BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

| In the Matter of<br><br>Eligible Telecommunications Carriers (ETC) Rulemaking | Docket No. UT-053021<br><br>Comments of Sprint |
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Sprint Corporation, on behalf of its wireless division (consisting of SprintCom, Inc., Sprint Spectrum, L.P., and WirelessCo, L.P., d/b/a Sprint) and its incumbent local exchange carrier operating company in Washington, United Telephone Company of the Northwest d/b/a Sprint (collectively, "Sprint"), offers these comments in response to the Washington Utilities and Transportation Commission's (the "Commission" or "WUTC") preproposal statement of inquiry and specific questions issued in this docket.

Sprint participates in all aspects of federal and state universal service fund ("USF") support mechanisms. Sprint serves as a major wireless carrier as well as a rural incumbent local exchange carrier ("ILEC") in the State of Washington. Sprint partakes in USF as both a wireline Eligible Telecommunications Carrier ("ETC") and a wireless competitive ETC ("CETC") duly designated by the Commission. At the same time, Sprint is a net payor into the federal universal service fund, making contributions based on its wireless, local, and long distance operations that greatly exceed the support it receives from the federal fund. That combination of experiences undergirds Sprint's support for policies that will preserve service for end-users and ensure the long-term sustainability of USF while maintaining and enhancing the competitive neutrality of support mechanisms designed to increase the choices available to customers in high-cost areas.

Sprint agrees wholeheartedly with the Commission's view, as expressed in its past ETC orders and as indicated by the tenor of the questions posed in this proceeding, that consumers in rural as well as urban areas are best served by vibrant intermodal competition, and that consumers are in the best position to make choices about the advantages and disadvantages of particular universal service offerings. That basic truth about the general superiority of market-based solutions, coupled with the statutory and judicial mandate that USF funding remain predictable, portable, and competitively neutral, should guide the course that the Commission will pursue in this rulemaking proceeding.

The Federal Communications Commission's ("FCC") new standards for ETC designation and annual ETC certification adhere in some respects to the principles of competitive and technological neutrality. 1/ These new standards are mandatory for carriers obtaining an ETC designation from the FCC. As the *Report and Order* makes clear, however, state commissions are free to adopt the FCC's recommendations as they see fit, consistent with the principles of Section 214(e) and Section 254 of the Communications Act. 2/ The Commission might profitably implement the FCC standards in some instances. However, the Commission should keep in mind that it need not, and should not adopt all of these recommendations as a whole. Rather, these recommendations constitute, in essence, a menu of options from which the Commission can choose in order to construct a consistent, competitively neutral process for

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1/ *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 05-46, 20 FCC Rcd 6371 (2005) ("*Report and Order*").

2/ 47 U.S.C. §§ 214(e), 254. *See Report and Order*, ¶ 61 ("We decline to mandate that state commissions adopt our requirements for ETC designations.").

designation of ETCs in Washington, in furtherance of the principles enunciated in Section 214(e) and in the Revised Code of Washington Sections 80.36.300 and 80.36.600. 3/

Consistent with the general principles outlined above, Sprint offers the following answers to the Commission's list of specific questions posed in this rulemaking proceeding. 4/

**Question 1 – Single connection: ETCs designated by the WUTC receive support for all connections based on expenditures or on access lines served. This includes support for multiline business and residential customers. Can the WUTC limit through the ETC designation process the number of access lines per-customer for which an ETC receives support? Can the WUTC limit through the ETC designation process the type of customer (i.e., business or residential) for which an ETC receives support?**

The purpose of the ETC designation process is to decide whether a particular carrier satisfies the applicable criteria and is eligible to receive USF support. Pursuant to rules established by the FCC, all ETCs receive support for all connections they serve, including access lines or connections for both business and residential consumers. The WUTC has not been granted the authority to use the ETC designation process (or this rulemaking) to determine the amount of federal support that an ETC receives, or whether carriers may receive federal support for certain types of facilities, customers, or accounts.

Importantly, the Federal-State Joint Board on Universal Service ("Joint Board") recommended to the FCC that it use the ETC designation reform process to "limit the scope of

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3/ RCW 80.36.300 ("The legislature declares it is the policy of the state to . . . (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and (6) Permit flexible regulation of competitive telecommunications companies and services."); RCW 80.36.600(1) ("The purpose of the universal service program is to benefit telecommunications ratepayers in the state by minimizing implicit sources of support and maximizing explicit sources of support that are specific, sufficient, competitively neutral, and technologically neutral to support basic telecommunications services for customers of telecommunications companies in high-cost locations.").

4/ Sprint has preserved the wording, numbering, and ordering of the specific questions made available by the Commission, at times providing a single answer for the sake of simplicity to a group of questions dealing with related topics.

high-cost support to a single connection per household." 5/ Congress intervened, however, and prohibited the FCC from utilizing appropriated funds to "modify, amend, or changes its rules or regulations for Universal Service support payments to implement" this Joint Board recommendation. 6/ This congressional determination to prevent the FCC from using the ETC designation process to alter the formula for USF payments underscores the fact that funding decisions affecting federal universal service support mechanisms are the province of Congress and the FCC, and as such are not properly addressed in FCC or state commission ETC designation proceedings.

