STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	Docket No. 06-0468
Establishment of rules regarding	)	
service quality and customer protection	)	
applicable to wireless carriers	)	
operating as eligible	)	
telecommunications carriers	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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July 31, 2007

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NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), through its undersigned counsel, and pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Adm. Code 200.800), files its initial brief in the above referenced docket.

Introduction

The proposed rule, sponsored by Staff,[1] emanated from multiple workshops participated in by parties representing diverse stakeholders, including wireline local exchange carriers, and regional wireless carries and national wireless carriers. As Staff noted in its Initial Brief (at 4), the proposed rule does not reflect any party's primary position but is the result of negotiation and compromise. The bottom line is that although each party to the workshops, including Staff, would certainly prefer a rule that differs in certain diverse respects from the proposed rule, all of the parties, and the diverse interests the parties represent, can either "live with" the rule as proposed or actively support adoption

[1] Due to a few ministerial matters discussed below, a new draft of the proposed rule is attached as Att. 1 to this Staff Reply Brief.

of the proposed rule, with the exception of Sprint. Only Sprint has voiced objections to the proposed rule.

In essence, Sprint has characterized any provision of the proposed rule it finds objectionable as either preempted rate or market entry regulation.[2] However, Sprint's argument relies upon law interpreting the regulations application of regulations to *all* CMRS providers. The proposed rules that are the subject of this docket apply only to those CMRS providers who *chose* to seek designation as an ETC in Illinois and the consequential access to USF funds. This is a critical distinction. In addition, Sprint utterly ignores the distinction between an arguable unlawful assessment of the reasonableness of Sprint's rates and the application of consumer protection provisions regarding how a WETC would bill its rates. In Sprint's view, any matter related to billing is preempted ratemaking. Likewise, Sprint argues that certain provisions of the proposed rule would amount to preempted market entry regulation if the regulation would result in a Sprint need to adapt any of its existing business practices. Sprint's preempted market entry theory (i) fails to acknowledge that none of the proposed rules would impact Sprint's physical infrastructure, and (ii) fails to consider the degree of the alleged impact on market entry.

Sprint has summarized its bases for objecting to the proposed rule as follows:

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[2] As addressed in more detail below, Sprint also lumps together with its preempted market entry argument an argument that certain provisions of the proposed rule are also prohibited because they would negatively impact Sprint's decision to offer certain telecommunications services under Section 253(a) of the federal Act.

- Because the wireless industry is intensively competitive all wireless carries have economic incentives to provide the best service that is possible

- Wireless services are inherently mobile and traditional wireline basic local exchange service rules should not be applied to stifle the mobile nature of wireless services

- For national wireless carriers adherence to a single set of consumer protection and service quality standards rather than state specific rules that differ from the national standard is crucial to providing good service everywhere

- Several of the proposed rules that regulate the entry of and rates charged by commercial mobile service providers are contrary to federal law, 47 USC § 332(C)(3) and/or 47 USC § 253(a) and are preempted

Sprint Initial Brief at 1-2.

Staff will address each of Sprint's bases for objecting to the proposed rule in turn.

Staff Reply to Sprint

Wireless Industry Is Highly Competitive

Sprint claims that "the wireless industry is sufficiently competitive to ensure service quality and billing practices that satisfy the needs of wireless consumers." Sprint Initial Brief, at 8. This statement presumes facts that are far from being established.

First, the proposed rule does not seek to regulate the "wireless industry." See Staff Ex. 2.0 (McClerren Reply), at 12. The proposed rule would only be applicable to those wireless carriers that choose to petition the Commission to obtain ETC funds in Illinois. The WETCs that obtain funding in Illinois must also be prepared to take on carrier of last resort responsibility, which would require

the WETC to stand in the place of the previous ILEC, in which case the WETC would more closely resemble a wireline carrier than a wireless carrier in many regards, particularly to the average telecom consumer.

Second, as Mr. McClerren testified, the statistics Sprint employs to support its claim that the wireless industry is so competitive that there is no reason for the proposed rule is misleading. See Staff Ex. 2.0 (McClerren Reply), at 2 ("One of the key purposes of the USF is to provide monies to enable local service providers, either wireline or wireless, to deploy their network into areas that are not economically attractive absent USF funds."). In a truly competitive market there would be no need for the state of Illinois to provide WETC applicants USF funds.

