

2000

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

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; Matthew F. McNulty, III; Mark J. Ayotte; Philip R. Schenkenberg; Briggs and Morgan; Attorneys for Appellant.

Sander J. Mooy; Attorney for Appellee.

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IN THE UTAH SUPREME COURT

WWC HOLDING CO., INC,)	
)	
Appellant,)	Subject to Assignment to the
)	Utah Court of Appeals
)	
vs.)	Priority No. 14
)	
PUBLIC SERVICE COMMISSION OF)	Supreme Court No.: 20000835-SC
UTAH, STEPHEN F. MECHAM,)	
CLARK D. JONES, and CONSTANCE)	Public Service Commission
B. WHITE, Commissioners of the Public)	Docket No.: 98-2216-01
Service Commission of Utah,)	
)	
Appellees.)	

REPLY BRIEF OF THE APPELLANT

On Appeal from the Public Service Commission of Utah
In the Matter of the Petition of WWC Holding Co., Inc.,
for Designation as an Eligible Telecommunications Carrier

Sander J. Mooy, Esq.
Counsel for Public Service Commission
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111
Attorney for Appellee
Public Service Commission

Matthew F. McNulty, III, Esq.
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145-0340

Mark J. Ayotte, Esq.
Philip R. Schenkenberg, Esq.
Briggs and Morgan, P.A.
2200 First National Bank Building
332 Minnesota Street
Saint Paul, Minnesota 55101

ED

Attorneys for Appellant

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UTAH**

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Counsel for Public Service Commission
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111
Attorney for Appellee
Public Service Commission

Matthew F. McNulty, III, Esq.
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145-0340

Mark J. Ayotte, Esq.
Philip R. Schenkenberg, Esq.
Briggs and Morgan, P.A.
2200 First National Bank Building
332 Minnesota Street
Saint Paul, Minnesota 55101

Attorneys for Appellant

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DEFINED TERMS

Act: The Communications Act of 1934, as amended by, among other amendments, the Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq.

APA: Utah Administrative Procedures Act, Utah Code Ann. Ch. 63-466

CMRS: commercial mobile radio services.

Commission: the Public Service Commission of Utah.

DPU: Division of Public Utilities.

ETC: eligible telecommunications carrier.

FCC: Federal Communications Commission.

ILEC: incumbent local exchange carrier.

Kansas Order: In the Matter of Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Serv. Fund, Memorandum Opinion and Order, File No. CWD 98-90, FCC 00-309 (rel. Aug. 28, 2000).

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URTA: Utah Rural Telephone Association.

Western Wireless: Appellant WWC Holding Co., Inc.

Wyoming Order: In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896 (rel. Dec. 26, 2000).

ARGUMENT

WWC Holding Co., Inc. ("Western Wireless") files this Reply Brief in response to the briefs of the Public Service Commission of Utah ("Commission") and the Utah Rural Telephone Association ("URTA").¹ All parties agree that the Commission had a responsibility to conduct a balancing test to determine whether the public interest was met by designating Western Wireless as an additional eligible telecommunications carrier ("ETC") in the areas served by the affected URTA companies. Western Wireless filed a clear and specific challenge to the findings and conclusions that impacted the Commission's balancing test. In doing so Western Wireless presented narrow issues for appeal:

1. Should the Commission have found that designating Western Wireless as an additional ETC will bring public interest benefits of competition, increased subscribership, larger local calling areas, and mobility? The answer is clearly "yes" based on the undisputed record evidence.
2. Whether the Commission lawfully considered in its public interest determination the possibility the State Fund might increase in size with the designation of Western Wireless? The answer to this legal question is clearly "no" as a matter of federal and state law.

Once the Court corrects the Commission's errors stated in the Order, several public interest benefits will weigh in favor of Western Wireless' designation, and no detriments will weigh against the designation. A balancing of these factors clearly compels the conclusion that the public interest is served by designating Western Wireless as an ETC in each of the URTA companies' service areas.

¹ Western Wireless' Initial Brief is cited as "WW Br.," The Commission's Brief is cited as "Com. Br.," and URTA's Brief is cited as "URTA Br."

