

Agenda Date: September 12, 2007 (originally published July 11, 2007)  
Item Number: A6

**Docket: UT-073032**

Company Name: Washington Independent Telephone Association

Staff: Bob Shirley, Telecommunications Policy Analyst

### **Recommendation**

Deny the petition for “a moratorium on the designation of additional competitive eligible telecommunications carriers (ETCs) and the expansion of existing competitive ETC designations until such time as the Federal Communications Commission (FCC) completes action on the Recommended Decision of the Federal-State Joint Board on Universal Service, at the very least, and preferably until the FCC concludes action on the longer-term reform currently being pursued in WC Docket No. 05-337 and CC Docket No. 96-45.”

### **Background**

The Washington Independent Telephone Association (WITA) filed a petition on June 15 for a moratorium on designation of additional non-incumbent ETCs and a moratorium on expansion of existing non-incumbent ETC designations. WITA requests the ETC petitions of Sprint Nextel Corporation in Docket UT-073023, Eltopia Communications, LLC (Eltopia) in Docket UT-073024, and Intelligent Community Services, Inc., in Docket UT-053041 be held in abeyance until WITA’s petition is resolved.

WITA describes actions recommended to the FCC by the Federal-State Joint Board on Universal Service (Joint Board), describes notices issued by the FCC, describes matters pending before the FCC, and quotes statements of individual FCC commissioners, but does not provide an explanation of how the public interest would be served by establishing the requested moratorium. WITA also fails to state why a moratorium is in its interest.

### **Comments**

Eltopia Communications, LLC (Eltopia) filed comments on the petition June 20 indicating that its interests will be affected adversely if the petition is granted. Eltopia states it relied on WAC 480-123-040 when it petitioned for ETC designation and that it deserves to be treated in the same manner as all other ETC petitioners – specifically to receive a prompt decision based on the legal standards that to date have been applied consistently. It states suspending action on pending ETC petitions would be an extraordinary action and there is nothing in WITA’s petition to explain why an extraordinary action is necessary.

Eltopia refers to the same FCC activity discussed in the WITA petition and states the proper forum for addressing the size of the high-cost fund is at the FCC. Eltopia points out the Joint Board recommendation would affect the fund’s size; that it could have recommended the FCC

place a moratorium on designations but the Joint Board did not make that recommendation, and the FCC is not pursuing a moratorium on designations.<sup>1</sup>

Eltopia states a moratorium would limit its ability to meet the demands of customers in eastern Washington for basic and advanced services, and will result in unfair competition between Eltopia and all incumbent and non-incumbent ETCs.

Eltopia recommends that if the commission considers WITA's petition, it should treat it procedurally as a petition for an emergency rulemaking to, in essence, repeal WAC 480-123-040. It also recommends that if the commission adopts a moratorium, that it should apply prospectively.

Sprint Nextel Corporation (Sprint) commented on WITA's petition and states WITA has no standing to demand the commission hold pending ETC petitions because the outcome will have no effect on WITA's members. Sprint asserts the lack of a property interest on the part of one ETC concerning the designation of another ETC is well settled.

Sprint asserts a failure by the commission to hear and decide an ETC petition in a timely manner would create a *de facto* barrier to entry not permitted under 47 U.S.C. § 253(a).

Sprint asserts the Joint Board recommendation is immaterial until the FCC acts and the commission should not adjust its actions based on speculation about what the FCC might do. Additionally, Sprint asserts the FCC has never encouraged states to delay ETC designation and that to do so may act as a prohibited barrier to entry. Sprint points out the FCC never enacted a moratorium on designations.

Sprint points out that there have been policy issues concerning the universal service program pending before the FCC throughout the eleven years since the 1996 Act and that WITA has never suggested its members' designations be delayed.

WITA responded to Eltopia's assertion the petition is a request for an emergency rulemaking. WITA states the purpose of adopting a moratorium would be to give notice to companies that the commission will not take action on petitions. WITA states there is no requirement to act on ETC applications by a particular time.

WITA states a reason to delay is for the commission to determine the effect on all non-incumbent ETCs if the FCC creates a cap on the fund based on 2006 payments. WITA asserts that commissions may take into account activity pending at the FCC in determining when and how to respond to designation petitions. WITA also states that a moratorium should not be

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<sup>1</sup> See *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision (Released May 1, 2007).

prospective only; that a moratorium that affects Eltopia's petition would only be a delay in action and not application of a different set of rules to Eltopia.