Third, even assuming that the wireless industry is competitive, in this context, ETCs, as possible carriers of last resort, are providing services more akin to wireline services in that the phone service provided are not "supplemental" to wireline services. As IITA witness Mr. Flesch explained that just because there is a degree of "competition between and amongst the wireless carriers [such competition] has not resulted in wireless carriers providing a 'basic level of service that customers expect when they purchase local exchange service, or what the customer intends to use as the functional equivalent of local exchange service, from any provider' in high cost rural areas." IITA Ex. 1.0 (Flesch Reply), at 6-7, *citing* Staff Ex. 1.0 (McClerren Dir.), at 5. Moreover, as Mr. Flesch so aptly concludes, "[t]he fact that there is competition between and amongst wireless carriers in Chicago and in other areas is not a reason or

justification for there not being quality of service requirements and customer protections for wireless carriers who seek ETC status." *Id*.

Fourth, Sprint presumes to speak for telecommunications consumers when it states that due to the competitive nature of the wireless industry its service quality and billing practices "satisfy the needs of wireless consumers." Sprint, thus, appears to have taken on a dual role in this proceeding – supporting the interests of a national wireless carrier and also speaking on behalf of the customers of all wireless carriers. Clearly, these dual roles are in conflict, and Sprint's avowed advocacy on behalf of wireless consumers should be disregarded.

Finally, the facts in this record demonstrate that Sprint's claim is not supported by fact. In reality, the wireless consumers are not satisfied with the wireless industries' service quality and billing practices, Sprint's argument notwithstanding. Staff Ex. 2.0 (McClerren Reply), at 4-5.

Wireless ETC Rules Must Be Limited to the CTIA Code

Sprint argues that any wireless ETC rules the Commission promulgates must be limited to adoption of the CTIA Code. Sprint Initial Brief, at 9. Sprint, however, fails to provide a cognizable basis for its assertion that the Commission's authority is so limited. Federal law does not preclude the Commission from imposing consumer protection and service quality standards. As Staff pointed out in its Initial Brief, the FCC expressly explained that state commissions could go beyond the FCC's "framework" imposing consumer protection and service quality standards for WETCs that are more comprehensive than the CTIA Code. See Staff

Initial Brief, at 8-11, citing to ¶ 30 of the FCC's ETC Order ("As with the other requirements adopted in this Report and order, state commissions that exercise jurisdiction over ETC designations may either follow the Commission's framework or impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers.").

Moreover, As IITA witness Mr. Flesch noted, the CTIA Code "is a code that carriers can, or cannot, voluntarily agree to comply with and provides neither the Commission or Illinois consumers with enforceable rules related to service quality or consumer protection," such as those contained in the proposed rule. IITA Ex. 1.0 (Flesch Reply), at 8. Consequently, a wireless carrier can opt in and also opt out of abiding by the CTIA Code.

Likewise, the AG provided the Commission with a comprehensive and sagacious analysis of the CTIA Code compared to the proposed rule, indicating, among other things, that the CTIA Code did not provide consumers with sufficient consumer protections. AG Initial Brief, at 8-10. Staff agrees entirely with the AG's analysis. Finally, as the AG notes, the"CTIA Code is a good starting point, and its protections are included in the proposed [] rules. However, the proposed rules properly include additional measures of protection for consumers that should be adopted." *Id.*, at 10. Consequently, Sprint is clearly wrong that the any wireless ETC rules the Commission promulgates must be limited to the CTIA Code as the FCC has expressly stated that state commissions are free to go beyond the FCC's framework and impose consumer protection and service quality rules that go beyond the CTIA Code.

Traditional Wireline Basic Local Exchange Rules Properly Adapted For Wireless Technology Will Not Stifle The Nature Of Wireless Services

Sprint argues that because wireless services are inherently mobile and traditional wireline basic local exchange service rules should not be applied to stifle the mobile nature of wireless services. However, as the AG clearly articulated in its Initial Brief (at 4-5), one of the goals of advancing universal service principles and goals is to ensure that:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, … *that are reasonably comparable to those services provided in urban areas* and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
>
> 47 U.S.C. §254(b)(3)(emphasis added).