**Question 2 – The WUTC has relied on the principles of competitive and technological neutrality in analysis of ETC designation decisions. Should the WUTC continue to apply these principles to ETC designation analysis? Are there practical or other limits to the principles of competitive and technological neutrality in the context of ETC designations? Could broadband (VoIP), cable, WiMax, or satellite phone service providers be designated ETCs?**

The Commission should continue to rely on the principles of competitive and technological neutrality in its analysis of ETC designation decisions. These principles make good sense and good policy, and, just as importantly, are mandated by federal and state laws regarding universal service. Section 254(b) of the Communications Act directs the Joint Board and the FCC to base universal service policies on the principles of universal access to telecommunications and information services reasonably comparable to services offered in high-density areas, 7/ and to implement specific and predictable federal and state support mechanisms. 8/

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5/ *Report and Order*, ¶ 11.

6/ *Id*. at ¶¶ 11, 16 (citing the 2005 Consolidated Appropriations Act, § 634 (Dec. 8, 2004)).

7/ 47 U.S.C. § 254(b)(3).

8/ *Id*. § 254(b)(5).

The Communications Act and USF mechanisms are designed both to ensure universal service and promote competition in all parts of the country, including high-cost and rural areas. 9/ The federal courts have confirmed that the Communications Act mandates a competitively neutral funding system for USF programs, in which both incumbent and competitive ETCs receive portable support. 10/ There is no basis for suggesting that this Commission should depart from its practice of applying these principles in its ETC designation decisions made pursuant to Section 214(e)(2) of the Communications Act. Furthermore, the Commission should continue applying these principles pursuant to the policies enunciated in RCW 80.36.300, which declares the policy of the State of Washington to "[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." 11/

So long as satellite phone service providers, providers of broadband, cable, or WiMax-based service offerings such as VoIP and other IP-enabled services offering these services are common carriers and comply with other baseline statutory requirements for ETC designation, Sprint believes that ETC designation could be open to these providers. This is

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9/ *See Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 50 (1997) ("We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers.").

10/ *See, e.g., Alenco Communications v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000) ("[P]ortability is not only consistent with [the statutory requirement of] predictability, but also is dictated by the principles of competitive neutrality and . . . 47 U.S.C. § 254(e)."). *See also id.* at 616 ("[T]he program must treat all market participants equally – for example, subsidies must be portable . . . so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this [portability] principle is made necessary not only by the economic realities of competitive markets but also by statute.").

11/ RCW 80.36.300(5).

particularly true considering the demonstrated benefits and the statutory requirements calling for competitive and technological neutrality.

**Question 3 – The WUTC has required ETC petitioners to state that the carrier will offer its services throughout the area for which it seeks designation. The FCC has determined that it will "require that an ETC applicant make specific commitments to provide service to requesting customers in the service areas for which it is designated as an ETC." Does the FCC's new requirement differ from the WUTC's requirement? If the WUTC were to adopt a rule on this topic, what "specific commitments" should be required?**

**Question 4 – The WUTC has required ETCs to offer service throughout the service areas for which the ETC is designated. The WUTC has refrained from directing ETCs to provide service in a particular manner. The FCC lists six methods for extending service. Should WUTC now require the method(s) of service in addition to requiring service?**

The FCC's new requirements are different and somewhat more exacting than the Commission's practice to date. Both the new FCC requirements and the Commission's current approach address the same general issues of designated service area coverage and extension of service. The new FCC standard announced in the *Report and Order* goes beyond simply requiring, as the WUTC orders do, that an ETC applicant offer its services throughout the area for which it seeks designation. The new FCC standard requires an ETC applicant to commit to extending service to specific potential customers "[i]n those instances where a request comes from a potential customer within the applicant's licensed service area but outside its existing network coverage." 12/ An ETC's commitment to extend service "within a reasonable period of time" in such a situation is limited, however, to instances in which "service can be provided at reasonable cost" pursuant to one of six specific methods for extending service. 13/

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12/ *Report and Order*, ¶ 22.

13/ *Id.*

Sprint would not object to the Commission's adoption of a state rule mirroring these FCC requirements, nor do we particularly recommend such an approach. The Commission could reasonably decide to continue to refrain from directing ETCs to provide service in a particular manner. Significantly, the new FCC standard is not a general directive to provide service in a particular manner. The FCC now requires ETC applicants to commit to extend service within a reasonable time in one of six ways – if and only if any of these methods are available to the ETC at reasonable cost – in the special circumstance of a request for service from a potential customer within the ETC's designated service area. If the Commission were to adopt the "specific commitments" required by the FCC or any other specific methods for extending service to unserved customers, such commitments should be narrowly tailored to the same limited circumstances in which the FCC's six specific commitments apply.

