

2000

WWC Holding Co., Inc v. Public Service Commission of Utah : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *WWC Holding Co., Inc v. Public Service Commission of Utah*, No. 20000835.00 (Utah Supreme Court, 2000).
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IN THE SUPREME COURT OF THE STATE OF UTAH

WWC HOLDING CO., INC.,

Petitioner,

vs.

Supreme Court No. 20000835 SC

Priority No. 14

PUBLIC SERVICE COMMISSION OF
UTAH, STEPHEN F. MECHAM,
CLARK D. JONES and CONSTANCE
B. WHITE, Commissioners of the Public
Service Commission of Utah,

Public Service Commission
Docket No.: 98-2216-01

Respondents.

BRIEF OF RESPONDENT UTAH RURAL TELECOM ASSOCIATION

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FILED
MAY 25 2001
CLERK SUPREME COURT
UTAH

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PARTIES TO THE PUBLIC SERVICE COMMISSION PROCEEDING

Appearing in PSC Docket No. 98-2216-01 were:

WWC Holding Company, Inc. (hereinafter “Petitioner” or “Western Wireless”).

The Division of Public Utilities (the “Division”)

The Committee of Consumer Services (the “Committee”)

The Utah Rural Telecom Association (“URTA” or “Respondent”)

Qwest Corporation (formerly known as US West Communications, Inc.)

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JURISDICTION OF THE COURT

Jurisdiction in the Utah Supreme Court exists pursuant to Section 78-2-2(3)(e)(i) Utah Code Ann. (2001) which provides that this Court has appellate jurisdiction over final orders and decrees in formal adjudicative proceedings originating with the Public Service Commission (the “Commission”). This appeal is from the Report and Order dated July 21, 2000 issued by the Commission in Docket No. 98-2216-01.¹

STATEMENT OF ISSUES

1. Whether the Commission abused its discretion or exceeded the bounds of reasonableness and rationality when it determined that Western Wireless had not met its burden of establishing that it was in the public interest to designate Western Wireless as an eligible telecommunications carrier (“ETC”).
2. Whether the Commission’s Report and Order is supported by substantial evidence when viewed in light of the whole record before the court.
3. Whether the Commission erred in requiring that Western Wireless price its services at or below the rate charged by the incumbent carrier in order to receive State universal service support funds.

PROVISIONS OF CENTRAL IMPORTANCE

Statutory provisions of central importance to this appeal are 47 U.S.C. § 214(e), 47

¹ The Commission’s Report and Order is reproduced in Petitioner’s Addendum beginning ADD-1. References to the Record on Appeal will be cited as “R_____, p, ____.”

U.S.C. § 254, Section 63-46a-2(16)(c) Utah Code Ann. (2001 and Section 63-46b-16(4)

Utah Code Ann. (2001). These first three provisions are set forth in the Petitioner's

Addendum or in the Commission's brief. Section 63-46b-16(4) Utah Code Ann. (2001)

provides as follows:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) The agency has acted beyond the jurisdiction conferred by any statute;
- (c) The agency has not decided all of the issues requiring resolution;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) The persons taking agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) The agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) The agency action is:
 - (i) An abuse of the discretion delegated to the agency by statute;
 - (ii) Contrary to a rule of the agency;
 - (iii) Contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) Otherwise arbitrary or capricious.

§ 63-46b-16(4) Utah Code Ann. (2001) (emphasis added).

STATEMENT OF THE CASE

Western Wireless filed a petition with the Commission on August 31, 1998,

seeking designation as an ETC in order to qualify for receiving universal service support from both the federal and state universal service funds. (R00001, WWC Holding Co., Inc's Petition).

URTA, on behalf of its member companies, sought to intervene in the proceeding below. (R00006, Petition for Intervention of URTA). On December 16, 1998, the Commission granted the petition to intervene. (R00007, Order Granting Intervention). URTA is an association comprised of the independent telephone companies of the State of Utah. Each member of URTA is: (1) an "incumbent local exchange carrier" ("LEC") as defined by 47 U.S.C. § 252(h); (2) a "rural telephone company" as defined by 47 U.S.C. §153(47)); and (3) the only designated ETC in its respective service area. (URTA members are sometimes referred to hereafter as "rural telephone companies"). URTA requested that the Commission make an inquiry and determination based on 47 U.S.C. Section 214(e) whether Western Wireless should be designated as an ETC in areas served by the rural telephone companies that are URTA members. (R00006, Petition for Intervention of URTA).

URTA, Qwest Communications, the Division and the Committee each opposed Western Wireless' petition to be granted ETC status. All of these parties asserted that Western Wireless failed to provide an adequate record to establish that any purported benefits of ETC designation outweighed the evidence of serious detriments to universal service in rural Utah.

A hearing on Western Wireless' petition was held on November 30 and December

1, 1999. (R00220 and R00221 Transcript of Proceedings in Docket No. 98-2216-01, 11-30-99 and 12-1-99, hereinafter “Transcript”). Western Wireless offered testimony through one witness. Each of the other parties in the Docket also offered testimony and evidence that it would not be in the public interest to designate Western Wireless as an ETC. This testimony is described in more detail below.

On July 21, 2000, the Commission issues its Report and Order in which it granted Western Wireless ETC status in the service territory of Qwest Communications, - a non-rural carrier and denied ETC status in the URTA members rural service territory. (R00198, Report and Order). The Commission concluded that it would not be in the public interest to designate Western Wireless as in ETC in the rural telephone companies’ study areas. The Commission was concerned about the possible negative impacts on Utah’s Universal Public Telecommunications Service Support Fund (the “Fund”) without corresponding public benefits. (R00198, Report and Order, p. 12-13). The Commission recognized that designation of Western Wireless as an ETC could have a serious negative impact on the burdens placed on the state Fund. (R00198, Report and Order, p. 13). The Commission also observed that since Western Wireless’ prices are likely to be up to 125 percent of the incumbent’s prices, offering a lower cost service was not a benefit that balances out the public interest equation. (Id.)

Western Wireless filed a request for reconsideration or rehearing. (R00210, Request for Reconsideration or Rehearing). After 20 days, this request was deemed denied and the appeal followed.

SUMMARY OF ARGUMENT

The Commission's Report and Order should be affirmed. The Court should not substitute its judgment for the Commission's determination that Western Wireless did not meet the burden of establishing the public interest was served by designating it as a second ETC in areas of the State served by rural telephone companies. Contrary to Western Wireless' argument, this Court should not enter affirmative findings of fact that Western Wireless is entitled to ETC designation as having met the public interest standard. Such an action would be contrary to firmly established precedent. The public interest is a matter that the state commission is specifically charged by statute to determine and is a prerequisite to granting ETC status in rural service areas. Such a determination must be upheld on appeal if it is supported by any substantial evidence.

Congress fully recognized that competition, by itself, will not produce the intended universal service results in lower volume, higher cost, rural areas and Congress adopted explicit universal service provisions to deal with potentially detrimental impacts of competition contrary to the public interest in such rural areas. That is precisely why Congress gave state commissions the ability to refuse to designate a second ETC in rural areas. If Congress had intended that promoting competition be the sole criterion in determining ETC status, there would have been no purpose in requiring a separate public interest finding as a prerequisite to ETC designation in rural areas, since all requesting carrier, being additional competitors, would be designated ETCs.