Thus, while the Commission is clearly precluded from assessing the reasonableness of a WETC's rates or market entry, it is not prohibited from seeking to ensure that the universal service funds the state provides WETCs advances the goal of providing consumers in rural, high-cost areas services that *are reasonably comparable to those services provided in urban areas.* That is what the proposed rule seeks to accomplish. As Staff witness, Mr. McClerren summarized: "the proposed rule in Attachment 1 provides the Commission the necessary level of service quality and customer protection assurance, yet contemplates the cost benefit analysis certain to be conducted by potential wireless ETCs." Staff Ex. 2.0 (McClerren Reb.), at 5-6.

Mr. McClerren testified that "there are structural differences between the wireless and wireline carriers that have to be acknowledged." Staff Ex. 1.0 (McClerren Dir.), at 4. Mr. McClerren also testified, in the ETC context, there exists

a "policy tension, or trade off" between the quality of service provided by wireline carriers compared to the wireless providers quality of service. Mr. McClerren explained:

> The Commission should be aware that wireless service does not, nor will it in the near future, provide the same high level voice quality call transmission that a wireline phone currently provides. There are inherent aspects of wireless service, including dropped calls or signal strength, that limit a wireless carrier's ability to provide that same high level voice quality call transmission. The tension, or trade-off, for the Commission is that wireless ETCs are willing to act as a local exchange service provider, willing to go into a previously non-competitive market, invest, and provide the benefits of a competitive alternative – an alternative that may also provide redundancy and may even be able to reach the "double wide in the back forty" cost effectively. The Illinois General Assembly and the Commission have both encouraged competition in the telecommunications industry, believing that market forces will lead to better, cheaper telecommunications service for the citizens of Illinois. Accordingly, at some level, ETC funding for wireless carriers is inherently a trade off between service quality and the benefits of competition. The task before the Commission in this proceeding is to ascertain that service quality rules are promulgated that ensure a minimum level of service quality and customer protections, yet are not so onerous that a wireless carrier will fail to see a cost benefit to seeking ETC funds.
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> *Id*. (internal footnotes omitted).

Moreover, IITA witness, Mr. William Flesch, astutely addressed the issue of state regulation of WETCs from a wireline carrier's perspective:

> While the IITA does not support 'parity for parity sake', if wireline carriers, such as IITA member companies, are to be subject to service quality and consumer protection rules, wireless carriers who seek federal universal service funds and ETC status should be subject to similar rules reflecting the differences in technology. Such rules are appropriate not only to assure the Commission and customers in regard to the quality and level of basic service but is also appropriate for competitive reasons in light of the existing competition between wireline and wireless carriers. A wireless ETC

> could become a 'carrier of last resort' the same as a wireline carrier and could be the sole and only provider of basic service in a geographic area if a wireline carrier gives up its ETC status. This is a different role (with different responsibilities) than providing discretionary and competitive wireless service that is not supported by federal universal service funds.
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> IITA Ex. 1.0 (Flesch Reply), at 8-9.

Consequently, traditional wireline basic local exchange rules properly adapted for wireless technology will not stifle the nature of wireless services. Further, as Mr. Flesch testified, a WETC could become a "carrier of last resort," which is an entirely different role (with different responsibilities) than providing discretionary and competitive wireless service, which is all that the CTIA Code addresses.

None of the Provisions Of The Proposed Rules Are Preempted Rate Regulation

Sprint argues that a "close examination of the Proposed Part 736 demonstrates that many of the proposed rules directly regulate the rates that can be charged by a WETC and thus run afoul of federal law and are preempted by the Supremacy Clause of the united States Constitution." Sprint Initial Brief at 16. Sprint appears to take the position that any regulation of WETCs reflexively equates to rate or market entry regulation. In fact, the provisions of the proposed rule that Sprint finds objectionable as preempted regulation are, on their face, other terms and conditions related to billing and other consumer protection matters, just the sort of terms and conditions that congress explicitly envisioned being addressed by states. H. R. Rep. No. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588 ("By "terms and conditions," the Committee intends to include such matters as

customer billing information and practices and billing disputes and other consumer protection matters.") (emphasis added).