**Question 5 – The FCC now requires "that an ETC applicant submit a five-year plan describing with specificity its proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its designated service area." The FCC has stated that an ETC's five-year plan "must include: (1) how signal quality, coverage, or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation; (2) the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; (3) the specific geographic areas where the improvements will be made; and (4) the estimated population that will be served as a result of the improvements." Are there circumstances in Washington that provide support for an approach similar to the FCC's, or support an approach different from the FCC's?**

**Please provide information about the effort and cost that might be required to comply with the FCC requirements should they be adopted by the WUTC.**

**If the WUTC requests five-year plans, should there be an evaluation of the plans, and if so, what criteria should be used to determine the adequacy or accuracy of the plans?**

**Question 6 – The FCC now requires ETCs to demonstrate supported improvements have been made through particular report elements. It requires "an ETC applicant must submit coverage maps detailing the amount of high-cost support received for the past year, how these monies were used to improve its network, and specifically where signal strength, coverage, or capacity has been improved in each wire center**

**in each service area for which funding was received. In addition, an ETC applicant must submit on an annual basis a detailed explanation regarding why any targets established in its five-year improvement plan have not been met." If the WUTC were to adopt this reporting requirement, are there other investments or expenditures that should qualify as satisfactory to meet the requirement to use federal support only for intended purposes?**

**Should the WUTC require ETC applicants to submit formal improvement plans? If so, what should those plans include? What reports should be required of ETCs; what should be the focus of the review; and what should occur when reported results vary from plans?**

The Commission should not adopt the unworkable 5-year plan requirement suggested in the *Report and Order*. From a business perspective, it is unrealistic for any entity operating in the dynamic market for telecommunications services and information services to make concrete plans with such a long time horizon. Virtually no one in the industry does so. Just as it would be difficult or impossible for any carrier to propose such a plan with any particularity, it would be difficult or impossible – not to mention time-consuming – for the Commission and its staff to evaluate such plans. Providing quality service that will satisfy customers' changing needs virtually requires that any business plan be flexible and subject to modification, given the changes that are bound to occur in demand for services, market conditions, and technology over any five-year period.

There are no valid criteria for evaluating the adequacy or accuracy of such plans. Regulators should not be in the position of evaluating carriers' network designs. Carriers cannot be punished for failing to meet benchmarks established in a five-year plan when the purported "failure" is due to nothing more than a change in plans in response to changed market conditions and realities. Reported results might often vary from the formal plan because network deployment decisions necessarily change over time in response to market signals and pressures.

Furthermore, it would violate the competitive neutrality principles discussed above if the Commission were to require such plans only for new entrants and CETC applicants

but not for incumbent carriers or existing ETCs. The Commission should not require five-year plans of any ETC, however, as such plans are unworkable and likely to inhibit natural growth and changes in service to meet customer demand.

Finally, the FCC's new application and annual certification requirements fail to recognize that Section 254(e) of the Communications Act requires only that ETCs use support "for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 14/ The statute does not limit the use of USF support to incremental capital expenditures designed to increase network coverage, signal strength, and capacity throughout a designated service area. The Commission should recognize that other investments and expenditures do qualify for support, and should continue to allow both incumbents and CETCs to use support for operating expenses, depreciation costs for capital expenditures incurred in the past, and associated overhead attributable to the costs of supported facilities and services.

**Question 7 – The FCC rejected suggestions that build-out plans include a specific timeline. Should the WUTC request build-out plans with specific timelines?**

For the reasons outlined in answer to Questions 5 and 6 above, the Commission should not adopt any of the rigid formal planning requirements recommended by the FCC. Even the FCC, however, in discussing the rationale for its five-year plan requirement, rejected the notion that build-out plans should include specific timelines, start dates, and completion dates. As the FCC noted in rejecting commenters' proposals for such timelines, "mandatory completion dates established by the [FCC] would not account for unique circumstances that may affect build-out, including the amount of universal service support or customer demand." 15/

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14/ 47 U.S.C. § 254(e).

15/ *Report and Order*, ¶ 24.

**Question 8 – The FCC will require an applicant for ETC designation to demonstrate its ability to remain functional in emergency situations, and to "demonstrate it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations." Should the WUTC adopt this requirement? If it does, how should "emergency situation" be defined? What does it mean "to remain functional" in an emergency situation?**

**Many ETCs in Washington operate under WAC 480-120-412 and 414. If the FCC requirement were adopted by the WUTC, would compliance with these rules satisfy the FCC requirement?**

**Question 9 – The WUTC has a rule that address backup power and reserve battery capacity. *WAC 480-120-411*. Would compliance with that rule satisfy the FCC's requirement in Paragraph 25?**

**Question 10 – The FCC rejected a proposal for a requirement that an ETC maintain eight hours of back-up power and ability to reroute traffic to other cell sites in emergency situations. What does your company have in place today to meet back-up power needs? Should the WUTC adopt an eight-hour requirement? Require the ability to reroute traffic to other cell sites in emergency situations? Require the ability to re-route traffic from the line-side of a switch?**

Sprint would not object to the Commission's adoption of the back-up power and emergency function requirements outlined in the *Report and Order*, and takes no position on the Commission's definition of "emergency situation" or the obligation "to remain functional" during an emergency. Sprint notes, however, that these FCC requirements regarding ability to remain functional in an emergency are not necessary in this context, as these tests bear no direct relationship to the purposes of USF and duplicate obligations that carriers must already meet. The Commission should follow the FCC's lead in rejecting an eight-hour back-up power requirement.

**Question 11 – The FCC will now require reporting on an annual basis of outages experienced by ETCs. Should the WUTC require similar reports on an annual or more frequent basis? How could the WUTC use the reports in the annual certification process?**

The Commission should not require similar reports from ETCs on an annual or more frequent basis. This requirement is duplicative of existing FCC reporting obligations and

the more stringent reporting obligations already in place in Washington pursuant to WAC 480-120-412(2). Such a requirement is also unnecessary in light of existing market incentives, because a competitive carrier that experiences frequent outages and network downtime will rapidly lose customers to other, more reliable providers in its designated service area. Outage reporting requirements for ETC applicants and existing ETCs are not necessary to limit the amount of support paid out, because an unreliable carrier that experiences a net loss in customers will experience an equivalent loss in USF support.

