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June 27, 2007

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: Docket No. UT-073032

Dear Ms. Washburn:

Enclosed please find ten (10) copies each of "Sprint Nextel Corporation's Response to Petition of Washington Independent Telephone Association's Petition for Moratorium".

Feel free to contact me with any questions or concerns you may have regarding this filing.

Sincerely,

Kristin L. Jacobson

Kristin L. Jacobson

Enclosures

Posted

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Petition of Washington Independent Telephone Association for Establishment of a Moratorium on Designation of Competitive Eligible Telecommunications Carriers	)	DOCKET NO. UT-073032

SPRINT NEXTEL CORPORATION'S RESPONSE TO PETITION OF WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION PETITION FOR MORATORIUM

Dated: June 27, 2007

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SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation (Sprint Nextel) respectfully submits the following response to the Petition of Washington Independent Telephone Association for Establishment of a Moratorium on Designation of Competitive Eligible Telecommunications Carriers filed June 15, 2007 (WITA Petition). For the reasons set forth below, the Washington Utilities and Transportation Commission (Commission) should reject WITA's transparent effort to delay the designation of competitive eligible telecommunications carriers (ETCs) in Washington.

I. WITA HAS NO STANDING TO DEMAND A STAY

A. WITA has no interest in the outcome of ETC application proceedings

As a threshold matter, WITA has no standing to demand that the Commission hold pending or future ETC applications in abeyance, because the outcome of those application proceedings will have no effect on its members. It is well settled that an incumbent local exchange carrier (ILEC) has no protectable property interest in its status as the incumbent ETC and, therefore, no right to due process. Indeed, following WITA's protracted challenge to the competitive ETC designation of US Cellular, the Washington Supreme Court upheld this Commission's finding that WITA was not entitled to due process:

> Nothing in the 1996 Act or state law requires the Commission to hold an adjudicative proceeding before designating a telecommunications carrier an ETC. However, [WITA] and its members claim that their status as the sole ETCs designated in their service areas constitutes a property interest protected by the Fourteenth Amendment. Their claim is insupportable . . . Here, [WITA] members have identified no state or federal law or regulation entitling them to designation as exclusive ETCs in their service areas. To the contrary, the statute that gives the Commission the authority to designate ETCs in this state plainly provides that 'the State commission may, in the case of an area served by a rural telephone company, . . . designate more than one common carrier as an eligible telecommunications carrier for a service area.' 47 U.S.C. sec. 214(e)(2) (emphasis added). Just as [WITA] members can point to no source for the alleged property interest, they have cited no case law even suggesting that a statute permitting multiple designees may nevertheless implicitly entitle an individual designee to procedural due process before additional designations may be made.

Wash. Ind. Tel. Assoc. v. Wash. Util. and Trans. Com., 65 P.3d 319 (2003) (emphasis added).

Likewise, other state regulatory commissions have rejected ILEC efforts to delay competitive ETC entry within their service areas by demanding lengthy adversarial proceedings. For example, in Wisconsin, the PSC similarly concluded that ILECs in that State have no protectable interest in the outcome of a competitive ETC designation:

> CenturyTel, Inc. and TDS Telecom Corporation own local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue. These companies are competitors of Midwest. On this basis, these companies claim they have a substantial interest protected by law, and will suffer special injury based on the ETC designation of Midwest. Federal law and state law, however, do not create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs. *Alenco Communications v. FCC*, 201 F.3d 608 (2000) ("The purpose of universal service is to benefit the customer, not the carrier."); *WITA v. WUTA*, 65 P.3d 319 (2003); *In re Application of GCC License Corp.*, 647 N.W.2d 45, 52, 264 Neb. 167, 177 (2002) ("[r]ather, customers' interest, not competitors', should control agencies' decisions affecting universal service" and that "[t]he Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETCs simply by default as the sole service provider operating in a particular area.") *See also, State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 311 (1980). (Economic injury as the result of lawful competition does not confer standing.); *MCI Telecommunications v. Pub. Serv. Comm.*, 164 Wis. 2d 489, 496, 476 N.W.2d 575 (Ct. App. 1991); and *Wisconsin Power & Light v. PSC*, 45 Wis. 2d 253 (1969) (". . . the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.")