Moreover, Sprint has failed to establish the "clear" and "manifest" congressional intent required to preempt state law. *Building & Construction Trades Council v. Associated Builders & Contractors,* 507 U.S. 218, 223-224 (1993) (*quoting Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress ***did not intend to displace state law***") (emphasis added). Thus, a strong presumption exists ***against*** preemption, and state laws are not superseded by federal law unless that is the "clear" and "manifest" purpose of Congress. *See e.g., CSX Transportation v. Easterwood,* 507 U.S. 658, 664 (1993) ("In the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'") Consumer protection in the area of telecommunications is an area traditionally governed by the state of Illinois under its general police powers.[3]

In fact, as Staff noted in its Initial Brief (at 12), the Seventh Circuit has held that only issues that "require the state court to assess the reasonableness of the rates charged" are preempted. *Fedor v. Cingular Wireless Corp*., 355 F.3d 1069, 1074 (7th Cir. 2004)("*Fedor*"). The proposed rule does not "assess the reasonableness of the rates charged;" neither would the Commission were it to adopt the proposed rule. Sprint's claim that certain aspects of the proposed rule constitute preempted rate regulation is rebutted by the fact that, under no interpretation of any proposed rule, would the actual rates of a wireless carrier's

[3] The Illinois Public Utilities Act was first enacted on June 29, 1921, and became effective on July 1, 1921.

come before the Commission. For instance, to assess the reasonableness of the rates Sprint charges, the Commission would at minimum need to know what the Sprint rates are. There is not, however, and will not be a shred of evidence in the record of Sprint's rates or for that matter any other wireless carrier's rates. The proposed rule does not prescribe, set, or fix rates for WETCs. It does not prevent WETCs from raising their rates. It does not limit how much WETCs can charge per minute, whether they can round their charges to the nearest minute, or whether they can charge for time during which a person is dialing and not actually connected to the person being called.

In *Fedor*, the Seventh Circuit addressed at length[4] the distinction the FCC drew between matters that may be related to rates and situations that would involve a court in a determination of whether a carrier's rates were reasonable:

> In *Southwestern Bell*, the FCC held that state law claims stemming from state contract or consumer fraud laws governing disclosure of rates or rate practices are not generally preempted under § *332*. *Southwestern Bell*, 14 F.C.C.R. at 19908 P 23. The FCC held that billing information, practices and disputes which may be regulated by state contract or consumer fraud laws fall within the "other terms and conditions" which states are allowed to regulate. *Id. at 19901 P 7*. Therefore, *Southwestern Bell* rejected the notion that all claims related to rates or billing are necessarily preempted by § *332*.
>
> The FCC further explored that issue in *Wireless Consumers*, wherein it addressed whether damage awards against commercial mobile service providers based on state court tort or contract claims are preempted by § *332* as equivalent to rate regulation. *15 F.C.C.R. 17021*. The FCC answered in the negative, holding that such claims are generally preempted only where they involve the court in ratemaking. *Id. at 17034 PP 23, 24*. The FCC in *Wireless Consumer*s expressly rejected the argument that any determination of monetary liability is equivalent to a finding that the service was inadequate for the charge, and therefore necessarily a finding that the rates charged were unreasonable. *Id. at 17035 P 25*. The FCC recognized that state law claims are preempted where the court

[4] Staff apologizes in advance for the extended block quote but risks the awkwardness of the quote because of the insightful, relevant analysis.

must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service. *Id.* The FCC proceeded, however, to delineate a number of circumstances in which inquiries related to rates or billing practices would not be preempted:

> On the other hand, a case may present a question of whether a CMRS [commercial mobile radio service] service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier's advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. In such a situation, a court need not rule on the reasonableness of the CMRS carrier's charge in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. In our view, the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance.

Id. at P 26 [footnotes omitted]. Therefore, the FCC distinguished between claims that would enmesh the courts in a determination of the reasonableness of a rate charged and those that would require examination of rates in the context of assessing damages, but would not involve the court in such a reasonableness inquiry.

Fedor, 355 F.3d at 1072-1074.

In light of the above-described FCC distinction between claims that would require an assessment of the reasonableness of rates and claims that although related to rates did not require an assessment of the reasonableness of such rates, the *Fedor* court held that Fedor's claims were not preempted by federal law because although a state court would need to "refer to the rates in assessing damages, [it] would never examine the reasonableness of those rates." *Fedor*, at 1074. In this proceeding, unlike in *Fedor* and the FCC cases *Fedor* cites, the provisions of the proposed rule that Sprint objects to as preempted rate regulation

do not even require referring to Sprint's rates or examining Sprint's rates. Again, there is not a shred of evidence of any wireless carrier's rates in this proceeding. The objected to provisions of the proposed rule are generally applicable to all WETCs regardless of a carriers' rate and thus are facially entirely distinct and separate from a wireless carrier's rates.