Rather than respond to these specific appeal issues, the Commission and URTA wade through the entire record and seek to re-litigate the entire case. They rely on arguments previously made to the Commission rather than what the Commission stated in the Order as a basis for its public interest determination. In doing so they forget that Western Wireless prevailed on nearly every issue in this case, and that the only detriment found by the Commission had nothing to do with Western Wireless' service, network, or satisfaction of the basic ETC criteria. Thus, suggestions that Western Wireless failed to try its case effectively or that it failed to explain its network or services (Com. Br., p. 17) are nothing more than attempts to cloud the issues before the Court. In taking this approach, the Commission and URTA respond only superficially to Western Wireless' discussion of the undisputed record of consumer benefits, and the Federal Communications Commission's ("FCC") interpretation of the public interest standard in 47 U.S.C. § 214(e)(2).

The Court should keep focused on the issues presented for appeal, should recognize the findings and conclusions not challenged on appeal, and should reject attempts by the Commission and URTA to re-try this case. Western Wireless urges the Court to reverse the Order, thereby taking the action necessary to bring the benefits of competitive universal service to rural consumers in Utah.

I. WESTERN WIRELESS PROPERLY STATES THE STANDARD OF REVIEW AND SEEKS APPROPRIATE RELIEF

The Commission and URTA misstate the proper standard review and question the authority of this Court to correct the errors of fact and law made in the Order. Western Wireless challenged one specific finding of fact, three findings which the Commission failed to make, and two legal conclusions. WW Br., p. 2. With regard to findings of fact (both made and not made), Western Wireless has the burden to show the Commission's Order is not supported by substantial evidence in the record, or is arbitrary and capricious. Id. With regard to the two legal challenges, this Court reviews those questions de novo. Id.

The Commission and URTA fail to recognize these separate points of appeal, and instead attempt to lump all of the issues together and claim there is one mixed question of fact and law – whether the public interest standard was met. Com. Br., p. 9 (evidence as a whole does not show a net public interest benefit); URTA Br., p. 11. Moreover, the Commission and URTA attempt to backfill the analysis by arguing alleged detriments that were not adopted as findings of fact by the Commission or stated as part of the Commission's public interest rationale in the Order. Characterizing it this way is an attempt to avoid having to justify the Commission's specific errors of fact and law challenged on this appeal. While the public interest factor is clearly a balancing test (Com. Br., p. 9; URTA Br., p. 10), Western Wireless does not challenge the balancing per se, it challenges what was balanced. Meaningful review of the agency's action

requires that Western Wireless have the ability to challenge the findings and the conclusion that determined what would be balanced.²

In addition, the Commission and URTA (using identical language and citations) claim Western Wireless seeks improper relief, and suggests this Court has no power to make findings not made by the Commission or to make partial modifications of the Commission's Order. Com. Br., p. 7; URTA Br., p. 16. This argument is plainly wrong, and is based on cases that were not appealed pursuant to the Utah Administrative Procedures Act ("APA").³ The APA specifically gives the Court authority in its "review of formal adjudicative proceedings" to "order agency action," to "order the agency to exercise its discretion as required by law," or to "set aside or modify" the order appealed from: Utah Code Ann. § 63-46b-17(b) (Supp. ADD-1). This attempt by the Commission and URTA to ignore the APA and tie this Court's hands on appeal is the first sign they cannot rebut Western Wireless' arguments on the merits.

II. THE COMMISSION AND URTA IGNORE FINDINGS MADE IN THE ORDER THAT ARE NOT CHALLENGED ON APPEAL

Reading the briefs of the Commission and URTA one would not guess that Western Wireless has already been designated as an ETC by the FCC, as well as state commissions in Minnesota, Nebraska, Iowa, North Dakota, South Dakota, Oklahoma,

² In its Order, the Commission determined there were no benefits, and one detrimental impact, making the balancing test quite simple. Western Wireless asks the Court to add four benefits and eliminate the detrimental impact, which would make the balancing test just as easy. Thus, the focus of this appeal is not the act of balancing, but instead what is put on either side of the scale.

³ For Example, in Telecommunications Resellers of Utah v. PSC, the Court's review was governed by Utah Code Ann. § 54-7-16. 747 P.2d 1029, 1030-31 (Utah 1987).