Application of Midwest Wireless Wisconsin, LLC for Designation as an Eligible Telecommunications Carrier in Wisconsin, Docket No. 8203-TI-100, *Final Decision* (Sept. 30, 2003) (emphasis added).

And in Michigan, the PSC has simply grown tired of the ILECs' repeated efforts to delay competitive entry by making the same unpersuasive arguments each time a competitive ETC application is filed. *In the matter of the application of RFB CELLULAR, INC., for designation as an eligible telecommunications carrier pursuant to Section 214(e)(6) of the Communications Act of 1934*, Case No. U-13145, p. 4 (Nov. 20, 2001) ("[T]he Commission concludes that it need not solicit comment on the application, which would only further delay action on the application.

The rural ILECs have not offered any substantial reason for the Commission to deny the application, and the Commission doubts that additional comments would be productive.")

The Commission should similarly disregard WITA's tired arguments in this proceeding and deny its members' efforts to further delay ETC designations in Washington.

B. WITA's sole basis for delay – *i.e.*, the Joint Board's recommended cap – will not affect its members

WITA's lack of standing is better illustrated by looking to its own arguments in this proceeding. In sum, WITA complains the Commission should institute a moratorium on the designation of competitive ETCs because the Federal-State Joint Board on Universal Service (Joint Board) has recommended that the FCC prospectively cap the amount of federal high-cost universal service support distributed to competitive, but not incumbent, ETCs. *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45, FCC 07J-1 (May 1, 2007) (*2007 Joint Board Recommendation*).

Under the *2007 Joint Board Recommendation*, each and every WITA member, as an incumbent ETC, will be held harmless from the effects of the proposed cap. As a result, no WITA member will see a reduction – or indeed any change – in the amount of federal universal service support it receives if the FCC ultimately adopts the Joint Board's recommended cap. Likewise, under current FCC funding rules, as well as the Joint Board's recommend funding cap, no WITA member will see any change in the amount of federal universal service support it receives if the Commission continues to designate competitive ETCs. Thus, WITA's single-issue Petition fails to offer any legal basis to suggest its members have standing to pursue this matter before the Commission.

II. THE COMMISSION SHOULD NOT, AND CANNOT, STAY PENDING ETC APPLICATIONS

For similar reasons, the Commission must reject WITA's demand that consideration of pending ETC applications be stayed pending further action by the Joint Board or FCC. This same speculative argument – *i.e.*, that the Commission should ignore its legal obligation to hear and decide ETC petitions because the Joint Board or FCC may take some undefined action at some unknown time which could potentially affect the designation of competitive ETCs – has been flatly rejected by the FCC and other State commissions. More importantly, the Commission's failure to timely hear and decide competitive ETC applications would violate section 253(a) of the Federal Telecommunications Act as it would create a *de facto* barrier to entry. Accordingly, the Commission should reject WITA's dilatory arguments here.

A. The Joint Board recommendation is immaterial until the FCC acts

First and foremost, the Commission should ignore WITA's protests because the *2007 Joint Board Recommendation* has no immediate legal effect and, therefore, should not be considered in this proceeding. As the legislative history makes clear, until the FCC acts to adopt or decline a recommended decision of the Joint Board, the recommendations are merely advisory:

> Consistent with all Joint Boards established under section 410(c), the recommendations of the Joint Board are advisory in nature, and the FCC is not required to adopt the recommendations. However, the Committee [on Commerce, Science and Transportation] intends that the FCC shall give substantial weight to the Joint Board recommendations.