The Commission acted reasonably and appropriately in denying ETC status to

Western Wireless. Western Wireless failed to set forth an adequate record upon which the Commission could have determined that its ETC designation would be in the public interest. The principle problem with Western Wireless' approach is that it asked the Commission to accept its bare assertions without any data or support. Western Wireless never provided to the Commission information on its universal service offering, its pricing and its approach to customer-specific issues. The record does not establish that the purported benefits of such a designation outweigh the detrimental impacts the designation could have on rural Utah and the state Fund. The record establishes that such a designation would in fact be contrary to the public interest. The Commission found that such a designation may have an adverse impact on the preservation and advancement of universal service. Under-utilization of the incumbent telephone company's network, stranded capacity and the increased use of universal service funds to mitigate network economy losses, increased costs and increased prices of service in rural Utah were among the detriments of ETC designation that outweighed any potential benefits.

Finally, the Commission's requirement that Western Wireless price its services at no more than the affordable base rate was not erroneous. This ruling was consistent with the Commission's statutory mandate to ensure that rates are just, reasonable and affordable. When Western Wireless crossed the boundary from being just another common carrier, to becoming an ETC (in Qwest territories) and to receive universal service funds, it lost its exemption from rate regulation, to the extent that its rates must be affordable

ARGUMENT

I. The Impact on Universal Service is the Principal Determinant of Public Interest.

The Telecommunications Act of 1996 (the “Act”) grants states explicit authority to determine which carriers should be designated ETCs. See 47 U.S.C. § 214(e)(2) (1999). Only ETCs designated by a state commission are entitled to receive universal service support. In the Matter of Federal-State Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 88776 (May 8, 1997) (“Universal Service Order”), corrected in CC Docket No. 96-45 Erratum, FCC 97-157 (June 4, 1997), *aff’d in part, rev’d in part, remanded in part sub. nom. Office of Public Utility Counsel v. FCC*, 183 F. 3d 393 (5th Cir. 1999).

Under the Communications Act of 1934 as amended by the 1996 Act, the United States adopted a two-pronged telecommunications policy. The 1996 amendments created a pro-competitive telecommunications policy. See 47 U.S.C. §§ 251 and 253, - Interconnections and Removal of Barriers to Entry. In addition, the historical policy of universal service, 47 U.S.C. § 151, was re-emphasized in the 1996 amendments:

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, including interexchange services and advanced 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. Thus, after the 1996 amendments, the two-pronged telecommunications policy includes a preference for a competitive market structure for the delivery of

telecommunications services, and a commitment to preservation and advancement of universal service.

A competitive market policy is modified, however, by specific safeguards in the Act that reflect Congress' realization that rural service areas may not be amenable to a competitive market. The safeguard provisions include a careful examination by a State commission of whether more than one carrier should be designated to receive universal service support in a rural service area. Section 214(e) of the Act provides:

Upon request, and consistent with public interest, convenience and necessity, the State Commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission....Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

47 U.S.C. § 214(e) (emphasis added). The Act provides the state commission great discretion in regard to certification of ETCs in rural LEC areas. Before the commission may designate more than one ETC within any service area served by a rural telephone company, the Act requires that it must "find that the designation is in the public interest". See 47 U.S.C. §214(e).

The Act then recognizes that not all carriers are entitled to be designated as ETCs by the state commission. However, Western Wireless takes the position that by designating it as an additional ETC, competition will result and that, since, it argues, competition is in the public interest, the public interest test is thereby met. (R0051, Prefiled Direct Testimony of Gene DeJordy, p. 21; See also Petitioner's Brief, p. 23-25).

This simplistic argument misses the very point that the Act incorporates: competition can have a detrimental impact contrary to the public interest in rural service areas. It also ignores the adverse impacts of such designation. Moreover, the record does not lead to the conclusion advanced by Western Wireless that there are significant benefits in such a designation. It is clear that such so-called benefits, do not overcome the detriments of such designation as set forth in the record, in order to justify an ETC designation.² All of the other parties in the docket below, took the position that the potential detriments of ETC designation outweighed any purported benefits.

If Congress had intended that competition be the sole or controlling criterion, there would be no purpose in a separate public interest finding and all requesting carriers would be designated ETCs because each additional carrier is another competitor. But universal service policy goals are separate from the promotion of competition. Congress fully recognized that competition, by itself, will not produce the intended universal service results in lower volume, higher cost, rural areas and Congress adopted explicit universal service provisions to deal with potentially detrimental impacts of competition contrary to the public interest in such rural areas. That is precisely why Congress gave state commissions the ability to refuse to designate a second ETC in rural areas. The unequivocal language of section 214(e) providing that an additional eligible

² Contrary to Western Wireless' contention, the Commission didn't specifically find there would be "no benefits" by designating Western Wireless an ETC. See Petitioner's Brief, at p. 2, 9. Instead, the Report and Order and the record support the conclusion that the detriments to such designation outweighed any benefits and that, therefore, such a designation was not in the public interest.

telecommunications carrier “may” be designated in rural service areas - as distinguished from “all other areas” where an additional carrier “shall” be designated - illustrates that a policy favoring designation of a competitive ETC does not apply to rural service areas. Thus, contrary to Western Wireless’ assertion, competition alone does not establish the public interest.

The public interest determination requires an examination of the impacts arising from the introduction of a second ETC in rural areas and consideration of the effects such impacts have upon the public interest. Here, the Commission balanced the question of competition against the public policy objectives of universal service and found that Western Wireless had not established that it was entitled to ETC designation. The Commission found that such a designation may have an adverse impact on the preservation and advancement of universal service. (R00198, Report and Order, p. 12-13).

Contrary to what Western Wireless contends, a prohibition on competition is not at issue here. The rural telephone companies are not requesting protection from competition. Western Wireless already operates and competes in the rural exchanges and URTA does not seek to prevent that. Rather, the refusal to designate a second ETC is a mechanism to limit the availability of universal service support funds. The rural telephone companies seek to limit access to universal service funds because of the adverse impacts on such funds recognized by the Commission in its Report and Order.

II. Applying the Appropriate Standard of Review, The Court should Give Deference to and Affirm the Commission

The fundamental threshold question is whether it is in the public interest for any additional ETC to be designated in an area served by a rural telephone company. Resolution of this fundamental question is a matter to be determined by the state commission.³ This determination is a question of fact, or at most, a mixed issue of fact and law. In either case, the Court should grant deference to the Commission's determination that ETC designation to Western Wireless is not in the public interest.

When reviewing matters of fact, the Court affords great deference to the Commission's findings, "upholding those based on evidence of any substance." Telecommunications Resellers of Utah vs. Public Service Commission, 747 P.2d 1029, 1030 (Utah 1987). In Utah Department of Business Regulation v. Public Service Commission, 734 P. 2d 431 (Utah 1986), the Court stated: "[i]n deciding whether the Commission's factual findings will sustain its transfer of the certificate, we must review those findings with the 'greatest degree of deference' and affirm those findings where they are supported by evidence of 'any substance whatever.'" Id. at 433. (citations omitted). The provision that there be substantial evidence to support a finding does not require or specify a quantity of evidence but requires only "such relevant evidence as a

³ 47 U.S.C. 214(e). "The discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest." Universal Service Order, ¶ 135.

reasonable mind might accept as adequate to support a conclusion.” Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Court gives deference to the administrative agency on questions of fact because it stands in a superior position from which to evaluate and weigh the evidence and assess the credibility and accuracy of witnesses’ recollections. Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah 1997).