Texas, Colorado, California, Nevada, and Kansas. One would most certainly not guess that Western Wireless has also been designated as an ETC in Utah by the Utah Commission. The fact is, however, the Commission in its Order rejected countless challenges to Western Wireless' Petition and found Western Wireless met the requirements of Section 214(e)(1) and state law for designation as an ETC, including provision of services required of all ETCs, and the intent and ability to advertise and provide those services throughout the requested designated service areas. DI 198, pp. 5-12, 13-15. The Order thus represents the Commission's rejection of the same claims now argued on appeal, including that Western Wireless' Petition lacked specificity (DI 172, p. 10; DI 180, pp. 4-5), lacked detail as to its network (DI 180, pp. 5-6; DI 173, pp. 5-7), and did not allow for appropriate regulatory oversight (DI 172, pp. 15-16), among many others.

In an attempt to justify the Order's outcome on the public interest question, the Commission and URTA argue these exact same points, and even suggest these issues were resolved against Western Wireless below. For example, URTA states that: "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." URTA Br., p. 22; see also Com. Br., p. 11. This is simply untrue – nothing in the Order suggests the Commission had any such concerns, and it most certainly was not a factor in the Order's public interest analysis.⁴

⁴ Moreover, the FCC specifically recognizes that an ETC applicant cannot be expected to finalize its business plans prior to being designated an ETC. In the Matter of Federal-

The same can be said for the Commission's argument that Western Wireless failed to show sufficient coverage on its network to provide the services. Com. Br., p. 12; see also URTA Br., pp. 18-21. To the contrary, the Order specifically found that Western Wireless demonstrated full coverage on its network in both Qwest exchanges and URTA study areas in the Petition. DI 198, pp. 11-12. As to the URTA companies' areas, the Commission found "Western Wireless is licensed and provides the supported services throughout these companies' study areas." DI 198, p. 12. The Commission dismissed claims of inadequate coverage in Qwest areas by stating that "to the extent there might be a few small and discrete areas not within Western Wireless' existing signal coverage," Western Wireless would extend its service within a reasonable time. DI 198, p. 11. The Commission's claim on appeal that lack of coverage or detail regarding the network was or should be part of the public interest analysis is clearly without merit. Compare also the Commission's argument that Western Wireless provides substandard service (CB, pp. 10-11) with the Order's findings that Western Wireless meets or exceeds all service requirements for ETCs (DI 198, pp. 7-11).

By making these arguments the Commission and URTA contradict findings made in the Order and not challenged on appeal. The Court should reject these assertions as being contrary to the Commission's Order and beyond the scope of review, and should

State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, FCC 00-248, ¶ 13 (rel. Aug. 10, 2000) ("South Dakota Order") (Supp. ADD-2).

review only the specific findings and conclusions properly challenged by Western Wireless.

III. THE COMMISSION AND URTA CAN NOT DISPUTE THAT THE APPLICATION OF THE FCC'S PUBLIC INTEREST ANALYSIS REQUIRES DESIGNATION OF WESTERN WIRELESS AS AN ETC

The FCC's recent interpretation of the public interest standard in the Wyoming Order represents the FCC's binding interpretation of federal law. The FCC is the implementing agency for the Act (Sprint Spectrum v. State Corp. Comm'n of Ks., 149 F.3d 1058, 1061 (10th Cir. 1998)), and its rules and orders can be set aside only by the federal courts of appeal. 28 U.S.C. § 2342(1). Applying this FCC standard as required by federal law eliminates the only adverse impact found in the Order, and recognizes the benefits of Western Wireless' ETC designation. See WW Br., pp. 32-33. The Court must acknowledge the FCC's authority to interpret federal law and apply its interpretation of the public interest standard to correct the Commission's Order.

It is clear from the Wyoming Order that the Commission erred by failing to consider the general benefits of competition as a factor that supports a public interest finding. WW Br., pp. 23-25. Like the FCC's Wyoming Order, the Commission should have recognized that:

[A]n important goal of the Act is to open local telecommunications markets to competition. Designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies.