Senate Report No. 104-23, p. 25 (March 30, 1995) (emphasis added). Moreover, despite the Joint Board's urging of prompt action, the FCC has up to one year in which to act on the Joint Board's recommendations. 47 U.S.C. § 254(a)(2). In the interim, the Senate Committee on Commerce, Science and Technology has begun conducting hearings to perhaps fashion a more

competitively-neutral reform measure than simply capping competitive ETC support.[1] Thus, notwithstanding the FCC's recent solicitation of comments on the *2007 Joint Board Recommendation*, it is certainly premature for this Commission or any party to begin speculating when, whether and how the FCC will respond to the Joint Board's proposal to cap competitive ETC support.

B. The FCC has never encouraged the States to delay ETC designations pending future pronouncements but, instead, noted that such delay may violate section 253(a) of the Federal Telecommunications Act

WITA's argument is also irreconcilable with the evolving nature of universal service. The Federal Telecommunications Act fully contemplates that the FCC and Joint Board will continue to review and address the universal service support mechanisms over time:

> Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services . . . The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

47 U.S.C. § 254(c)(1)-(2).

In response to various recommendations of the Joint Board over the past eleven years, the FCC has issued numerous Orders addressing universal service issues and has never once suggested that ETC designations be held in abeyance pending future FCC pronouncements. For example, on May 21, 2003, the FCC issued its *Twenty-Fifth Order on Reconsideration, Report and Order, and Further Notice of Proposed Rulemaking* to address certain Lifeline and Link Up issues. Instead of recommending that States stop designating competitive ETCs pending further action, the FCC commended State commissions for proceeding to consider and decide

[1] It is worth noting that in response to the Joint Board's 2004 recommendation to limit federal high-cost universal service support to a single "primary line," Congress passed legislation prohibiting the FCC from utilizing any federal funding to implement such proposal. *2005 Consolidated Appropriations Act* at § 634.

ETC cases. In so doing, the FCC further noted that a State's [in]action with respect to an ETC designation may violate section 253(a) of the Federal Telecommunications Act as such [in]action would constitute a barrier to entry:

> We decline to adopt a rule at this time that would require state commissions to resolve the merits of any request for designation under section 214(e) within sixth months or some shorter period. We conclude that such action is unnecessary at this time. In so doing, we note that a number of ETC designation requests pending at the time of release of the *Twelfth Report and Order and Further Notice* have been resolved by state commissions. We commend these state commissions for resolving those designation requests. We continue to encourage state commissions to act with the appropriate analysis yet as expeditiously as possible on all such requests. In addition, we note that a state's action on ETC designation request may be reviewed under section 253 as a potential barrier to entry. Although we continue to encourage states to address such requests in a timely manner, we find no need for further action at this time.

In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, *Twenty-Fifth Report and Order*, FCC 03-115, ¶ 26 (rel. May 21, 2003) (emphasis added) (footnotes omitted).[2]

Likewise, the FCC itself has declined to institute a moratorium on ETC designations pending final action on Joint Board recommendations. For example, in 2005 the FCC undertook its most comprehensive review of ETC eligibility and reporting criteria since adopting its *First Universal Service Report and Order* in 1997.[3] Yet, the FCC did not stay its consideration of

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[2] The FCC has determined that a State regulatory commission's resolution of an ETC petition constitutes a "legal requirement" under section 253(a). Thus, State action which would effectively preclude a prospective entrant from providing service as a federal ETC – like WITA's proposed moratorium – is preempted by federal law. *See In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket 96-45, *Declaratory Ruling*, FCC 00-248, ¶ 18 (rel. Aug. 10, 2000) (citing *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 n.31 (5th Cir. 1999) ("[I]f a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate' more than one carrier."))

[3] *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket 96-45, *Report and Order*, FCC 97-157 (rel. May 8, 1997).

pending ETC applications. Rather, while awaiting the Joint Board's issuance of recommendations in 2004,[4] the FCC continued to designate competitive ETCs stating:

> While we await a recommended decision from the Joint Board . . . The framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission.