Section 63-46b-16(4)(g) Utah Code Ann. (2001), in discussing appellate court review of administrative agency actions, indicates that the Court should grant relief only if: “[t]he agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.” (emphasis added).⁴ All legitimate inferences drawn from such factual findings are examined in the light most favorable to the agency’s findings. See Hales Sand & Gravel v. Audit Division, 842 P.2d 887, 888 (Utah 1992). As set forth below, based on the record as a whole, there was substantial evidence before the Commission that reasonably supported its conclusion. Moreover, there was insufficient evidence submitted by Western Wireless to sustain another conclusion.

For mixed findings of fact and law, Commission orders “must be rationally based and are set aside only if they are imposed arbitrarily and capriciously or are beyond the ‘tolerable limits of reason.’” Telecommunications Resellers, supra, 747 P.2d at 1030,

⁴ With respect to implied findings, findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made.” Hall v. Hall, 858 P.2 d 1018, 1025 (Ut. App. 1993).

quoting Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 611-12 (Utah 1983). In State v. Pena, 869 P.2d 932 (Utah 1994), the Court cited *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L. Rev. 635 (1971) by Professor Maurice Rosenberg (hereinafter Rosenberg) to discuss the appellate review spectrum. The metaphor of a pasture was used to describe the degrees of discretion:

To the extent that a trial judge's pasture is small because he or she is fenced in closely by the appellate courts and given little room to roam in applying a stated legal principle to facts, the operative standard approximates what can be described as 'de novo'. . . . But to the extent that the pasture is large, the trial judge has considerable freedom in applying a legal principle to the facts, freedom to make decisions which appellate judges might not make themselves *ab initio* but will not reverse - in effect, creating the freedom to be wrong without incurring reversal. Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted.

Id. at 937-938.

The Court explained this principle by reference to Soter's, Inc. v. Deseret Federal Savings & Loan Ass'n, 857 P.2d 935 (Utah 1993), where the Court stripped back the law on the doctrine of waiver to its most basic form. The Court recognized that its previous cases had developed an inconsistent elaboration on waiver based on the specific facts of the cases. The Court acknowledged the futility of trying to craft such a fact-specific doctrine and simply instructed trial courts to apply the basic doctrine to the facts of the case. In commenting on the Soter's case, the Court in Pena observed:

The net effect was to say that waiver is a highly fact-dependent question, one that we cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law through a course of

such decisions. In terms of our present discussion, Soter's increased the size of the trial court's pasture because we found ourselves unable to describe the share of the smaller one with adequate clarity.

State v. Pena, supra, 869 P.2d at 938.

In summarizing, the Court in Pena, cited to Rosenberg to set forth three circumstances where discretion ought to be left to the trial court: (1) when the facts are so complex and varying that no rule adequately addressing these facts can be spelled out; (2) “when the situation to which the legal principle is to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative”; and (3) when the trial judge has observed things such as appearance and demeanor of a witness that cannot be adequately reflected in the record. Id. at 939.

These principles should operate here to cause the Court to grant discretion to the Commission. First, the question of what constitutes the public interest is complex and not easily susceptible to a bright-line rule determination. The public interest determination is a fact specific determination and should, contrary to Western Wireless' assertion, not be reviewed *de novo* by this Court, since it is highly unlikely that a coherent statement of the law can be established given the fact dependent circumstances of such a standard.

Moreover, not only is the ETC public interest determination a new area of inquiry in a rapidly changing telecommunications environment where the “pasture” has not been fenced closely, the issue of whether it is in the public interest to designate a second ETC in rural areas of the State, is a matter federal statute specifically charges the Commission

with the responsibility to determine. See 47 U.S.C. 214(e). Where the policy determination of what constitutes the public interest has been vested in the Commission, this Court should grant “operational discretion” to the Commission’s application of the facts to the public interest standard and should be reluctant to overturn the Commission’s determination. See, e.g. State v. Vincent, 883 P.2d 278, 281 (Utah 1994), citing State v. Pena, supra, 869 P.2d at 935-36. The Court views this Pena standard as “a more accurate measure of the degree of deference to be given to an agency , taking into account factors such as policy concerns and an agency’s expertise. . . .” Drake v. Industrial Commission, supra, 939 P.2d at 181.

Section 63-46b-16(4)(h)(i) Utah Code Ann (2001) also indicates that an appellate court may grant relief if an agency’s action is “an abuse of the discretion delegated to the agency by statute.” Appellate courts defer to an agency’s statutory interpretation “when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.” Morton Int’l, Inc. v. Auditing Division, 814 P.2d 581, 589 (Utah 1991). When such a grant exists, appellate courts will not disturb the agency’s ruling unless its determination exceeds “the bounds of reasonableness and rationality.” Osman Home Improvement v. Industrial Commission, 958 P.2d 240, 243 (Utah App. 1998). The Commission regularly determines the public interest in proceedings before it pursuant to a statutory delegation.⁵

⁵ The Commission must make a public interest determination in granting a certificate of convenience and public necessity. Moreover, the Commission is charged by State statute to determine whether allowing a competitive local exchange carrier, regulated by the Commission, to offer public telecommunications services in the service territory of an incumbent telephone

Here, where the Commission is specifically charged by both federal and state statutes to make the ultimate public interest determination, and has the expertise to make such determinations, this Court should not substitute its judgment for that of the Commission.

Not only does Western Wireless advance an erroneous standard of review in its argument, Western Wireless asks this Court to violate principles of appellate review and, rather than remanding for additional proceedings if the record is insufficient, enter affirmative findings that Western Wireless should be designated an ETC. See Petitioner's Brief, p. 10, 32 and 46. Under no circumstances should this Court affirmatively rule that Western Wireless should be designated an ETC. The Court has stated that it will not substitute its own findings for the Commission's on appellate review of Commission orders. Mt. States Legal Foundation v. Public Service Commission, 846 P.2d 1047, 1058 (Utah 1981) ("nor are we authorized to make findings not made by the Commission"). The Court does not have the authority to modify or partially set aside a Commission order. Upon hearing a petition, the Court is only empowered to affirm or set aside a Commission order. Telecommunications Resellers, *supra*, 747 P.2d at 1030.

As set forth below, Western Wireless failed to set forth an adequate evidentiary record on which the Commission could find that designation of it as an ETC was in the public interest. On the contrary, the record contains substantial evidence that such

corporation is in the public interest. The Commission has the statutory authority to exclude a competitor from an exchange of less than 5,000 access lines based on a public interest standard. See e.g. § 54-8b-2.1 Utah Code Ann. (2001).

designation was not in the public interest and the Commission's Report and Order should be affirmed.

III. The Commission Correctly Determined that Western Wireless Failed to Establish that ETC Designation was in the Public Interest.