Wyoming Order, ¶ 17 (ADD-80); see also id. ¶ 1 (ADD-73) ("we find that the designation of Western Wireless as an ETC in those areas served by rural telephone

companies serves the public interest by promoting competition"). In failing to recognize public interest benefits of competition, the Commission left a significant piece out of the public interest equation.

The Commission also erred by ignoring undisputed record evidence of specific consumer benefits, including increased subscribership, mobility, and a larger local calling area. WW Br., pp. 25-32. The FCC's Wyoming Order recognizes the public interest is served because some consumers will benefit from large local calling areas and the provision of wireless local loop service. ADD-82. The Wyoming Order thus supports Western Wireless' argument that these consumer benefits should have been a part of the Commission's public interest analysis.⁵

Finally, the FCC interpreted the public interest standard and determined:

Congress was concerned that consumers in areas served by rural telephone companies continue to be adequately served should the incumbent telephone company exercise its option to relinquish its ETC designation under Section 214(e)(4).

Wyoming Order, ¶ 18 (ADD-81). While such relinquishment could be a threat if competition were not sustainable, the FCC "[rejected] the general argument that rural areas are not capable of sustaining competition for universal service support," and

⁵ The Commission and URTA attempt to distinguish the Wyoming Order by claiming that Western Wireless provided more information to the FCC than it did in this case. Com. Br., p. 17, fn. 3; URTA Br., p. 18 fn. 6. Nothing in the record of this appeal supports such a view. The filing made by Western Wireless in the Wyoming docket is not part of the record on appeal so no comparison can be drawn. In fact, there was a far greater degree of information and specificity in this proceeding, which involved discovery, testimony, and three days of hearings. The Wyoming docket was decided only on written submissions. More importantly, the level of specificity did not play any role in the FCC's public interest analysis. See Wyoming Order, ¶¶ 16-22 (ADD-80).

required rural LECs to prove this detriment based on empirical evidence. Wyoming Order, ¶¶ 20, 22 (ADD-81).

The Commission's Order cannot be squared with this FCC public interest analysis for two reasons. First, the Commission's funding rules for the State Fund guarantee the URTA companies a statutory rate of return, thereby eliminating any possibility that the incumbent will be harmed by competition to the detriment of consumers. DI 198, p. 12. Under this funding scheme, no consumers are put at risk, which is the potential detriment Section 214(e)(2) was intended to guard against. Wyoming Order, ¶ 20 (ADD-81) ("we decline to conclude this constitutes a serious risk to consumers") (emphasis added). The Commission and URTA utterly fail to address this significant point.⁶ Second, the only finding the Commission made was that it was possible that the size of the State Fund might need to increase with the presence of a competitor. DI 198, p. 13. There was no finding that each URTA area cannot support competition, and instead the Commission's Order relied acted on a general argument because it might prove to be true.⁷

⁶ Although URTA claims the potential for relinquishment should be considered (URTA Br., p. 35), the Commission made no finding that this was a risk, and the current funding scheme makes that an impossibility. Moreover, even Dr. Compton testified that relinquishment was not a realistic threat. DI 300, pp. 24-26.

⁷ The Commission's brief claims Dr. Compton conducted an analysis of URTA study areas as was contemplated by the FCC in the Wyoming Order. Com. Br., p. 19. To the contrary, Dr. Compton looked only generally to whether population growth was fast or slow, and the Commission made no findings based on this testimony. DI 300, pp. 9-11. In fact, both DPU/CCS and URTA admitted in their post-hearing briefs that no one conducted a detailed analysis of whether URTA areas can accommodate competition. DI 172, p. 5 ("We recognize that no detailed empirical study was performed as to the affect on rural companies for granting ETC status"); DI 180, p. 12 fn.7 ("URTA has not

In short, the FCC's public interest analysis properly focuses on the consumer, is binding, and it is patently inconsistent with the Commission's public interest analysis below. The Court should recognize the clear path set by the FCC and use that analysis as a basis to reverse the Commission's Order and grant Western Wireless the relief it has requested in this proceeding.