Further, Sprint's assertions of improper or federally preempted rate regulation are pure speculation, unsupported by any evidence. For instance, Sprint has failed to provide any evidence that absent the proposed provisions its rates would somehow be lower or higher, or even impacted by the absence of the proposed provisions. In fact, Sprint has failed to provide any evidence that the proposed provisions would directly or even indirectly impact its rates. See Staff Ex. 2.0 (McClerren Reply), at 6-7 ("At no point does [Ms. Taylor] offer any guidance to the ICC that if a certain section of the rule is implemented, what the resulting cost of the implementation would be."). Sprint merely asserts that the proposed provisions are preempted rate regulation. Such an unsupported speculative impact on rates does not establish the "clear" and "manifest" congressional intent to preempt state law, particularly a presumptively valid exercise of police powers in the area of consumer protection.

Sprint hinges the success of its position on one case from the Eighth Circuit. Sprint cites *Cellco v. Hatch*, 431 F.3d 1077 (8th Cir. 2005)("*Cellco*"), *cert. denied* 2006 U.S. LEXIS 7807 (Oct. 16, 2006), to support its position that certain provisions of the proposed rule are preempted rate regulation. The Cellco case is clearly distinguishable from the proposed rule. In the *Cellco* case, the state statute froze rates and thus maintained rates that would be different but for the state statute. Unlike in the *Cellco* case, however, the proposed rule does not impact the rates a wireless provider would charge. Although it is possible that the proposed rule *could*

cause some marginal increase in the costs of doing business for a WETC, it would not have a direct and certain impact on a WETCs' rates.

Specifically, Sprint cites to *Cellco* for support for its position that many billing provisions of the proposed rule are preempted rate regulation because the rule would not come into play until after Sprint issues a bill. Clearly, Sprint remains free to set its rates for the period billed, whether the period is in the past, present, or future.

Most of the provisions of the proposed rule that Sprint finds objectionable as rate regulation are general consumer protection provisions on billing practices and do not set the rates Sprint would charge. See Proposed Parts 736.610(d)(1), 736.610(d)(2), 736.610(e), 736.620, and 736.630(b). As noted above, Sprint rates inherently need to be set and fixed prior to billing, which also requires the rates to be set and fixed prior to any potential application of the proposed rule.

Other provisions that Sprint finds objectionable as rate regulation are consumer protection provisions on billing practices related to those potential consumers lacking good credit and, again, do not set the rates Sprint would charge. See Proposed Parts 736.630(d), 736.640, 736.650, 736.630(d), 736.640, and 736.650. Finally, Sprint also finds objectionable as rate regulation consumer protection provisions discontinuance of service and, again, do not set the rates Sprint would charge. See Proposed Parts 736.660, 736.670, 736.690, and 736.695. The proposed provisions on bad credit customers and discontinuance of service, again, do not set or fix rates but could only be applicable to Sprint after it has set and fixed its rates and then billed the customer.

Further, whether the WETC would raise its rates to cover any additional cost of business due to the proposed rule is entirely speculative. Thus, rather than having a direct and certain impact on rates, as the state statute in *Cellco* was found to have, the proposed rule would, at most, merely have a speculative, indirect, and

uncertain impact. The *Cellco* case does not establish preemption based on indirect or speculative impacts. The *Cellco* court explains the distinction between the prohibited direct and certain impact and the allowed indirect and uncertain impact on rate regulation in the context of damage awards.

> In light of the legislative history classifying billing information, practices, and disputes as "other terms and conditions," however, the FCC has concluded that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332." The FCC later clarified that while § 332(c)(3) "does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims[,] . . . whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." In reaching that conclusion, the Commission noted that the "indirect and uncertain effects" of damage awards pursuant to state contract and tort law are not the same as the effects of direct rate regulation, and that although such awards may increase the costs of doing business, these costs "fall no more heavily on CMRS providers than on any other business."
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> *Cellco*, 431 F.3d at 1081(Internal citations omitted.)