Western Wireless failed to present sufficient evidence to support the conclusion that designating it as an ETC in areas served by Utah rural telephone companies was in the public interest. Western Wireless was required to present an adequate evidentiary record upon which the Commission could conclude that designating Western Wireless as an additional ETC would be in the public interest. The burden rested on Western Wireless to prove it was entitled to the relief requested. See, e.g. Utah Department of Business Regulation v. Public Service Commission, 614 P.2d 1242, 1245 (Utah 1980). Western Wireless did not meet the burden of establishing that its request for ETC designation was in the public interest. Western Wireless presented a limited case before the Commission. It only called one witness and this witness failed to provide a basis for the Commission to make a public interest determination in Western Wireless' favor.

A. Western Wireless Did Not Provide Adequate Evidence on the Services it Would Offer.

Western Wireless never provided specific evidence about the telecommunications services it intended to offer as an ETC. Because of the failure to provide technical information, information on price, the terms and conditions of the offering and a time schedule for offering the services, the Commission was wholly deprived of sufficient

information for it to make a public interest determination.⁶ It is a hollow argument to merely claim in the abstract that competition is good without providing the specific information and data upon which the Commission can determine the nature, terms and conditions of the proposed competition, including price.

Western Wireless did not even provide evidence that it can provide universal service throughout the service areas. It merely advanced that it “will” offer a universal service package. This refusal or inability to provide evidence was clearly a major reason why the Division opposed Western Wireless’ ETC designation. During meetings with the Division, Western Wireless never provided documentation detailing the service and equipment they intended to offer and thus, the Division was unable to validate the claims of Western Wireless. (R00298, Prefiled Testimony of Ingo Henningsen, p. 8; R00299, Prefiled Rebuttal Testimony of Peggy N. Egbert, p. 11). Western Wireless refused to provide evidence, *inter alia*, regarding (1) the common existence of service gaps; (2) a map of its actual current and intended network coverage; (3) the traffic and blocking limits of its network and how it would handle the significantly increased burdens it would face if Western Wireless became an ETC; (4) a financial plan, budget or any other evidence showing Western Wireless had the ability to carry out its plans at an affordable

⁶ It is particularly interesting to note that while here Western Wireless provided no information on prices and specific services, in the Wyoming FCC case, upon which it relies so heavily, Western Wireless provided “supplemental information relating to the services offered, the charges for those services, and availability of customer assistance services.” Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45 (12-26-2000), ¶ 11, included in Petitioner’s Addendum at ADD-73. Western Wireless provided no explanation as to why it did not similarly supplement the record in this docket. Its failure to do so, however, results in a wholly inadequate record to support the conclusions it advances.

price; or (5) a technical or engineering model or plan describing how Western Wireless would implement its services.⁷

Western Wireless asserted that it has coverage throughout the service area. Yet, it provided only a conclusory statement rather than any detail that it had such coverage. (R00220, Transcript, p. 12). Western Wireless' witness stated that he based his assertions of signal coverage on models prepared under the direction of the company. Yet, he admitted that such models hadn't been submitted to the Commission and didn't know why they had not been submitted. (R00221, Transcript, p. 298). When pushed, the witness acknowledged that Western Wireless could have gaps in the coverage area and may have areas where it would need to enhance signal strength. (R00220, Transcript, p. 12, 304). Western Wireless admitted that mountains can prevent a signal reaching a customer. (R00221, Transcript, p. 300). It also admitted that it would not know if it had signal to any given customer until it went out to the customer's residence. (R00221, Transcript, p. 303-304). Western Wireless acknowledged it may have to add antennas, increase the strength of a cell site, add channels to increase capacity and add towers. (R00220, Transcript, p. 12, 37; R00221, Transcript, p. 308). In rebuttal of Western Wireless's assertion about full coverage, URTA's witness testified that he had learned, without making a survey or specific inquiry, that the company did not have

⁷ (R00220, Transcript, p. 24, 26; R00221, Transcript, p. 323). With respect to a financial plan and technical model, it is interesting to note that Western Wireless admitted at the hearing, that it had a budget and a technical model regarding its Nebraska universal service plans. (R00220, Transcript, p. 25-26). It is logical to infer that such data exists regarding Utah, but that Western Wireless chose not to provide it to the Commission.

coverage in at least two cities in the designated coverage area. (R00221, Transcript, p. 393, 413, 434). He stated that if Western Wireless had provided the requested information on its network, including cell sites, it would help to determine if there were other areas without signal coverage. (R00221, Transcript, p. 434-435).

The fact is, Western Wireless did not submit any detailed information about its Utah network. (R00221, Transcript, p. 550-551). It submitted a map but the map didn't take into account signal coverage based on topography and other factors. (R00221, Transcript, p. 539-540). Western Wireless claimed that its network was designed to take into account topography. Yet, it provided no information on the signal strength of its network due to topographic features. For example, Western Wireless should have submitted information on the number of towers and how far apart they are located. (R00221, Transcript, p. 275-276). Western Wireless admitted that it had the information on the number of towers and where they were located, but had not provided it to the Commission. (R00221, Transcript, p. 299). Western Wireless' witness also admitted that the company had data on the traffic volume its current network could handle in Utah but that this information also wasn't submitted to the Commission. (R00221, Transcript, p. 309-310).

The principle problem with Western Wireless' approach is that it asked the Commission to accept its bare assertions without any data or support. Western Wireless never provided to the Commission information on its universal service offering, its pricing and its approach to customer-specific issues. In fact, it consciously decided it would not provide such information to the Commission until after it obtained ETC

designation. (R0051, Prefiled Direct Testimony of Gene DeJordy, p. 16). Perhaps Western Wireless simply didn't perform all of the analysis necessary. Western Wireless' witness, for example, stated he didn't know how many customers the network could handle. (R00220, Transcript, p. 104). He had no idea of the projected costs for the proposed universal service offering in Utah. (R00220, Transcript, p. 28). He was also not aware of how many full-time employees would be allocated to Utah if Western Wireless became an ETC. (R00220, Transcript, p. 27). Western Wireless' also testified that it expected the usage of its network to increase if ETC status were granted, but didn't have an estimate of by how much. (R00220, Transcript, p. 41, 105). But Western Wireless acknowledged that adding a tower could cost several hundred thousand dollars, that antennas could cost several thousand dollars and that the base unit would cost between \$300 and \$400. (R00220, Transcript, p. 43-45). Western Wireless expected to use universal service funds to defray the costs of expanding its Utah network. (R00220, Transcript, p. 42). However, because Western Wireless didn't know what towers and antennas it would add, apparently what such costs would be was completely unknown. Moreover, Western Wireless is attempting to get ETC certification in 13 states. It stated that it will make whatever financial commitment is necessary in Utah. (R00220, Transcript, p. 54-55). Yet, it provided nothing to support its capability to fulfill this commitment. Since the Commission had no data on which to base a determination as to the projected amount of such costs for Utah, it simply had no way of knowing whether Western Wireless could meet this commitment.

Moreover, Western Wireless acknowledged that as soon as it gets ETC status, it

has an obligation to immediately provide the universal service offering. (R00220, Transcript, p. 150). Yet, it didn't submit any implementation plan to the Commission to indicate that it would be able to do so. (R00220, Transcript, p. 150). Without plans in place, it is unrealistic to suppose that Western Wireless can roll out service simultaneously throughout the service area. (R00221, Transcript, p. 279).

The failure to provide requested information constitutes an adequate reason, standing alone, to deny Western Wireless's application for ETC designation. Because of the dearth of detail, the Commission was justifiably concerned about what it was Western Wireless intended to offer, at what price and when it intended to offer services.