**Question 12 – The FCC will require a carrier seeking "ETC designation to demonstrate its commitment to meeting consumer protection and service quality standards" by making "a specific commitment to objective measures to protect consumers." The FCC did not adopt standards; it permits an ETC to propose standards to which the ETC will adhere. What are the concerns for consumer protection and service quality in Washington that should be addressed by standards? If there are concerns, what standards should apply?**

**Question 13 – The FCC stated that "we encourage states to consider, among other things, the extent to which a particular regulation is necessary to protect consumers in the ETC context, as well the extent to which it may disadvantage an ETC specifically because it is not the incumbent LEC," and to "not require regulatory parity for parity's sake." If the WUTC were to adopt a rule "to protect consumers in the ETC context," what existing (demonstrated) problems should be addressed and in what way?**

Although the FCC did not adopt any single set of consumer protection standards, the *Report and Order* did state that, consistent with FCC ETC designation precedent, "a commitment to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement for a wireless ETC applicant." 16/ Sprint proposes that the Commission recognize the sufficiency of the CTIA standards, just as the FCC and other state commissions have done. To respect competitive neutrality principles and real differences between the economic realities faced by wireline and

16/ *Id*. at ¶ 28.

wireless carriers, the Commission should not impose legacy ILEC consumer protection standards on wireless carriers, which typically operate in a far more competitive environment and by definition operate as CETCs alongside incumbent wireline ETCs.

> **Question 14 – The FCC will require an ETC to "demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation." The FCC itself declined to adopt a specific local usage threshold, but will review local usage offerings on a case-by-case basis. The FCC intends to "ensure that each ETC provides a local usage component in its universal service offerings that is comparable to the plan offered by the incumbent LEC in the area." The FCC encourages states to determine whether the ETC "provides adequate local usage." If the WUTC determines it should require wireless ETCs to offer something other than their current subscriber offerings, should the WUTC investigate the revenues and expenses of wireless companies to determine if the offering intended to be comparable to the incumbent LEC's offering is fair, just, reasonable, and sufficient?**
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> **If the WUTC considers a requirement that wireless ETCs provide local usage comparable to that of the incumbent LEC, should the WUTC also consider a requirement that incumbent LECs have a local usage offering comparable to one or more wireless plans, including limited "anytime" minutes, extended area calling, or national "toll free" service?**

The Commission should decline to follow the FCC's recommendations regarding local usage requirements. Existing wireless offerings include usage bundles that consumers find compelling. Rather than imposing legacy rate structures on wireless carriers by regulation, the Commission should continue to encourage all competitive carriers to set their own rate structures in a way that appeals to consumers. A wireless carrier, for example, might satisfy local usage goals without the imposition of any additional regulatory requirements by offering innovative packages that include bundles of local and long-distance minutes.

It would make little or no sense for the Commission or the FCC to require wireless carriers to match wireline rate structures – just as it would make no sense to impose wireless rate structures on incumbent wireline providers. The mere suggestion that the Commission could require incumbent LECs to offer anytime minutes, extended calling areas, or

national toll-free any-distance plans risks ignoring legitimate differences in customer preferences and differences in costs between wireless and wireline that characterize an efficient market. To do so reduces customer welfare and market efficiency for the sake of parity alone. The *Report and Order* recognizes the inherently local nature of typical existing wireless plans but still leaves open the possibility for an unwarranted case-by-case analysis of ETC applicant offerings. 17/ Wireless and wireline carriers work with very different network architectures and costs. Any requirement that wireless carriers adopt wireline rate structures would violate the principles of competitive neutrality for a number of reasons, including that wireless networks are more susceptible to usage-sensitive costs.

**Question 15 – The FCC did not impose an equal access requirement on all ETCs, it stated that ETC applicants should acknowledge that the FCC may require equal access in the event that no other ETC is providing equal access within the same service area. Should the WUTC consider imposing an equal access requirement?**

The Commission should not impose an equal access requirement on wireless ETCs, nor should it require carriers to make an "acknowledgement" that they might be required to do so in the event that no other ETC is providing equal access. To the contrary, Section 332(c)(8) prohibits state commissions from imposing equal access requirements on commercial mobile radio service ("CMRS") carriers. 18/ Sprint believes neither the FCC nor the state commissions should second-guess Congress's judgment that, given the competition among

17/ *Id*. at ¶ 33.

18/ 47 U.S.C. § 332(c)(8); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802 (2002).