IV. THE COMMISSION SHOULD HAVE MADE FINDINGS OF BENEFITS OF WESTERN WIRELESS' DESIGNATION AS AN ADDITIONAL ETC

The Commission erred by finding that there would be no benefits weighing in favor of designating Western Wireless as an additional ETC in any study area of a rural telephone company. The Commission should have recognized and weighed several undisputed benefits as part of its public interest balancing test based on the record evidence.⁸ Compare DI 222, pp. 622-23 (Dr. Compton agrees there will be specific benefits of Western Wireless' service). By failing to do so, the Commission ignored undisputed benefits designating Western Wireless as an ETC.

submitted specific studies showing the impact designating WWC an ETC would have in the rural companies impacted.").

⁸ URTA claims the Order did not find there would be "no benefits," but instead found that unspecified detriments outweighed the benefits. URTA Br., p. 9 fn.2. URTA is wrong. The Commission neither recognized nor weighed any public interest benefits as part of its balancing test. DI 198, pp. 12-13. In seeking reconsideration Western Wireless specifically requested findings of the benefits of competition, increased subscribership, mobility, and a larger local calling area, but the Commission declined to reconsider or clarify its Order. DI 210, pp. 3-6.

A. The Order Should Have Reflected General Benefits of Bringing Competition to URTA Service Areas.

Given the clear mandates of the federal Act, the orders of the FCC, and the Utah Legislature's mandatory directives, there is simply no way to justify the Commission's failure to give any consideration to the fact that granting Western Wireless' Petition will bring benefits of competitive universal service to rural consumers in Utah. Neither URTA nor the Commission argues this point, they simply claim that competition should not be the only factor in the public interest equation. Com. Br., pp. 8-9; URTA Br., p. 8. Western Wireless agrees that competition should not be the only factor, and has never claimed otherwise. In fact, Western Wireless quite clearly said that competition "must be found to be a consideration" in the public interest determination. WW Br., p. 25 (emphasis added). While competition is not the only factor, however, it must be part of the balancing test, and the Commission's failure to give any weight to this public interest benefit is clear error.

The FCC's Wyoming Order directs that competition is a goal of the Act and a benefit that advances the public interest. Wyoming Order, ¶¶ 1, 17 (ADD-73, 80). As pointed out in Western Wireless' Initial Brief, there was agreement on the record that competition is presumed to be in the public interest. WW Br., p. 24. This presumption is consistent with the statutory directives of the Utah Legislature to the Commission. See

Utah Code Ann. § 54-86-1.1. For these reasons the Commission erred by failing to find in its Order that competition is a benefit to be weighed in the public interest analysis.⁹

B. The Order Should Have Reflected the Benefit of Increased Subscribership.

The Commission specifically recognized that increased subscribership would be a benefit that would weigh in favor of the public interest. DI 198, p. 13. Western Wireless in its Initial Brief pointed to the uncontradicted record evidence that demonstrates Western Wireless could and would serve consumers who currently do not have landline telephone service. WW Br., pp. 25-26. The record evidence shows there are consumers in the URTA study areas who do not have service due to the cost of extending land-line facilities. Id. Because Western Wireless' network could serve those consumers immediately (without imposing line extension costs) Department witness Dr. Compton identified that as a "big benefit" of Western Wireless' designation. DI 222, p. 633. The Commission simply ignored Dr. Compton's testimony when it concluded Western Wireless would not serve any unserved consumers. DI 198, p. 13.

⁹ Other state commissions (like the FCC) have also begun their public interest analysis with a presumption that competition was in the public interest. See, e.g., In the Matter of GCC License Corporation, Kansas Corporation Comm'n Docket No. 99-GCCZ-156-ETC, Order No. 10, p. 4 (May 19, 2000) (competition in rural telephone company service areas is presumed to be in the public interest) (Supp. ADD-63); Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418, Texas Public Utilities Commission Docket Nos. 22289 and 22295, Order, p. 19 (Oct. 30, 2000) (clear policy in favor of competitive telecommunications markets); In the Matter of Western Wireless Holding Co., Inc., Colorado Pub. Utils. Comm'n Docket No. 00K-255T, Decision on Exceptions, p. 16 (rel. May 4, 2001) ("Both federal and state statutes establish the public policy of promoting competition in telecommunications markets.") (Supp. ADD-42).