B. The Record Was Inadequate to Establish Purported Benefits of ETC Designation.

The Commission recognized that granting ETC status to Western Wireless would seriously jeopardize the state Fund and would not be in the public interest. The Commission has a fundamental responsibility to safeguard the finite Fund and to see that it is used appropriately to provide the greatest benefits to Utah telecommunications customers. The Commission found that designating Western Wireless as an ETC in the areas served by the rural telephone companies would result in a significantly increased burden on the Fund. (R00198, Report and Order, p. 12-13). Furthermore, the services offered by Western Wireless do not swing the public interest balance in its favor, because the costs of such services may be up to 125 percent higher than the incumbent's prices. (R00198, Report and Order, p. 13).

Western Wireless asserted that it meets the public interest test simply by its existence as a competitor. (R0051, Prefiled Direct Testimony of Gene DeJordy, p. 21).

It claims that failure to designate Western Wireless as an ETC would deprive customers of the benefits of competition. However, Western Wireless produced a wholly insufficient record to establish the alleged benefits of its service to consumers. Western Wireless claims that the Commission ignored the benefits Western Wireless' designation will bring to rural consumers. Petitioner's Brief, p.22. On the contrary, it must be concluded that the Commission considered these purported benefits, to the extent the insufficient record on this subject would allow, and found them insubstantial. Western Wireless did not provide adequate information to the Commission about the pricing, services and offerings for the Commission to determine benefits to rural consumers by designating Western Wireless as an ETC. To the extent such information was provided, it mandates a conclusion that the benefits were minimal.

1. Pricing of Services. The Commission noted in its Report and Order that the prices Western Wireless will charge may be significantly higher than rural telephone company prices. The Commission observed that Western Wireless's "prices may well be higher than the incumbent prices, up to 125% of the incumbent's prices, therefore offering a lower cost service is not a benefit that can be counted on to balance out the public interest equation." (R00198, Report and Order, p. 11). Western Wireless did not demonstrate that its supported services will be priced at affordable levels as required by Section 254 of the Act. Whether or not a service is available at an affordable rate is critical to achieving the purposes of universal service reflected in § 254(e) and the public interest under § 214(e)(2). Section 254(e) of the Federal Act provides that "the [FCC] and the States should ensure that universal service is available at rates that are just,

reasonable, and affordable.” See 47 U.S.C. §254(b)(1). The FCC has indicated that the states “should exercise initial responsibility” and have the “primary responsibility for determining affordability of rates.” See Universal Service Order, at ¶ 108, 118..

The Commission, however, could not make a determination of affordability. Western Wireless refused to provide information regarding its anticipated rates to be charged for its universal service offering. (R00119, WWC Holding Company;s Responses to US West’s First Discovery Requests). It based its refusal in part on the ground that, as a wireless provider, it is not subject to rate regulation of the Commission. (R0051, Prefiled Direct Testimony of Gene DeJordy, p. 24). Western Wireless did not commit to a particular offering nor did it inform the Commission what price they will charge for the intended services. (R00219, Transcript, p. 127-128). It admitted, however, that it was unable to make final decisions regarding prices of its universal service offerings until it was designated an ETC. (R00119, WWC Holding Company’s Responses to US West’s First Discovery Requests, Response to Request No. 4). It also stated that “pricing will depend upon the full scope of services offered, the subsidy funds available and market forces.” (R00125, Reply Testimony of James Blundell, p. 27). Western Wireless also admitted that it didn’t know what any of the rural telephone companies presently charge for any of their services , but nevertheless claimed without this information that its services would be priced comparably. (R00219, Transcript, p. 331). Western Wireless could conceivably, offer only a luxury offering with additional non-supported services such as voice mail, caller ID and could charge whatever it wanted. (R00220, Transcript, p. 131).

It is also clear that the Commission should not designate a second ETC unless the Commission can be assured that reasonable service packages and rates will continue to be provided by that ETC. Since Western Wireless did not provide any information to make the determination of whether its universal service package would be reasonable and affordable, it was properly not designated an ETC. In fact, evidence indicated that pricing of Western Wireless' services would be significantly higher than that of the rural telephone companies. Increased prices to consumers is not in the public interest. Therefore, the Commission correctly recognized that Western Wireless did not offer a lower cost service as a benefit that "could be counted on to balance out the public interest equation." (R00198, Report and Order, p. 11).

2. Inferior Service Quality. Quality service is a fundamental principle of universal service identified in the 1996 Act. 47 U.S.C. §254(b)(1). The substitutability of service quality is also an important public interest consideration. This Commission should evaluate the public interest with respect to the ability of any potential second ETC to serve all consumers with similar service quality to the services of the first ETC. A designated ETC has the full obligation to provide all of the services supported by the plan throughout the entire service area and to provide services which are equal in quality.

Western Wireless also did not establish that its services were of a quality to sustain a public interest determination. Western Wireless asserted that it would provide a top quality service option to its customers and, in the hearing, stated it would provide a more modern, up-dated network than the rural telephone companies. (R00221, Transcript, p. 337). Yet, as outlined above, this bald assertion was made without

adequate supporting data as to its network and services and also, without knowledge whatsoever of the rural telephone companies networks, equipment or services. Western Wireless' witness admitted that he didn't know whether the rural telephone companies in whose area Western Wireless intended to serve had an analog or digital switch; (R00221, Transcript, p. 338). He admitted that he had no information about their equipment or network. (R00221, Transcript, p. 338). In fact, he admitted that he didn't know vis-a-vis those companies whether Western Wireless provides a more updated, reliable service than they do. (R00221, Transcript, p. 338). Western Wireless certainly didn't establish that its services would be better than those offered by the rural telephone companies. In fact, as set forth below, its services are inferior to the rural telephone companies.

3. An undefined Local Calling Area. The record is vague about the local calling area Western Wireless intended to provide. Western Wireless claimed that it would provide a "larger" local calling area. See Petitioner's Brief, p. 28-30. In discovery, it stated that it would "likely" have local calling areas that are larger than those of the incumbent LECs. However, it admitted that it had "not determined the exact extent" of these local calling areas. (R00119, WWC Holding Company's Responses to US West's First Discovery Requests, Response to Request No. 28). However, at the hearing, the Western Wireless witness demonstrated a lack of knowledge about the local calling areas and could not answer how or where Western Wireless' calling areas would be larger. He simply did not know what Western Wireless' local calling area would be. (R00220, Transcript, p. 78-79, 161-162). Inability to describe the local calling area, its

boundaries and how such boundaries would be determined, hardly establishes a public interest benefit.

4. “Mobility” has not Been Established as a Public Interest Benefit. Western Wireless also asserts that the public interest is established by the “mobility” of its possible service. See Petitioner’s Brief, p. 31-32. However, other than the fact that its equipment could be moved, there was no evidence that such mobility was different than what is currently available to telephone subscribers of the incumbent’s network using cordless phones. Western Wireless failed to establish benefits that its equipment would have over currently available service.

C. Moreover, the Record is Replete With Evidence that the Detriments of ETC Designation are Substantial.

The record is clear that designation of Western Wireless as an ETC would be contrary to the public interest because of the serious risk of negative consequences to rural Utah. The Commission recognized that the purported benefits claimed by Western Wireless of allowing a second ETC were clearly outweighed by the detrimental impacts of granting ETC status.