CMRS carriers, "equal access" requirements would be counter-productive in the CMRS context. 19/

Moreover, as the FCC has found in the past, imposing equal access obligations on CMRS carriers through the guise of ETC criteria would "undercut local competition and reduce consumer choice." 20/ Consumers benefit from the bundled local/long distance packages that wireless carriers introduced, and that wireline ILECs are now beginning to imitate. Imposing an equal access obligation on wireless ETCs would discourage such beneficial, pro-consumer offerings, and would move decidedly in the wrong direction. 21/

**Question 16 – The FCC did not adopt a requirement for ETC applicants to demonstrate the financial capability to provide quality services throughout the designated service area. Should the WUTC adopt a requirement that an ETC applicant demonstrate the financial capability to sustain supported services? Should the WUTC require proof of financial capability to sustain supported services as part of the annual certification process?**

Although Sprint would not object to such a requirement, it is not necessary in this context and is particularly not necessary for wireless carriers. As the FCC explained in the *Report and Order*, "compliance with the existing requirements for ETC designation . . . require

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19/ *See Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 14095 (Joint Board 2002) ("*Definition of Universal Service RD*"), Separate Statement of Commissioner Kathleen Abernathy ("*Abernathy Equal Access Statement*"), at 38 ("In response to the Commission's previous effort to impose equal access on CMRS carriers, Congress spoke loudly and clearly in opposition to such a requirement. We should be faithful to that plain statement of legislative intent, rather than seeking ways around it.").

20/ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8820, ¶ 79 (1997).

21/ *See Abernathy Equal Access Statement* at 41 ("Looking at the telecommunications marketplace as a whole — which is more competitive than ever before, and which is moving away from artificial service-category distinctions based on geographic boundaries — I am frankly puzzled by the argument that we need to adopt an intrusive and backward-looking regulatory requirement for CMRS carriers.").

an ETC applicant to show that it has significant financial resources." 22/ The FCC also noted that ETCs must demonstrate that they have used universal service support to provide quality service throughout their designated service area, and that wireless carriers in particular have needed significant financial resources since 1994 to purchase their licenses at auction. Finally, the *Report and Order* correctly observed that most wireless carriers already operate systems within their FCC-licensed service areas in satisfaction of FCC regulations requiring licensees to meet build-out or substantial service requirements. 23/

**Question 17 – The FCC states that in making a public interest determination, the "public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas." To what degree should the WUTC consider the purposes of the Act and section 254 principles, including "the deployment of advanced telecommunications and information services to all regions" in making the public service determination?**

**Question 18 – The FCC states "in light of the numerous factors it considers in its public interest analysis, the value of increased competition, by itself, is unlikely to satisfy the public interest test." The WUTC has considered the benefits of competition, not competition itself. How should the WUTC factor in the benefits of competition when determining the public interest in ETC designation?**

The Commission should continue its present practice of according substantial weight to the benefits consumers experience as a result of designation of competitive ETCs, which makes possible facilities-based competition on a level playing field, particularly in high cost, rural areas where it might not otherwise occur. Promoting competition throughout the nation is a fundamental purpose of the Act, and as the FCC observes, the "public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes

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22/ *Id*. at ¶ 37.

23/ *Id*.

of the Act itself" – including promoting competition. While competition may not be the only factor in a public interest analysis, it is certainly an important and central public interest benefit that the WUTC should continue taking into account.

In particular, Sprint urges the WUTC to decline to follow the FCC's recommendation to require ETC applicants in areas served exclusively by *non-rural* ILECs to make a specific "public interest" showing. 24/ Instead, the WUTC should adhere to its existing practice, and to the precedent previously set by the FCC's Common Carrier Bureau, of concluding that, once a non-rural ETC applicant demonstrates that it has satisfied the statutory requirements of all ETCs, a carrier's receipt of ETC status "is consistent *per se* with the public interest," and additional public interest showing should not be necessary. 25/

This approach is rooted in the statute itself, as well as the legislative history. Section 214(e)(2) of the Act (with respect to ETC designation by state commissions), and Section 214(e)(6) of the Act (with respect to ETC designation by the FCC) provide that regulators "*shall*" designate ETC applicants in *non-rural* ILEC areas. The same statutory provisions state that regulators "*may*" issue such designations in *rural* ILEC areas – but only if, before doing so, they "find that the designation is in the public interest." The legislative history makes it clear that, in *non-rural* areas, the role of the regulatory review is to determine whether the applicant meets the statutory criteria; if it does, then the statutory requirements have been met and the regulator "shall" issue the designation. By contrast, the legislative history makes it clear

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24/ *Id*. at ¶¶ 3, 42-43.

25/ *Federal-State Joint Board on Universal Service, Cellco Partnership d/b/a/ Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, 16 FCC Rcd 39, 45, ¶ 14 (Com. Car. Bur. 2000) ("*Cellco Delaware ETC Order*").

that the statute requires the regulator to conduct an additional public interest inquiry in *rural* ILEC areas that does not apply in *non-rural* ILEC areas. 26/

Given that the statute specifically requires an additional "public interest" finding for ETC applications in areas served by *rural*, but not *non-rural*, ILECs, it makes no sense to interpret the general language in the statute stating that all designations are to be "consistent with the public interest, convenience, and necessity" as requiring an additional showing in non-rural areas. Thus, the general "public interest, convenience, and necessity" language in the statute can only mean that, "[f]or those areas served by non-rural telephone companies, . . . designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) is consistent *per se* with the public interest." 27/ In other words, Congress has already made the decision that, if a carrier has met the prescribed ETC criteria, then designation of that carrier as an ETC is in the "public interest, convenience, and necessity." 28/ No additional public interest finding should be required.

