption is reasonably necessary for the convenience or welfare of the public. Because we find that Nextel does not qualify as a public service corporation, we do not reach these latter questions.

[23] In addition to the instant case, the Department has before it the following petitions by CMRS providers for zoning exemptions under G.L. c. 40A, § 3: Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-80, in Marlborough; Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-112, in Manchester-by-the-Sea; Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, D.P.U. 95-110, in Holliston; and Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, D.P.U. 96-13, in Hanover. These petitions are mooted by this Order and subject to dismissal based on our analysis in this Order.

[24] This holding takes effect as of the date of this Order and thus has only prospective application for each CMRS provider. We do not revoke those zoning exemptions which the Department previously had granted under G.L. c. 40A, § 3. However, companies which in the past have been found by the Department to be public service corporations (including NYNEX Mobile/NYCGSA, previously known as Boston Cellular

Finally, the Department recognizes the value of the services offered by CMRS providers and supports their efforts to build out their systems consistent with Federal, state and local law and policy. We strongly encourage CMRS providers and localities to work diligently to reach mutually acceptable solutions to the siting of towers,[25] and anticipate that, if such mutually acceptable solutions are not possible, CMRS providers will seek relief from the courts or the State legislature.

---

Geographic Service Area, and Cellular One/Southwestern Bell Mobile Services, previously known as Yankee CellTell), may no longer represent themselves to local communities as such. See NYCGSA, D.P.U. 94-111 (1995); NYCGSA, D.P.U. 87-224 (1988); Boston Cellular Geographic Service Area, Inc., D.P.U. 1565/84-21 (1984); Cellular One, D.P.U. 89-111 (1989); Southwestern Bell Mobile Systems, D.P.U. 88-237 (1988); Yankee CellTell, D.P.U. 1621 (1984).

[25] In two pending cases, the Department has granted continuances to two CMRS providers to further explore siting alternatives which did not appear viable at the time the petitions for zoning exemptions were filed. Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-112; Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, D.P.U. 95-110.

V. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the Petition of Dispatch Communications of New England, Inc., d/b/a Nextel Communications, Inc. for a zoning exemption is hereby denied on the grounds that it does not qualify as a public service corporation under G.L. c. 40A, § 3; and it is

FURTHER ORDERED: That the Secretary of the Department shall transmit a certified copy of this Order to the Town Clerk of the Town of Sterling; and that Nextel shall serve a copy of this Order upon the Board of Selectmen, Planning Board, and Conservation Commission of the Town of Sterling within five business days of its issuance and shall certify to the Secretary of the Department within ten business days of its issuance that such service has been accomplished.

By Order of the Department,

_____
John B. Howe, Chairman

_____
Mary Clark Webster, Commissioner

_____
Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).