1. Negative Impacts on the Universal Service Fund.

The potential negative impacts on the state Fund, identified by the Commission in the Report and Order, are reason alone to justify the denial of ETC status in areas served by the rural telephone companies. Contrary to what Western Wireless contends, the impact on the funding and level of the Fund is a legitimate factor to consider in a public interest determination. As was brought out at the hearing, the demographics of rural

Utah don't support additional ETC designations. A fast-growing, higher volume market in urban Utah could be divided among competitors without substantial detrimental effects on any set of customers. (R00221, Transcript, p. 452). However, in areas possessing little or no growth (areas in which URTA members serve), it would be economically inefficient and not in the public interest for a second carrier to divert customers from the incumbent. Competition could exacerbate under-utilization of an incumbent's facilities in low growth, static areas. In such an area, diversion of customers would result in stranded capacity. (R00221, Transcript, p. 452-454). Loss of customers in such an area would result in very little reduction of costs, thus average costs would increase and prices elevated in line with increases in average costs. (R00300, Prefiled Direct Testimony of Dr. George Compton, p. 13). Yet if support is on a per-line basis, universal service support will decrease. The incumbent receives less universal service support, but since its costs haven't decreased, the incumbent must receive additional universal service support from the Fund to preserve its same cost recovery or it must raise rates. In these rural exchanges, network scale economy losses would more than outweigh any efficiencies gained from competition.⁸

Rural telephone companies are more vulnerable to the effects of the loss of only a few, or even one, of their higher volume customers. This leaves the rural telephone

⁸ This loss of scale economies is not offset by reduced costs to customers. The Commission recognized this when it found that Western Wireless' prices would not be lower than those of the incumbent telephone company and "therefore offering a lower cost service is not a benefit that can be counted on to balance out the public interest equation." (R00198, Report and Order, p., 11).

companies and their customers far more vulnerable to “cream skimming”. (R00292, Direct Testimony of Raymond A. Hendershot, p. 25). Such a practice will increase the costs of the remaining customers and lead to increases in local rates. An incumbent’s average costs would increase if customers abandon the incumbent to subscribe to the entrant’s services, since there would be very little reduction in the incumbent’s costs. Costs are largely fixed and sunk. Prices may then be increased in line with elevated average costs. (R00140 Rebuttal Testimony of Raymond A. Hendershot, p. 3).

Even Western Wireless’s witness admitted that if the incumbent’s customer base is static or declining, the loss of customers and the resulting loss of revenues could result in increased average costs for the incumbent. (R00221, Transcript, p. 345). Moreover, he could give no specific examples of how the rural companies in Utah could offset this loss of customers by increased efficiencies or how they could reduce costs. (R00221, Transcript, p. 345-349).

Designation of a second ETC may also discourage investment, and even provide incentives for current ETCs to withdraw from providing service to the highest cost portions of their service areas. (R00221, Transcript, p. 453-455; R00292, Direct Testimony of Raymond A. Hendershot, p. 28). If a second ETC is designated in rural areas, the incumbent rural telephone company will recognize the risks of providing service to the highest cost portions of their service areas and may seek to reduce that risk by not investing in the customers that are the most expensive to serve. (R00292, Direct Testimony of Raymond A. Hendershot, p. 28). Duplication of facilities and loss of network investment is not in the public interest where market demand and foreseeable

growth would not otherwise support multiple providers.

Providing universal service funding to a second ETC for a duplicate competing network may have the detrimental effect of depriving either network of the necessary USF support, with the result that neither network will be able to provide the level of advanced services to all at prices comparable to urban areas. The Division's concerns about a second ETC in rural Utah bear repeating:

Rural carriers in Utah now are all still rate of return regulated. Any revenue shortfalls must be made up through higher rates to remaining customers or through higher USF payments. And this will be true, I believe, as long as those companies remain regulated under rate of return, which is no longer the case for US West. Therefore, movement of any USF funds to a second carrier will need [sic] the higher costs to remaining Utah customers.

Although some expenses may be eliminated or plant become no longer used and useful, the loss of only a few customers may be devastating to some of Utah's very small, independent carriers. If any of these companies are unable to continue to invest in new plants or are unable to continue operations altogether, customers will be left with inferior services or be forced to purchase service from Western Wireless, which claims that it's not subject to any Commission regulation and provides a service that in many ways is much different than what is currently available.

(R00221, Transcript, p. 552-553, Testimony of Ingo Henningsen).

URTA's witness also testified that the harm which would be caused in rural Utah will outweigh any possible minimal benefits that could result in the future for an unknown number of customers. He stated that:

Designating Western Wireless as an ETC will remove substantial universal service support from rural [telephone incumbents], which would make it difficult for them to continue to make investments in order to supply the full array of high-quality telecommunications and data services their customers expect. . . . [Rural companies] have very limited customer bases consisting of small towns and farms and ranches, all of which are costly to serve yet provide limited revenue-producing opportunities. Also, as a general rule,

there is very little growth in access lines. . . . If the universal service support such companies receive were drawn away by another carrier, it would immediately diminish the rural company's ability to invest in network upgrades and to add new advanced services for customers as in the past. Rural companies would eventually be unable to make the investments to serve customers. The base of customers is too small, and costs too substantial, to withstand a loss or support without requiring a decrease in levels of investment or greatly increasing local rates. Less investment, of course, eventually will result in declining service for customers.

(R00292, Direct Testimony of Raymond A. Hendershot, p. 14-15).

In summary, designating a second ETC in rural areas will either result in an increase in the total costs of providing USF support or result in neither ETC receiving the funding needed to provide and maintain the network in high cost areas. (R00292, Direct Testimony of Raymond A. Hendershot, p. 29). Thus, designation of a second ETC will result in an increased USF burden. (R00140, Rebuttal Testimony of Raymond A. Hendershot, p. 4). The Commission clearly recognized this detrimental impact on the Fund in denying Western Wireless's petition and took this evidence into account in issuing its Report and Order.

2. The Unrebutted Evidence Submitted by the Division Supports the Conclusion that ETC Designation was not in the Public Interest.

The Division's witness Dr. George Compton provided extensive testimony on the public interest standard which was unrebutted. Dr. Compton testified that there was no evidence of any cost savings that would result from designation of Western Wireless as an ETC. Dr. Compton analyzed the growth rates in each of the counties which contain exchanges where Western Wireless is seeking ETC status. Dr. Compton concluded that in the small, slow growing exchanges any network economy losses would more than

outweigh any efficiencies gained from competition. (R00300, Prefiled Direct Testimony of George Compton, p. 6-9).⁹

Designation of Western Wireless as an ETC would also not result in lower prices to consumers. Dr. Compton testified that competition from a second ETC may result in prices actually increasing in rural areas. Competition would exacerbate the tendency for there to be an under-utilization of the incumbent's facilities. (R00300, Prefiled Direct Testimony of George Compton, p. 8). Areas possessing little or no growth [areas in which URTA members serve] would constitute areas where it would most likely be inefficient for a second carrier to come in and divert customers from the incumbent. There, capacity would more likely be stranded over a longer term by customers abandoning the incumbent's system in order to subscribe to the entrant's services. (R00300, Prefiled Direct Testimony of George Compton , p., 7). When a rural incumbent's average costs go up (due, for example, to a loss of customers and very little reduction in costs owing to costs being largely fixed and sunk) prices may be elevated in line with elevate average costs. (R00300, Prefiled Direct Testimony of George Compton, p. 12).