**Question 19 – The FCC states that it weighs advantages and disadvantages of particular service offerings. The WUTC has stated that it believes customers can determine the value of advantages and disadvantages of service offerings better than the government. Should the WUTC consider advantages and disadvantages of carrier service offerings when making a public interest determination in an ETC**

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26/ *See Telecommunications Act of 1996, Conference Report to Accompany S.652*, Rept. 104-458, 104th Cong., 2d Sess. (Jan. 31, 1996), at 141 ("If more than one common carrier that meets the requirements of new section 214(e)(1) requests designation as an eligible telecommunications carrier in a particular area, the State commission shall, in the case of areas not served by a rural telephone company, designate all such carriers as eligible. If the area for which a second carrier requests designation as an eligible telecommunications carrier is served by a rural telephone company, then the State commission may only designate an additional carrier as an eligible telecommunications carrier if the State commission first determines that such additional designation is in the public interest.").

27/ *Cellco Delaware ETC Order,* 16 FCC Rcd at 45, ¶ 14.

28/ The phrase "public interest, convenience, and necessity" is a stock boilerplate phrase used elsewhere in Section 214 and in comparable state statutes regarding certifying carriers and permitting them to enter a market.

**designation? Is the price of a service offering an "advantage or disadvantage?" Is the quality of a service offering an "advantage or disadvantage?"**

The fact that wireless carriers' offerings are different from ILEC offerings is itself a benefit. Prices for wireless service offerings may be higher or lower than prices for wireline service offerings in a particular area. For example, the *Report and Order* notes that prior FCC ETC designation proceedings found that the wireless applicants' customers were subjected to fewer toll charges than the incumbents' end-users, and that the wireless customers could choose from a variety of local usage plans that often included large volumes of minutes. 29/ The underlying technology and other aspects of wireless service are very different from wireline, so that "apples-to-apples" comparisons are difficult – and ultimately, unnecessary.

Sprint agrees with the Commission's statement that customers can determine the value of advantages and disadvantages of service offerings more effectively than the government. Giving consumers more choices is always beneficial and in the public interest. The Commission need not evaluate those choices to determine whether certain sub-components of competitive offerings qualify as advantages or disadvantages of the ETC applicant's service plan.

**Question 20 – The FCC has emphasized service quality of carriers seeking ETC designation. It states, "the requirements to demonstrate compliance with a service quality improvement plan and to respond to any reasonable request for service will ensure designation of ETC applicants that are committed to using high-cost support to alleviate poor service quality in the ETC's service area." Is there a service quality problem among ETCs in Washington; if so, what is the problem? What specific information about poor service quality is in the record of the FCC that the WUTC might use to compare to carriers' service quality in Washington as part of the process of determining whether to grant or deny ETC designation?**

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29/ Report and Order, ¶ 33, n.86 (citing Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia, Memorandum Opinion and Order, 19 FCC Rcd 6438, 6433, at ¶ 23 (2004); Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia, Memorandum Opinion and Order, 19 FCC Rcd 1563, 1576, at ¶ 29 (2004).

Sprint is not aware of any service quality problem among ETCs in Washington, either with incumbent ETCs or CETCs designated by the Commission. As noted throughout these comments and specifically in answer to Questions 14 and 19, wireless and wireline networks have different advantages and offer different benefits to consumers. Wireless service gives customers freedom and mobility, offers them innovative and attractive bundles that include local and long-distance minutes, and allows them to call 911 and obtain emergency services from their cars or from remote locations. Wireless also experiences certain disadvantages by comparison to wireline, such as lower bandwidth, lack of E-911 service where PSAPs have not deployed necessary facilities, and higher rates in some instances. Consistent with the public policies underlying both the federal Communications Act and Washington's telecommunications laws, consumers should be empowered to make their own choices. 30/ The Commission should continue to pursue ETC designation policies that will fulfill this mandate, empowering consumers in high-cost areas to make choices among competing, qualified ETCs.

**Question 21 – Should the WUTC determine that ETC designation of a carrier will confer a public benefit before making the initial designation? If so, what information should the WUTC use to arrive at a determination of public benefit? Should the WUTC require some proof of continuing public benefit as part of the annual certification process?**

Sprint concurs with the FCC's assessment that such a pre-designation finding of the conferral of public benefit is unnecessary. Rejecting calls for a more stringent public interest analysis prior to making an initial ETC designation, the FCC concluded that its pre-existing designation factors and the expanded requirements in the *Report and Order* allow for an appropriate public interest determination. 31/ The Commission should likewise find that its

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30/ *See, e.g.*, 80.36.300(5); *id*. 80.36.600(1).

31/ *Report and Order*, ¶ 47.

existing ETC designation criteria and any new standards it adopts in this rulemaking proceeding provide ample opportunity to pass upon the merits of an application, thereby obviating the need for a public benefit determination.

**Question 22 – The FCC has rules that provide federal high-cost support to rural incumbents based on embedded costs of those carriers. The FCC rules provide support to non-incumbent ETCs for every line served based on the costs of incumbents, not on the costs of the ETC. In Washington, federal universal service has been disaggregated for rural incumbents so that support is based on costs associated with each rural exchange. As a result, non-incumbent ETCs receive support based on the level of support needed by the rural incumbent to serve an exchange. Should the WUTC address cream skimming more than it has: if so, how?**

The WUTC has addressed the issue of study area disaggregation and potential "cream skimming" effectively, by separating each ILEC study area into its component exchanges. This protects ILECs against the risk that a CETC might engage in "cream skimming" – *i.e.*, attempt to serve only the low cost exchanges within a study area but receive support based on the higher average cost of the study area as a whole. It also facilitates competitive entry by enabling prospective CETCs to apply for designation in only those exchanges that they are able to serve, without facing a requirement to serve the remainder of a rural study area. Thus, the WUTC need not make any changes to its existing, effective policy in this area.