In Staff's view the proposed rule would have no direct, if any, impact on a WETC's rates. It is clear, moreover, that even any *potential* impact the proposed rule could have on rate regulation would likely be *de minimus* and would certainly be the permissible "indirect and uncertain" effect that the *Cellco* court explained was not preempted.

Market Entry and Providing Services

Sprint further alleges that certain provisions of the proposed rule "prohibit[s] the entry of a WETC" in violation of Section 332(c)(3)(a). Sprint also claims that certain provisions of the proposed rule, standing alone or in combination, prohibits the provision of telecommunications services in violation of Section 253(a) of the

federal Act. Sprint Initial Brief at 20. Before addressing the specific provisions of the proposed rule that Sprint finds objectionable, Staff will turn first to Sprint's Section 253(a) argument and then to its preempted market entry argument.

Section 253(a) Argument

Sprint argues that Section 253(a) preempts state and local regulations that "prohibit or have the effect of prohibiting" a carrier from providing telecommunications services. Sprint Initial Brief at 20, *citing Sprint Telephony PCS v County of San Diego*, 377 F. Supp 2d 886 (S.D. Cal. 2005) ("*County of San Diego*"), *aff'd* 2007 US App. LEXIS 5753 (9th Cir. March 13, 2007). Although as Sprint acknowledges, certain provisions of the proposed rule could be a factor in a Sprint determination to refrain from seeking ETC designation in Illinois, Sprint has not alleged that the proposed rule would be a barrier to its provisioning of wireless services generally. In fact, Sprint is currently operating in Illinois, providing any telecommunication services it deems appropriate. It is only *if* Sprint decides to apply for WETC funds in Illinois that its Section 253(a) argument could possibly arise. Staff also disagrees with Sprint's claim that the proposed rule would be too onerous for it to provide any service it chose to in Illinois (and the fact that *only* Sprint is objecting to the proposed rule would seem to refute that argument).

Nonetheless, the decision to seek ETC funds in Illinois is entirely up to Sprint, as is the decision to offer to provide any telecommunications services it deems appropriate. In other words, the proposed rule could not prohibit or have the effect of prohibiting Sprint from offering to provide any telecommunications services it deems appropriate because it would only be applicable to Sprint *if* it voluntarily chose to become a WETC in Illinois. In fact, in *WW Holding Co., Inc. v. Sopkin*, ___ F.3d ___, 2007 WL 1600389 (10th Cir., June 5, 2007)("*WW Holding*") (attached

to the AG's Initial Brief), the court denied a similar claim that a state's WETC requirements were preempted because they would affect the interstate components of a carrier's service. The *WW Holding* court explained that:

> The states' authority to make ETC designations extends to wireless carriers seeking federal universal service subsidies. The FCC specifically rejected suggestions that "consumer protection requirements imposed on wireless carriers as a condition for ETC designation are necessarily inconsistent with section 332 of the Act." Instead, the FCC decided that "states may extend generally applicable, competitively neutral requirements [to wireless carriers] that do not regulate rates or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service." *Id.* at 6384-85. Of relevance here, the FCC has *not* said that a **state must parse out the application of these requirements to avoid affecting the interstate services** of carriers providing bundled services. The FCC's interpretation of the Telecommunications Act's provisions addressing state ETC designations is, of course, subject to deference.
>
> *WW Holding*, 2007 WL 1600389, p. 11 (internal citations omitted; bold added).

The WW Holding case recognized that state ETC regulation may impact interstate wireless services but did not require that impact to be avoided. Like in the *WW Holding* case, neither the FCC nor Congress has required that a state parse out the application of its WETC rules to avoid affecting the services, interstate or intrastate, that a carrier provides. *See also AT&T Co. v. Central Office Tel., Inc*., 524 U.S. 214, 228 (1998) ("The act cannot be held to destroy itself.").

In the *County of San Diego* case, which Sprint cites in support of its Section 253(a) argument, the requirements of the County of San Diego zoning ordinance were directed at the wireless carriers' physical network, primarily the siting of and construction of cell towers, which would have the effect of prohibiting certain telecommunications services. *County of San Diego*, 377 F. Supp. 2d 886, 895.