## **Discussion**

Commission staff considers the size of the fund to be an FCC issue, consistent with statements of the commission.<sup>2</sup> The only change since the commission stated its views on this matter is the FCC has invited and received comments, and may take action to limit the size of the federal fund by placing a cap (based on 2006 payments<sup>3</sup>) on the amount of funds distributed to non-incumbent ETCs. If the size of the fund is problematic, the FCC may be addressing the problem. Inaction on ETC designation petitions by this commission will not resolve fund issues before the FCC.

The result of ETC designations by the commission, however, is beneficial to Washington customers--who are the reason the federal program exists.<sup>4</sup> Wireless ETCs have invested millions of federal support dollars in their networks in Washington, including millions invested in areas served by WITA's members.<sup>5</sup> One result is increased availability of wireless signals at greater strength in rural Washington. Not only do the improved rural networks serve rural customers, but as a result of roaming agreements between such carriers as Verizon Wireless and wireless ETCs they also serve urban customers who travel in rural areas. That is, the availability of rural networks operated by ETCs with rural cellular service areas permit "nationwide" carriers to offer nationwide service by using, where necessary, the rural wireless networks improved with federal support.

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<sup>2</sup> "...[T]he decision before us is whether to limit altogether Sprint PCS's access to federal [High Cost Fund] HCF support by denying it ETC designation or to designate Sprint PCS as an ETC and let the FCC adjust support amounts if the revenue replacement provided by the HCF is providing more than sufficient support to ETCs. The FCC is in the better position to adjust either HCF support or PCS licenses if the FCC decides that it is necessary to do so." See *In the Matter of the Petition of Sprint Corporation, d/b/a/ Sprint PCS, Sprintcom, Inc., Sprint Spectrum, L.P., and WirelessCo., L.P. for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-043120, Order No. 01 (Corrected) (Jan. 27, 2005), ¶ 42. See also *In the Matter of the Petition of RCC Minnesota, Inc., d/b/a Cellular One For Designation as an Eligible Telecommunications Carrier*, WUTC Docket No. UT-023033, Order Granting Petition for Designation as an Eligible Telecommunications Carrier, ¶ 66 (August 14, 2002) (*RCC Order*) ("Rural ILECs are correct that current FCC rules do not decrease support for one ETC if an additional ETC is added. We take the FCC rules as we find them, and that includes its determination (with which we agree) that support should be provided for all lines, regardless of which carrier provides them or the technology used to provide the service. Concern about a cap or restructuring of the federal universal service fund is speculative at best.")

<sup>3</sup> Designations in 2007 will not increase the fund size under the proposed cap; designations could affect the distribution between non-incumbent ETCs.

<sup>4</sup> "Universal service is intended to benefit customers, not companies." *RCC Order*, ¶ 62 (citing *Washington Ind. Tel. Ass'n*, 110 Wn.App. at 510 (citing *Alenco Communications Inc. v. Federal Communications Comm'n*, 201 F.3d 608, 621 (5th Cir. 2000)).

<sup>5</sup> See filings in Docket UT-063052, Certification of Support for Rural and Non-Rural High-Cost Carriers Pursuant to 47 C.F.R Sections 54.313-314, CC Docket Nos. 96-45 and 00-256.

Granting the petition would effectively eliminate review of ETC petitions on their merits for as long as eighteen months. A blanket moratorium on the consideration of the merits of petitions as contemplated by WAC 480-123-040 would be inconsistent with the public interest because it would leave some petitioners at a competitive disadvantage. Excessive delay would be contrary to the principle of competitive neutrality.<sup>6</sup>

A full and fair discussion of the merits of pending and future ETC designation petitions, however, will provide WITA ample opportunity to discuss FCC and related activities it describes in its petition, and will afford WITA an opportunity to state the public interest reason for denying individual petitions while not resulting in excessive delay in responding to designation petitions.

### **Summary**

Commission staff recommends the petition for a moratorium on ETC designations be denied because the petition lacks any statement of the public interest benefit to Washington in establishing the moratorium. Furthermore, WITA can address the issues that concern it when individual ETC designation petitions are considered.

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<sup>6</sup> See, for e.g., *Twelfth Report And Order, Memorandum Opinion And Order, And Further Notice Of Proposed Rulemaking, CC Docket 96-45 (Adopted June 8, 2000) (Released June 30, 2000)* ¶ 114 (“...[E]xcessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas. We believe it is unreasonable to expect prospective entrants to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether they are eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost areas....competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services...indefinite delays in the designation process will thwart the intent of Congress, in section 254, to promote competition and universal service to high-cost areas...we commit to resolve, within six months of the date filed at the Commission, all designation requests...strongly encourage state commissions to resolve designation requests filed under section 214(e)(2) in the same time frame.”(footnotes omitted)).