In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, *Memorandum Opinion and Order*, FCC 03-338, ¶ 4 (rel. Jan. 22, 2004) (*Virginia Cellular*); *see also In the Matter of Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, FCC 04-37, ¶ 4 (rel. April 12, 2004) (*Highland Cellular*).

Following the Joint Board's issuance of its *2004 Recommended Decision*, but prior to taking final action on the Joint Board recommendations, the FCC designated several competitive ETCs noting then, as now, that the final outcome of its rulemaking could impact the amount of support received by competitive ETCs:

> The [FCC] is seeking comment on the Recommended Decision of the Federal Joint-Board on Universal Service (Joint Board) concerning the process for designation of ETCs and the Commission's rules regarding high-cost universal service support. Verizon argues that, in light of the impact that ETC designations have on the universal service fund, the [FCC] should not rule on any pending ETC petitions until the completion of the rulemaking proceeding. Although Verizon raises important issues, we decline to delay ruling on pending ETC petitions at this time. . . . We note that the outcome of the rulemaking proceeding could potentially impact, among other things, the amount of support that ALLTEL and other competitive ETCs receive in the future.

[4] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, *Recommended Decision*, FCC 04J-1 (Feb. 27, 2004) (*2004 Recommended Decision*).

In the Matter of Federal-State Joint Board on Universal Service ALLTEL Communications, Inc. Petition for Designation as an Eligible Telecommunications Carrier, CC Docket 96-45, *Order*, DA 04-3046, ¶ 16 (rel. Sept. 24, 2004) (emphasis added).

Consistent with the FCC's articulated policy and its actions, several State commissions have similarly rejected demands to delay the designation of competitive ETCs pending FCC action on a Joint Board recommendation. *See, e.g., Application of Sprint Corporation for Designation as an Eligible Telecommunications Carrier*, Texas PUC Docket No. 28495, *Order No. 8 Denying Verizon's Motion to Abate* (Dec. 16, 2003) (rejecting speculative argument that proceeding should be stayed because "the federal ETC rules may be amended in some way at some unspecified time in the future"); *Application of United States Cellular Corp. for Designation as an Eligible Telecommunications Carrier*, OK Corp. Comm'n Cause No. PUD 200300195, *Order No. 478295* (July 21, 2003); *In the Matter of the Application of NPCR, INC. d/b/a Nextel Partners Seeking Designation as an Eligible Telecommunications Carrier*, Idaho PUC Case No. GNR-T-03-16, Order No. 29292 (July 21, 2003).

More importantly, this Commission has already determined to proceed with ETC applications despite ongoing Joint Board and FCC proceedings. *See, e.g., In the Matter of the Petition of AT&T Wireless PCS of Cleveland, et al.*, Docket No. UT-043011, *Order Granting Petition for Designation as an Eligible Telecommunications Carrier*, ¶¶ 31, 35 (April 13, 2004) ("Staff also noted that the Federal-State Joint Board's Recommended Decision is only that—a recommendation. It is not binding on the Commission. Even if the FCC were to adopt the recommendation, the result would be guidelines that are permissive only . . . The Commission declines the Rural ILECs' request that we initiate an adjudicative proceeding to consider what weight to give the recommended decision of the Federal-State Joint Board on Universal Service.

The *Recommended Decision* is not binding on the Commission, and even if it were, it sets forth permissive guidelines.")

C. Having enjoyed the benefit of the Commission's prior actions, WITA members cannot now be heard to complain

It bears noting that each of WITA's members was designated by the Commission under the applicable Commission rules and procedures in force at the time. None of these carriers sought to delay its own designation unless and until the Joint Board and the FCC finally resolved the myriad of universal service issues address over the past eleven years. Yet, apparently failing to appreciate the irony, WITA now complains that the Commission must withhold further competitive ETC designations until the FCC comprehensively reforms the federal universal service fund.