**Question 23 – The FCC declined to adopt a specific test to use when considering whether designation of an ETC will affect the size and sustainability of the high-cost fund. In the absence of a federal test, should the WUTC apply a test and what test should it apply?**

**Question 24 – The FCC states, "one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund." However, the FCC also has determined that a non-incumbent ETC is entitled to receive support for each line served in an amount equal to the per-line amount received by an incumbent ETC. May the WUTC deny ETC designation to an otherwise qualified carrier because receipt of the federally-determined support amount "could impose strains on the universal service fund?"**

**If a non-incumbent will serve a location without support, would fund sustainability be increased if the incumbent is not designated an ETC?**

The Commission should not apply any specific test based on the amount of support, nor should it consider the level of per-line support provided to an area, in determining whether to designate a carrier as an ETC. The only factor that should be considered in an ETC designation proceeding is whether the carrier satisfies the established eligibility criteria. Public policies regarding amounts of support are completely separate from designation. To be sure, Sprint believes that the overall level of the USF is growing rapidly and needs to be brought under control, and that changes are needed to certain aspects of the methodology for determining amounts of support. However, abusing the ETC designation process to control the size and growth of the fund would violate competitive neutrality. Sprint believes that the FCC should adopt more direct, competitively neutral policy changes to address this problem. In all events, however, policy on overall fund size and growth is beyond the scope of WUTC's review in specific ETC designation proceedings.

Tellingly, the FCC did not suggest any specific means by which to evaluate whether and when designation of an additional ETC would impose undue strains on the size of the fund – because there *is* no principled way to do so. How would the Commission assess the "level of federal high-cost per-line support to be received by ETCs" as part of the public interest analysis in a rural ETC application proceeding? The amount of per-line support, by itself, provides no information about the harms or benefits of designating a competitive ETC. A relatively high amount of per-line support to a rate-of-return rural ILEC may simply mean that the ILEC has expended excessive funds in an inefficient manner; it does not necessarily correlate with factors such as topography, population density, line density, distance between wire centers, loop lengths, and levels of investment.

The Commission's question about whether support to *ILECs* is needed in an environment where competitive entrants are willing to provide service without support raises important questions regarding obligations that may continue to exist such as carrier of last resort obligations, even if ETC status is relinquished. If any carrier – ILEC or competitor – satisfies the established ETC criteria, then current federal law and rules require that it receive support.

> **Question 25 – The FCC declined "to adopt a specific national per-line support benchmark for designating ETCs," and stated "Although giving support to ETCs in particularly high-cost areas may increase the size of the fund, we must balance that concern against other objectives, including giving consumers throughout the country access to services comparable to services in urban areas and ensuring competitive neutrality. In addition, as a practical matter, we do not believe we currently have an adequate record to determine what specific benchmark or benchmark should be set." Can the WUTC develop a state benchmark and apply it in the context of an ETC designation decision? What would be the benchmark?**

The Commission should follow the FCC's recommendation, and like the FCC should decline to use a specific benchmark based on per-line support – *i.e.*, WUTC should *not* establish a bright-line rule that designating a competitive ETC would be in the public interest if the amount of per-line support is less than X, but not if the amount exceeds X. Any such benchmark would be inherently arbitrary and would disserve the interests of consumers. It would be inherently arbitrary and disservice the interest of consumers.

Moreover, any presumption against ETC designation would be contrary to Section 214(e) of the Act, which establishes no such presumptions. The Fifth Circuit Court of Appeals has already rejected a prior FCC effort to create similar presumptions, and has clarified that to "impose[ ] such onerous eligibility requirements that no otherwise eligible carrier could receive designation . . . would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier . . . ." 32/ Where the statute specifically directs an agency to take an action if certain

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32/ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 & n.31 (5th Cir. 1999). In that case the court reversed what in effect was a presumption *in favor* of designating competitive ETCs. *Id.* at 417-48.

criteria are satisfied, the agency does not have authority to establish a rebuttable presumption *against* taking that action. 33/ Finally, use of such presumptions as "shortcuts" overlooks the fact that designation of wireless carriers as ETCs often provides major benefits to consumers and substantially advances the public interest, as the WUTC has recognized on many occasions.

**Question 26 -- The FCC declined to adopt a proposal that would allow only one wireline ETC and one wireless ETC in each service area. The FCC also stated "Such a proposal that limits the number of ETCs in each service area creates a practical problem of determining which wireless and wireline provider would be selected." Should the WUTC limit ETC designation to one wireline company and one wireless company in any location? Adopt a rebuttable presumption that it is not in the public interest to have more than one ETC in rural areas?**

The Commission should neither limit the number of ETC designations in any location to one wireline and one wireless company, nor adopt a restrictive rebuttable presumption that it is not in the public interest to designate CETCs in rural areas. The Commission should in this instance follow the FCC's lead and refuse to adopt measures that would fly in the face of the authorizing statutes and simultaneously work a disservice to the public interest.