The Commission does not point to any record evidence supporting its decision, but instead argues that Western Wireless 1) has large gaps in its coverage, and 2) would extend service (like the incumbent) only if it were reimbursed dollar-for-dollar for that line extension by either the customer or a universal service fund. Com. Br., p. 12. First (and again), the Order itself does not contain any findings of fact to support the argument. To the contrary, the Commission found Western Wireless has existing service throughout the URTA territories, and did not find the gaps the Commission now tries to rely on. DI 198, p. 12. Second, the evidence shows that Western Wireless committed to ensuring strong signal coverage for each such customer without additional charge, even if engineering means were needed to ensure a strong signal. DI 220, pp. 44-45. The suggestion that Western Wireless would "draw upon the universal service funds to make these expansions" (Com. Br., p. 12) mischaracterizes the testimony cited.¹⁰

The Court should read Dr. Compton's testimony and should determine that he gave undisputed testimony that as an ETC Western Wireless will provide universal service to some Utah residents who do not have it today. DI 222, pp. 632-33. As the FCC has said, "[a]t the simplest level, increasing the number of people connected to the telecommunications network makes the network more valuable to all of its users."

¹⁰ The testimony of Mr. Blundell relied on by the Commission in its brief is that Western Wireless would need to receive available subsidies to make its proposed offering available ubiquitously. In other words, Western Wireless will undertake an ETC's obligations only if designated an ETC. DI 220, pp. 79-80 (cited Com. Br., p. 12). This testimony does not support the Commission's reading that Western Wireless would extend service to a specific individual only upon a dollar-for-dollar reimbursement from a universal service fund.

Universal Service Order, ¶ 8. An ETC designation that will increase subscribership furthers the public interest, and should have been considered by the Commission in the public interest balancing test under Section 214(e)(2).

C. **The Order Should Have Reflected That a Larger Local Calling Area Would Provide Benefits to Some Consumers.**

Western Wireless pointed to undisputed record evidence showing that Western Wireless would provide a larger local calling area than the incumbents', and showed it was undisputed that some consumers would benefit from this service option. WW Br., pp. 28-30. The Commission challenges this argument only by questioning whether the local calling area will actually be larger. Com. Br., p. 15. Western Wireless gave clear testimony that this feature of cellular technology would be a primary way for Western Wireless to distinguish its service from the incumbents':

We believe, in addition, that the expanded calling area is also another component of the public interest that will be served here. We can provide that expanded local calling area today. We do for our cellular customers. We plan to do this with universal service offering. And as a footnote, we launched a demonstration project in Regent, North Dakota, earlier this year using this service, and customers have flocked to the service. Among the reasons they like it so well in Regent, North Dakota, is the expanded local calling area.

DI 220, p. 14. Once the Commission concedes Western Wireless will offer a larger local calling area to consumers, it must concede (as the DPU and CCS witnesses did), that some consumers will find this option to be beneficial. See WW Br., pp. 29-30. This furthers the public interest and should have been considered by the Commission.

D. The Order Should Have Reflected That a Mobility Component Would Provide Benefits to Some Consumers.

In its Initial Brief Western Wireless pointed to undisputed record evidence that 1) Western Wireless would provide a mobility component not currently available from landline ILECs, and 2) this mobility component would benefit some customers in the URTA service areas. The Commission's only challenge to this seems to be that "[t]here was no evidence that the 'mobility' of Western Wireless' proposed equipment ... was different from the 'mobility' currently offered by means of the cordless phones that are already available to telephone users of the incumbents' network." Com. Br., p. 16; URTA Br., p. 27. In fact, the product specifications for the wireless access unit states clearly that it will provide service to "any remote location where phone service is needed and cellular networks are available." DI 230. The suggestion, then, that cellular service does not provide greater mobility than landline service ignores common sense, common knowledge, and the record evidence. Commission Chair Meacham specifically asked about the mobility of a wireless unit. DI 220, p. 154. The response (which was not challenged by contrary evidence) was that in Western Wireless' universal service offerings a wireless access unit will be able to be used wherever its signal could be transmitted to and from the nearest cell tower. DI 220, p. 154. This will allow the customer to roam 25 miles away from their home. DI 222, p. 610. A mobility component that will allow a rural consumer to have access to the network twenty-five miles from the consumer's home is obviously not identical to what a cordless telephone provides, and shows the Commission's argument to be a red herring.