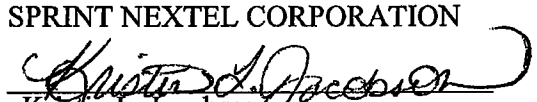
WITA's position is hypocritical at best. At worst, it is plainly anti-competitive – if not monopolistic. Indeed, in addition to their ILEC operations, certain WITA members' own wireless subsidiaries or affiliates have applied for and received designation as competitive ETCs under the Commission's applicable rules and procedures — specifically, TDS Telecoms' subsidiary US Cellular and Inland Telephone Company subsidiaries/affiliates Washington RSA No. 8, L.P. and Eastern Sub-RSA, L.P. d/b/a Inland Cellular. WITA members, as beneficiaries of the Commission's rules and procedures, cannot now be heard to complain about the validity of the same rules and procedures when other competitors invoke them.

CONCLUSION

Based upon the forgoing, Sprint Nextel respectfully requests that the Commission reject WITA's ill-considered Petition and proceed to hear and decide pending and future competitive ETC applications as required under sections 214(e) and 253(a) of the Federal Telecommunications Act.

Dated: June 27, 2007

SPRINT NEXTEL CORPORATION



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PROOF OF SERVICE

This is to certify that on the 27th day of June, 2007, a true and correct copy of the foregoing document was transmitted to the following as set forth below:

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Control Number: 28495

Item Number: 32

Addendum StartPage: 0

SOAH DOCKET NO. 473-04-0736
PUC DOCKET NO. 28495

APPLICATION OF SPRINT CORPORATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER (ETC) PURSUANT TO 47 U.S.C. § 214(e) AND P.U.C. SUBST. R. 26.418	§ § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

ORDER NO. 8
DENYING VERIZON'S MOTION TO ABATE

On December 9, 2003, Verizon Southwest (Verizon) filed a Motion to Abate. On December 12, 2003, the Staff (Staff) of the Public Utility Commission of Texas (Commission) and Sprint Corporation, on behalf of its wireless division (Sprint), filed responses opposing Verizon's Motion to Abate. Based on the arguments in the motion and the responses to the motion, the Administrative Law Judge (ALJ) denies Verizon's Motion to Abate.

Verizon provides two reasons for its motion. First, it states that the Eligible Telecommunications Carrier (ETC) rules are under review at the federal level and may be amended. The ALJ has previously denied a motion to abate at a prehearing conference on October 28, 2003, based on Verizon's argument that the federal ETC rules are under review. Because there is no indication on how or when the federal rules might be amended, the ALJ finds that Verizon has not provided adequate support for its argument; therefore, the ALJ continues to deny the abatement based on the argument that the federal ETC rules may be amended in some way at some unspecified time in the future.

Second, Verizon points to a recent decision in *Texas Telephone Association v. Public Utility Commission*. Verizon argues that the *Texas Telephone Association* case will impact this case because it requires an applicant to show that it can provide service in the entire study area instead of portions of the study area. Sprint, however, argues that the *Texas Telephone Association* case has no bearing on this proceeding. According to Sprint, the *Texas Telephone Association* case involved the designation of an ETC in the Texas portion of a *rural* incumbent local exchange carrier (ILEC)

service area in Texas and Arkansas. In this case, Sprint seeks designation as an ETC only in *non-rural* ILEC service areas entirely within Texas.

The ALJ questions whether the *Texas Telephone Association* holding would apply to the facts in this case based on Sprint's interpretation of the *Texas Telephone Association* holding. However, if Verizon wants to provide legal argument regarding the *Texas Telephone Association* case and show how it might impact this case, it can do so at the hearing or in post-hearing briefs. The ALJ will assign any weight to Verizon's arguments at that time. However, any holding in *Texas Telephone Association* case would not be a basis for an abatement in this case.[1] Accordingly, Verizon's motion to abate is denied. The procedural schedule set forth in Order No. 4 applies, and intervenor testimony is due December 19, 2003.

SIGNED, the 16th day of December, 2003.

Michael J. O'Malley

MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

[1] It appears that the Commission has addressed this issue in its preliminary order when it stated that an ETC service area could be less than an exchange.