This case is clearly distinguishable from the regulation set forth in the proposed rule. Not only does the County of San Diego case relate to the provision of wireless telecommunications services generally (rather than wireless ETC services), it directly and negatively impacts the construction of infrastructure. The proposed rule, of course, does not address a WETC's physical network nor does Sprint even allege that it does. Furthermore, ETC funding specifically supports the construction of infrastructure.

The requirements in the County of San Diego zoning ordinances, moreover, went far beyond anything in the proposed rule, while these extensive zoning requirements allowed for the "exercise of unfettered discretion at every level of the application process." *County of San Diego*, 377 F. Supp. 2d 886, 895. Again, Sprint does not even allege that the proposed rule contains criteria that intrinsically require subjective standards. Because the County of San Diego zoning ordinances are directed at a wireless carrier's physical infrastructure, while the proposed rule is not, and the San Diego ordinance provided those with enforcing it unfettered discretion, while the proposed rule contains objective criteria, the *County of San Diego* case and this proceeding are entirely distinct and not comparable.

Market Entry

Sprint also argues that certain provisions of the proposed rule, individually or collectively, prohibit market entry because: "The proposed regulation of WETCs in Proposed Part 736 is far-ranging, invasive and controls multiple business practices and interactions between WETCs and their customers by Illinois specific regulation that differs from existing business practices." Sprint Initial Brief, at 20. Sprint, thus, views any state regulation that would require a WETC to adapt its business practices however slightly to be preempted market entry because it *differs from its*

existing business practices. Of course, the proposed rule is only applicable to wireless carries that seek ETC status in order to receive universal service funding from the state of Illinois. Accepting Sprint's view of the federally bifurcated regulatory WETC framework entirely eliminates the states role in ETC designation.

Specifically, Sprint argues that the notice (Proposed Part 736.540) and reporting (Proposed Parts 736.115, 736. 520, and 736.530) provisions in the proposed rule are preempted market entry regulation, as is a provision requiring minimum answering times for operators and at business offices (Proposed Part 736.540). Sprint Initial Brief, at 20-21. None of these complaints are the type of complaint that would prohibit Sprint's entry into the markets of Illinois. In fact, Sprint is already in the Illinois market offering any wireless services it deems appropriate at rates it sets.

The proposed rule will have no effect, and Sprint does not allege it would, on a wireless carrier's installation of physical infrastructure. As noted above, Sprint is currently operating in Illinois. Sprint's argument that the proposed rule will prohibit its entry into the Illinois market is facially questionable. *See Fedor*, 355 F.3d 1069, 1073 ("[T]he claims in *Bastien* required the state court to determine the infrastructure appropriate to market entry, which is an area reserved under § 332."). Whether Sprint will ultimately petition the Commission for ETC status is a decision Sprint will make. Whether the proposed rule would be a decisive factor in Sprint's decision-making process is an entirely distinct issue from Sprint's market entry theory.

Ministerial Matter

Staff recently became aware that the proposed rule required a few last minute edits primarily to provide up to date information for the Commission's

Consumer Services division. Consequently, attached to this Reply Brief is Att. 1 which contains the proposed rule with the following edits in redline:

736.610(c) – "United State" added an "s" to read United States

736.660(e)(2) – End the sentence with the words "is paid."

736.700(a)(2)(A) – Delete the words "in person" because the ICC does not have public interface personnel available.

736.700(c)(3) – Change "Affairs" to "Services"

736.Appendix A – Add CSD's TTY number - 800-858-9277

736.Appendix B – Add CSD's TTY number – 800-858-9277

Staff apologizes in advance for these late ministerial edits to the proposed rule. Staff did send out an e-mail on Friday, July 20, 2007, to the parties providing them notice of these proposed edits. The Staff e-mail also requested a response from the parties if the proposed edits caused any party concern. Staff received no response. Staff is open to any proposed reply procedural mechanism if a party now finds any reason for concern.

Conclusion

WHEREFORE, for all the reasons set forth above, the Staff of the Illinois Commerce Commission urges that the proposed rule (Att. 1) be adopted in its entirety consistent with the arguments set forth herein.

Respectfully submitted,

/s/_____
Michael Lannon
Stefanie Glover

Staff Attorneys

Counsel for the Staff of the Illinois
Commerce Commission

July 31, 2007