These factors led the Division to conclude that there would be an increased burden on the state Fund if Western Wireless were designated as an ETC. The increased use of universal service funds to mitigate the afore-mentioned detrimental impacts in rural Utah was the principal basis on which the Division (and thereafter the Commission) concluded

⁹ It should be noted that Western Wireless did not provide the forward-looking cost data requested by the Division. (R00300, Prefiled Direct Testimony of George Compton p., 7).

that the detriments of ETC designation outweigh any potential benefits. (R00300, Prefiled Direct Testimony of George Compton, p. 14, 17).¹⁰

3. The Evidence Clearly Established that Western Wireless' Service is Inferior to Traditional Wireline Service.

The record demonstrated that Western Wireless's service is less reliable than traditional wireline. As stated by Dr. Compton, "In some of its technical specifications, wireless telephony of the nature proposed in the current Western Wireless application probably delivers lower service quality than does conventional wireline technology." (R00300, Prefiled Direct Testimony of George Compton, p.10, 11). Western Wireless' service is substandard compared to wireline service. (R00296, Pre-filed Direct Testimony of Phil Bullock for the Committee of Consumer Services, p. 1). Western Wireless's service is more susceptible to topographic disruption from routine causes, such as trees, foliage, hills, and other physical objects. Further, the service may be disrupted by routine weather conditions, such as rain and snow. (R00299, Rebuttal Testimony of

¹⁰ Western Wireless misconstrued Dr. Compton's testimony to conclude that Western Wireless would serve customers who are not currently receiving service in rural telephone company service territories. See Petitioner's Brief, p. 26-27. Dr. Compton's testimony was in the nature of general principles. He did not testify that Western Wireless would in fact serve such individuals. (R00221, Transcript, p. 632-634). In his pre-filed testimony, Dr. Compton made it clear that even though there may be some customers who haven't been able to receive service, this was not a sufficient fact to cause him to conclude that the public interest would be served by designating Western Wireless as an ETC. (R00300, Direct Testimony of George Compton, p. 17-18). URTA members also have the potential to serve such individuals. There was no evidence submitted that any specific benefit was attained by designating Western Wireless as an ETC in that it would serve such customers where the incumbent LECs would not. As set forth above, Western Wireless' failure to provide specifics about its intended service, leads to the conclusion that the Commission had no way of knowing whether Western Wireless would in fact serve such individuals.

Peggy N. Egbert, p. 16). The record also shows that wireline service is far more capable of meeting customer demands for advanced services, such as high speed internet service and that Western Wireless would have difficulty providing customers access to the internet at desired connection speeds. (R00299, Rebuttal Testimony of Peggy N. Egbert, p. 8-10; Transcript, p. 156, 589; See also R00140 Rebuttal Testimony of Raymond A. Hendershot, p. 3).

Due to an absolute right of an incumbent to relinquish ETC designation, evidence of landline substitutability is part of the public interest inquiry. Under § 214(e)(1), an ETC is required to offer the services that are supported by the federal universal support mechanisms under section 254(c) throughout the entire service area for which the designation is received. Section 254(e) and §214(e) operate together to spread the requirement to provide universal service among all ETCs within a designated area and to give the incumbent ETC the option to be relieved of that responsibility entirely if a second ETC is designated within the same area. If there are multiple ETCs in a service area and one ETC seeks to relinquish its ETC status in that area, the Commission is *required* to allow it to withdraw. 47 U.S.C. §214(e)(4). The statute provides:

A State commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advanced notice to the State commission of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an areas served by more than one eligible telecommunications carrier, the State commission shall require the remaining eligible telecommunications carrier or carriers to ensure that

all customers served by the relinquishing carrier will continue to be served.

47 U.S.C. § 214(e)(4)(emphasis added). That withdrawal places the responsibility for serving the entire area solely upon the remaining ETC. This requires the Commission to closely consider the applicant's ability to offer supported services which are substitutable for the incumbent's if it were to become the sole provider of such services in the service area. Nevertheless, Western Wireless asserted that it doesn't have to provide a service which is substitutable for a landline. (R00220, Transcript, p. 107). Moreover, it provided no evidence that it could meet the responsibilities of being the sole ETC in the event of relinquishment. (R00220, Transcript, p. 112-113). Western Wireless basically wanted the Commission to take its word for it that it could step up to this responsibility. (R00220, Transcript, p. 113). If a second ETC is designated, the already very high risks of capital investment become materially higher. The result may well be that many of the rural telephone companies would be unable to continue to commit, to the level they do today, the capital to provide quality, advanced telecommunications services.

In making the public interest finding, the Commission resolved the dilemma of how to allocate scarce resources (universal service funding) to provide universal service to customers. The effect of the Report and Order is to not grant ETC status to an applicant who has not made an adequate showing as to its service quality, particularly where there is also evidence on the record that its service is inferior.

D. Western Wireless Erroneously Interprets Federal and State Law.

Western Wireless in discussing the public interest, ignores the impact that a second ETC could have on the universal service fund and focuses instead only on the

argument that competition is in the public interest. In so doing, Western Wireless dismisses the requirements of Section 214(e) regarding rural areas, where competition is not the paramount consideration. Western Wireless' reliance on Alenco Communications, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000) is misplaced. Western Wireless argues that Alenco requires that universal service provisions must be implemented in a way that mandates competition. This is an incorrect reading of the case and ignores the fact that the Alenco court recognized that only those qualifying as ETCs are eligible to receive universal service support. The Court stated: "To the extent petitioners argue that Congress recognized the precarious competitive positions of rural LECs, their concerns are addressed by 47 U.S.C. § 214(e) which empowers state commissions to regulate entry into rural markets." Id. at 622. Thus, the court recognized that the provisions of Section 214(e) can override in rural areas. While recognizing the public interest determination under Section 214(e) as a basis to deny ETC status, the issue of what constitutes such a public interest determination to deny ETC status was not before the court. In no event, however, should the case be read to eliminate the Commission's discretion to refuse to designate an ETC to protect the viability of a universal service fund.

Western Wireless is also incorrect in asserting that state law mandates that Western Wireless should receive support from the Fund. The provisions of the Fund in Section 8b-15 must be read in concert with the other provisions of the Utah Telecommunications Act. The provisions in Section 8b-15 make it clear that a company has to be a "qualifying telecommunications corporation" in order to receive funds. See

§54-8b-15(7) and (8) Utah Code Ann. (2001).¹¹ This implicitly recognizes that some telecommunications corporations may not qualify for universal service support. The Act mandates that the Commission consider the public interest in determining whether there should be additional competition in the local exchange market for small telephone exchanges. See §54-8b-2.1(2) Utah Code Ann. (2001). The Act specifically recognizes that in exchanges with less than 5,000 access lines, a competitive local exchange carrier may not be granted a certificate, when it is not in the public interest. See §54-8b-2.1(3)(c) Utah Code Ann. (2001). If a carrier is not entitled to be certificated, logically it is not entitled to USF support. Under Utah law then, as in the Act, the promotion of competition is not the only consideration.

