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MCDERMOTT, WILL & EMERY

March 17, 2004

Via E-Mail

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

**Re: *Ex Parte* Presentation; 800 MHz Public Safety Interference Proceeding;
WT Docket No. 02-55**

Dear Ms. Dortch:

Entergy Corporation and Entergy Services, Inc. (collectively, "Entergy") hereby update their Supplemental Comments in the 800 MHz Public Safety Interference proceeding regarding limitations on the Federal Communications Commission's ("FCC") authority to subdelegate its statutory responsibilities to third parties.

In the Supplemental Comments, Entergy opposed the Consensus Parties' request that the FCC subdelegate its spectrum policymaking responsibilities to a Relocation Coordination Committee ("RCC"). Specifically, Entergy argued that the FCC lacks the express statutory authority to subdelegate authority over the 800 MHz realignment to a private party such as the RCC.¹ Entergy, and several other commenters, elaborated that the U.S. Court of Appeals for the District of Columbia Circuit has previously struck down agencies' attempts to subdelegate executive functions or policymaking to private parties.²

¹ Supplemental Comments of Entergy Services, Inc. 13-14 (Feb. 10, 2003).

² *Id.* at 13 (citing *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*, 132 F.3d 775 (D.C. Cir. 1998)); Supplemental Comments of Cinergy Corporation 21-24 (Feb. 10, 2003) (citing *Shook* and *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir.

Entergy hereby requests the FCC to take official notice of a recent decision of the D.C. Circuit which confirms that the FCC may not subdelegate policymaking authority to an outside party is impermissible without express statutory authority.³ In *United States Telecom Association v. FCC*, the court vacated the FCC's rules governing the unbundling of mass market switches and high-capacity dedicated transport facilities as an unlawful subdelegation of authority.⁴ The court noted that "when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making."⁵ The court also found subdelegation to be unlawful because private parties "may pursue goals inconsistent with those of the agency and the underlying statutory scheme."⁶ While the court acknowledged that the FCC could permit outside parties to contribute to the decision-making process in certain specific situations, it limited this authority to (1) conditioning a grant of federal approval on an outside party's decision, (2) performing fact-finding responsibilities, or (3) providing advice and policy recommendations.⁷

The Consensus Plan suffers similar fatal flaws. The Communications Act does not confer express statutory authority on the FCC to subdelegate its spectrum policymaking responsibilities to an outside party. Although the Consensus Parties have argued that the RCC would serve as a frequency coordinator under section 332(b) of the Communications Act, this attempted justification fails because the RCC would perform several duties that exceed the limited duties of a frequency coordinator, which exist merely to provide technical recommendations to the FCC.⁸ By contrast, the RCC's duties would rise to the level of policymaking.⁹

1997)); Supplemental Comments of Southern Communications Services, Inc. 16-18 (Feb. 10, 2003) (same).

³ *United States Telecom Ass'n v. FCC*, No. 00-1012, slip op. at 12-18, 26-28 (D.C. Cir. Mar. 2, 2004). Although the FCC's unbundling rules involved subdelegation to state commissions, the D.C. Circuit has applied the same analysis to subdelegations to private parties.

⁴ *Id.* at 12-18, 26-28. The U.S. Supreme Court invalidated an earlier version of the unbundling rules after finding that the FCC had failed to provide limiting standards and permitted private parties to exercise lawmaking authority. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89 (1999).

⁵ *USTA*, No 00-1012 at 13.

⁶ *Id.* at 13-14.

⁷ *Id.* at 15-17.

⁸ 47 C.F.R. § 90.175(h) (2002) ("[a]ny *recommendation* submitted [by frequency coordinators for the 800 MHz band] is *advisory* in character") (emphasis added).

⁹ In addition to frequency coordination, the RCC would (1) exercise general oversight of the 800 MHz realignment process, (2) develop and implement a revised 800 MHz band plan, (3) prepare and effectively approve applications, (4) resolve disputes in connection with the realignment process, (5) establish an arbitration panel to resolve relocation disputes between Nextel and

The Consensus Plan also fails to satisfy any of the three exceptions to this general prohibition because the RCC would exercise broad discretion over the realignment process, without adequate FCC oversight. For example, under the Consensus Plan, the RCC would appoint private parties to conduct binding arbitration of cost and timing issues arising during the relocation process. Moreover, the Consensus Plan would foreclose all rights to appeal certain arbitrated issues to either the FCC or the federal courts.¹⁰

Thus, the court's recent decision in *USTA* further confirms that the Consensus Plan, as proposed, would impermissibly require the FCC to subdelegate binding policymaking authority to the RCC. In addition, since the Consensus Parties have demanded that the Consensus Plan be adopted on an all-or-nothing basis, the FCC must reject the Plan in total.

Sincerely,

/s/ Shirley S. Fujimoto

Shirley S. Fujimoto
Counsel to Entergy

Cc: Commissioner Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
John B. Muleta, Bureau Chief, Wireless Telecommunications Bureau
Edmond J. Thomas, Chief Engineer, Office of Engineering and Technology
Michael J. Wilhelm, Wireless Telecommunications Bureau

incumbent licensees, (6) review and approve relocation reimbursement requests, (7) appoint and compensate the Relocation Fund Administrator, and (8) prioritize the NPSPAC Regions for realignment purposes. Supplemental Comments of the Consensus Parties at 15, 19, 21-22, Appendix C-5. While the Consensus Plan allows the FCC to approve some of these decisions (in a severely restricted timeframe), the Plan reserves certain authority for the RCC alone.

¹⁰ In any event, rights to appeal the RCC's decisions might not be sufficient to salvage the RCC because such rights of appeal did not insulate the FCC's unbundling rules from being declared unlawful subdelegations of authority.