It is undisputed that some consumers will choose to have a universal service offering with this option, and will be benefited by having this choice available. Because some consumers will benefit, this is a factor that should have been considered as part of the public interest examination.

V. THE POSSIBILITY THAT THE STATE FUND MIGHT INCREASE DUE TO WESTERN WIRELESS' DESIGNATION IS NOT A FACTOR TO BE CONSIDERED UNDER THE PUBLIC INTEREST DETERMINATION PURSUANT TO 47 U.S.C. § 214(e)(2)

The only negative aspect of Western Wireless' designation stated in the Order was the possibility that the State Fund might increase with an additional ETC. DI 198, p. 13.¹¹ Western Wireless does not challenge the finding that its designation might increase the size of the State Fund. Instead, Western Wireless' challenge to this determination is a legal one – whether it is consistent with the public interest for the Commission to use this possibility as a detriment of designating a competitive ETC. This challenge then, is one of law subject to de novo review by this Court.¹²

A. The Order's Public Interest Determination Frustrates Federal Law.

The Commission seeks to justify its protection of monopoly carriers to the detriment of competition by claiming that Congress recognized the states' "preeminent

¹¹ As discussed supra, the Commission made only one finding of a detriment, and none others. The Commission's claim that the record shows "overwhelming detriments compared to benefits" must be disregarded as not based on any findings in the Order. Com. Br., p. 18.

¹² URTA is wrong to state there was a finding that designation "would result in a significantly increased burden on the Fund." URTA Br., p. 22. The Order reflects no such finding and the Order instead denied the Petition in the URTA areas "because of the possible negative impact." DI 198, p. 13 (emphasis added).

role and authority" on universal service matters. Com. Br., p. 22. However, the public interest standard is in a federal statute that governs federal universal service dollars. See DI 198, p. 7 (ADD-7). The United States Supreme Court has recognized "there is no doubt ... that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 730 n.6 (1999). Here, in assisting the FCC's administration of this federal program, the Commission cannot ignore or frustrate federal goals under the guise of the "public" interest. Because the Commission's Order does just this, it cannot stand.¹³

In a comparable situation the North Dakota Commission's public interest determination under Section 214(e)(2) was reversed as being inconsistent with federal law. The North Dakota Commission had determined that the public interest standard for a federal ETC applicant was not met because there was no state universal service fund, and it speculated that federal universal service funding was not sufficient in rural telephone company areas. On appeal, the district court reversed the North Dakota Commission's application of Section 214(e)(2) as being inconsistent with federal policies:

¹³ Some states have imposed a separate public interest test for receipt of state funds, which arguably could consider state goals not mandated by federal law. There is no State Fund public interest requirement in Utah. Under Commission Rule R746-360-7, a competitive carrier is eligible for state funding by 1) being designated a federal ETC and 2) being in compliance with Commission rules and orders. Even if there were a State Fund public interest requirement, the Utah Legislature created the State Fund to support competition without advantage to any carrier, to be sufficient to fund competitive universal service, and to be consistent with the federal Act. Utah Code Ann. § 54-86-15(4)(c), (5), and 9. See also WW Br., pp. 24, 34. These legislative mandates are inconsistent with the Order's public interest rationale.

Federal case law indicates that in regards to federal funding mechanisms, the PSC cannot determine, or rely on its own determination, that the FCC's universal service mechanisms are not sufficient to provide for competition among universal service providers.... The Telecommunications Act of 1996 contemplates that separate universal service funds would be established at both the state and federal levels. The FCC has established mechanisms for the collection and disbursement of monies for the Federal Universal Service Fund which are independent of any state fund. By denying Western Wireless access to federal subsidies based on North Dakota's failure to create a separate state fund, the PSC is frustrating the purpose of the Telecommunications Act of 1996.