Under Section 214(e)(2) of the Communications Act, state commissions are authorized to designate ETCs, but they must do so according to certain guidelines:

> Upon request and consistent with the public interest, convenience, and necessity, the State commission . . . *shall*, in the case of all [non-rural] areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as *each additional* requesting carrier meets the requirements of [Section 214(e)(1)]. 34/

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33/ *See American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 771 (D.C. Cir. 1987) (vacating OPM regulation establishing a presumption that "appears to guide or direct the agency to act inconsistently with the [statute] and places an unwarranted and, at minimum, confusing burden on the employee").

34/ 47 U.S.C. § 214(e)(2) (emphases added).

The statute evinces Congress's clear intent that state commissions designate multiple CETCs in non-rural areas so long as each additional applicant meets the eligibility requirements of Section 214(e)(1). A policy limiting the number of ETCs to one wireless and one wireline carrier in any service area clearly violates this congressional mandate.

Section 214(e)(2) also directs state commissions to designate CETCs in areas served by rural telephone companies, but allows state commissions greater discretion in determining whether designation of a competitive entrant in a rural area may serve the public interest. A rebuttable presumption that competition does *not* serve the public interest in rural areas limits state commission discretion unnecessarily. Moreover, such a presumption violates the principles of competitive neutrality and does a great disservice to the interests of rural consumers. Federal and state USF statutes, along with FCC orders and judicial decisions confirming the FCC's approach, all demand competitive neutrality. A rebuttable presumption that would in practical effect limit or even eliminate competition between rural ILECs and wireless carriers would deprive rural consumers of "access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas." 35/ Universal Service support should be portable, not tied to a single type of carrier or technology. Rural consumers, like all other consumers, should have the choice of whether to buy supported telecommunications services from an ILEC or from a wireless carrier that satisfies the basic ETC criteria.

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35/ *Id*. § 254(b)(3).

**Question 27 – The FCC also declined to treat smaller and larger wireless carriers differently when the issue is the effect on the fund of ETC designation. What process and standards of review should be applied to various classes of ETC applicants? Should the same process and standards apply equally to all applicants?**

The principle of competitive neutrality requires that size should not affect the process and standards of review applied in the ETC application process. The WUTC should follow the FCC's recommendation and should decline to adopt different ETC designation processes or standards of review based on the size or technology of a carrier.

**Question 28 – The FCC addresses issues related to ETC designations for carriers whose service areas will include tribal lands. The WUTC has designated several ETCs that serve tribal lands, and in particular reservations. Should the WUTC require ETC applicants to send notice (a copy of the petition) to Indian tribes that might be affected by the designation?**

Sprint is unable see how ETC designation could "significantly or uniquely affect tribal governments, their land and resources" except in a positive sense by increasing the affordability of service to low income customers. Therefore, Sprint takes no position on the matter of whether the Commission should require ETC applicants to send a copy of the petition or other form of notice to Indian tribes that might be affected by the designation.

**Question 29 -- The FCC will require information from ETCs every year when the ETC makes its annual certification that it will use federal universal service support only for the intended purposes. Much of the information the FCC will require is similar to the information discussed in questions concerning initial designation. The FCC's new annual certification also requires information regarding the ETC's network and its use support funds. Should the WUTC require the same information as will the FCC?**

**The FCC created the Lifeline and Link Up programs to assist low-income consumers, and the federal tribal lifeline program to target low-income support to residents of Indian reservations. If the WUTC develops additional requirements for annual certification of designated ETCs, should it require annual reports on ETC efforts to publicize the availability of lifeline service in a manner reasonably designed to reach those likely to qualify for the service? Should it inquire into ETC practices related to accepting and processing requests for Lifeline service?**

**If the WUTC imposes any requirements for certification, must it do so by rule, or may it do so by order?**

Any annual certification filing requirements must be competitively neutral – the same requirements should apply to both ILECs and CETCs. The WUTC should not require any certification filings that would impose unnecessary burdens upon carriers or interfere with competitive market dynamics. Thus, as discussed above, the WUTC should decline to require certification filings regarding matters such as five-year plans, outage reports, local usage, equal access, and other matters that could impose unnecessary burdens on carriers and in many cases violate competitive neutrality. Moreover, there is no need to require carriers to certify annually that they will comply with the rules; carriers are required to comply with applicable rules whether they so certify or not, and the annual certification process adds nothing but burdensome and unnecessary paperwork.

Sprint takes no position on the Commission's questions regarding the Lifeline, and Link Up programs. We suggest, however, that such matters should be addressed in the separate, already pending proceeding concerning those programs at the FCC.

Finally, any requirements for certification must be imposed by rule, not on an *ad hoc* basis in ruling on a specific carrier's ETC application or otherwise.

**Question 30 – Should the WUTC disclaim jurisdiction with respect to one, some, or all ETC designations? Is the WUTC permitted to disclaim jurisdiction to conduct annual certifications for ETCs designated by the FCC? ETCs designated by the WUTC?**

There is no need for the Commission to disclaim jurisdiction with respect to any ETC designation or class of ETC designation decisions. To Sprint's knowledge, no party has challenged the Commission's jurisdiction to designate ETCs in the State of Washington or to conduct related certification proceedings, and Sprint cannot identify any reason the Commission should consider disclaiming jurisdiction to do so. Within the bounds of federal and state USF

laws, the Commission is free to adopt the practices that it sees fit in designating and certifying ETCs.

Respectfully submitted this 1st day of June, 2005.

By: /s/______________________________
Nancy L. Judy
State Executive