Western Wireless also asserts that the Report and Order violates 47 U.S.C. §§ 253 and 254. The argument that the Report and Order “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” 47 U.S.C. § 253(a) is erroneous. Western Wireless is not prohibiting from offering any services. In fact, it took the position that it was already offering services in rural Utah. Similarly, Western Wireless’ argument that the Report and Order violates §253(b) by not being competitively neutral, since some companies will have access to universal service funds while others will not, fails to take into account the other provisions of the Act. If Congress had intended that competitive neutrality means that any and every telecommunications company must have access to universal

¹¹ Even Western Wireless included in its brief the language that universal service support was available only to “qualifying” providers. See Petitioner’s Brief, p. 21.

service funds, there would be no need for an accompanying statutory provision to first make a public interest finding to support an ETC designation as a prerequisite to entitlement to such funds. The logical conclusion of Western Wireless' argument is that universal service funds would be given to every telecommunications company irrespective of whether it qualified as an ETC; otherwise competitive neutrality would be violated. Such an argument does not comport with universal service policy and statutory context of the 1996 Act.

IV. Section 332(c) Does not Preempt the Commission From Making Universal Service Funds Available Only to ETCs that Price Services at No More than the Affordable Base Rate.

Section 47 U.S.C. §332(c) does not preempt the Commission from requiring that Western Wireless's universal service offering be priced at the Commission's determined affordable base rate.¹² This section provides that an entity engaged in commercial mobile radio service ("CMRS") is to be treated as a common carrier under the Act. 47 U.S.C. §332(c)(1)(A). Subsection (3) of the statute then provides:

(3) STATE PREEMPTION.—(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone

¹² In Texas Office of Public Utilities Counsel v. FCC, 183 F. 3d 393 (5th Cir. 1999), the court made it clear that states were free to consider additional criteria than what is outlined in § 214(e). Therefore, states can consider affordability, service quality and customer service in determining whether ETC status should be granted.

exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. §332(c)(3)(A)(1999).

Interpretation of §332(c) must be made in light of §214(e). The extent of the prohibition on entry and rate regulation urged by Western Wireless would result in the Commission not being able to make any ETC determination, since granting or denying Western Wireless' application would constitute regulation of entry for Western Wireless into a service territory as an ETC. Even designation of the different service territories in which Western Wireless could operate could be construed as entry regulation. Western Wireless' approach would also prevent the Commission from making any pricing determination for universal service fund support. If a CMRS provider can price its universal service offering at any level it desires, the Commission cannot enforce its statutory mandate to ensure that rates are just, reasonable and affordable. Section 54-8b-11 Utah Code Ann. (2001) provides that the Commission should attempt to make available high quality universal service at just and reasonable rates to all classes of customers throughout the state. Similar objectives are established by the 1996 Act. It states 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).

The appropriate construction of §332(c)(3)(A) is to prohibit a state from imposing entry and rate regulation on a CMRS provider that operates simply as another common carrier in the provision of telecommunications services.¹³ But where a CMRS provider seeks to be designated as an ETC, it is no longer acting simply as a common carrier and the restrictions no longer apply. Because the CMRS provider seeks to become an ETC, it must comply with the ETC provisions of §214 and universal service provisions of §254. One of the central goals of universal service is affordable service. See 47 U.S.C. § 254. Not all common carriers are ETCs. It is the voluntary determination to seek ETC status, which is a decision to offer a required universal service package in a specified area and to receive monies from the state Fund, which imposes an additional obligation to price services reasonably. In other words, when Western Wireless crosses the boundary from being just another common carrier, to attempting to become an ETC and to receive universal service funds, it lost its exemption from rate regulation to the extent that its rates must be affordable. Where an entity chooses to become an ETC in order to receive universal service funds, it should become subject to the provisions of § 214 and §254.

Here, the Commission simply held that If Western Wireless expects to receive universal service funds, it can only receive reimbursement from the State Fund, for those universal service offerings priced at or below the affordable base rate as established by the Commission. (R00198, Report and Order, p. 15). All the Commission attempted to

¹³ Even then, the state can regulate entry and price where the CMRS service is a substitute for landline services offered by other common carriers. 47 U.S.C. §332(c)(3)(A)(1999).

do was implement the objective of universal service statutes by insuring that companies that receive either state or federal money charge an affordable basic telecommunications rate. That was not rate regulation, but rather an appropriate exercise of the Commission's responsibility to safeguard universal service funds. Western Wireless does not have to price its services at this level. It is free to do otherwise and not receive universal service funds.

V. The Administrative Rule Making Act Does Not Apply.

Contrary to Western Wireless' contention, the Utah Administrative Rule Making Act is not relevant in this proceeding. See §§ 64-46a-1 et. seq. Utah Code Ann. (2001). The Rule Making Act is clear that orders and decisions arising out of adjudicative proceedings are not rules. See §64-46a-2(16)(c) Utah Code Ann. (2001). Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making. Salt Lake Citizens Congress v. Mountain State Telephone & Telegraph, 846 P.2d 1245, 1252-1253 (Utah 1992) (an agency must be able to resolve legal issues when they arise in the context of adjudication).

In the Report and Order, the Commission was not singling out Western Wireless for the proposition that a carrier to be eligible for universal service funds may not charge a rate in excess of the affordable base rate. This was already a requirement for receiving universal service support, previously implemented through the rule making process. To be eligible to participate in the state Fund, a requesting carrier must be in compliance with the rules of the Commission. See § 54-8b-15(8) Utah Code Ann. (2001); R746-360(7)(A)(1) Utah Administrative Code (2000). Rule R746-360-(7)(B) states: " To be

eligible, a telecommunications corporation may not charge retail rates in excess of the Commission determined Affordable Base Rates for basic telecommunications service or vary from the terms and conditions determined by the Commission for other telecommunications services for which it receives Universal Service Fund support.”

R746-360(7)(B) Utah Administrative Code (2000). Western Wireless, along with all other telecommunications carriers in the State, could have participated in the rule making process where it was determined that universal service support funds are only available for those who price services at the affordable base rate or below. Moreover, Western Wireless and others are free to request that additional rule making be initiated to further define the affordable base rate. Given the fact that U S West’s rates were set in a rate case proceeding in which the Commission was charged with the statutory responsibility to make sure that rates were just and reasonable, it was reasonable for the Commission to conclude that such rates constituted an affordable base rate, at least in the interim until further proceedings can consider such rates. See §54-7-12 Utah Code Ann. (2001). URTA will not belabor this point but adopts the arguments the Commission set forth in its Brief in asserting that the Rule Making Act has no application to the Commission’s proceedings below. See Commission’s Brief, p. 31-33.

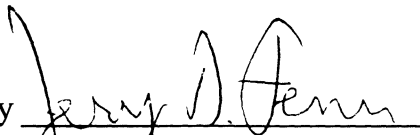
CONCLUSION

In summary, Western Wireless did not meet its burden of establishing that its requested ETC designation in rural service areas is in the public interest. On the contrary, the evidence clearly supported the Commission’s Order that such designation is not in the public interest. The Commission’s Report and Order was supported by substantial evidence

in the record and was not an abuse of discretion. Accordingly, the Court should affirm the Commission's Report and Order refusing to designate Western Wireless as an ETC in the service areas of URTA members.

DATED this 25th day of May, 2001.

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