Western Wireless Corp. v. Rural Telephone Company Group et al., Civil No. 00-C-1800, Slip Op. at 3-4 (N.D. Dist. Ct. Nov. 13, 2000) (citations omitted) (Supp. ADD-24). The Colorado Commission has similarly determined that the operation of its state fund rules cannot be allowed to frustrate federal law. In the Matter of Western Wireless Holding Co., Inc., Colorado Pub. Utils. Comm'n Docket No. 00K-255T, Decision on Exceptions, p. 8 (rel. May 4, 2001) (rejecting an interpretation of its rules that would conflict with 47 U.S.C. § 332(c)(3)(A)) (Supp. ADD-34). This Court should similarly hold that the Commission cannot ignore or frustrate goals and policies of the federal Act.

In Western Wireless' Initial Brief it explained that Section 253(a) of the Act prohibits a state from taking action that prohibits an entity from providing any telecommunications service. WW Br., pp. 18-19. The Commission claims Section 253(a) cannot be implicated because Western Wireless can still provide telecommunications services without being designated an ETC. Com. Br., p. 23. However, the FCC has ruled that Section 253(a) is violated where a state commission imposes a requirement that "[deprives] customers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition." South Dakota Order, ¶

12 (Supp. ADD-7); see also Kansas Order, ¶ 8 (ADD-67) (state can violate Section 253(a) by keeping a competitor out of the universal service market). The Order's conclusion that the public interest is not served by competition that might increase the size of the State Fund violates Section 253(a) as interpreted by the FCC.

Western Wireless also argued that the effect of the Order was to burden federal universal service mechanisms in violation of Section 253(f). WW Br., p. 36. The Commission asserts that Section 253(f) is violated only if the Commission hinders the collection of universal service assessments. Com. Br., p. 26. The term "federal universal service mechanisms," however, clearly includes assessments, regulations governing ETCs, and distributions of funds to carriers. Universal Service Order, ¶ 816. It is quite clear that rejecting competition for federal universal service dollars based on a fear that the State Fund might increase in some unspecified amount burdens the ability of federal mechanisms to have their intended effect, and thereby violates Section 253(f).

In essence, the Utah Commission has (under the guise of the public interest) refused to allow competition for federal universal service funding because it does not want its State Fund to subsidize competition in rural telephone areas. This violates federal law and clear federal policies, and cannot be a factor in a federal public interest test.

B. The Order's Public Interest Analysis Favors Incumbent Monopoly Providers In Violation Of Federal Law.

The Commission's Order makes clear an intention to fund incumbent monopolists first, and exclude competitors from the universal service market in rural telephone

company areas. In fact, it is unclear whether the Commission would ever designate a competitive ETC in a rural telephone area. This clearly an advantage to the incumbent, which violates the principle of competitive neutrality.

The Commission misunderstands the "competitive neutrality" requirement of Section 253(b). Com Br., p. 24. Western Wireless does not suggest that any carrier should receive universal service funding, but instead that the rules for designation and funding cannot favor the incumbent over the competitor. This is exactly what the FCC said in its Kansas Order: "Section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue." Kansas Order, ¶ 10 (ADD-68). See also RT Communications, Inc. v. F.C.C., 201 F.3d 1264, 1268 (10th Cir. 2000) (affirming preemption of Wyoming State rule that awarded incumbent LECs the advantage of continued monopoly status to the detriment of competitors).

By guaranteeing incumbents success in the marketplace, and denying competition because of that guarantee, the Commission's Order is not competitively neutral and violates federal law.

C. The Commission Did Not Find Any Other Detriments Associated With Western Wireless' Designation As An ETC.

As discussed supra, the Commission's Order was based only on a single indefensible detriment. No findings support claims that ETC designation would lead to an increase in average costs or losses in network economics (Com. Br., p. 18), or that

Western Wireless provides inferior service (URTA Br., p. 33). Significantly, URTA has not cross-appealed on these issues. Thus, once the Court reverses this sole indefensible detriment in the Order and adds findings of benefits of Western Wireless' designation, the balancing test will clearly fall in favor of designating Western Wireless as an additional ETC in the areas served by the URTA companies. That relief is appropriate and allowed by the APA.

VI. THE COMMISSION'S RATE CAP FOR STATE FUND PURPOSES IS UNENFORCEABLE AS TO A CMRS PROVIDER.

A. Section 332(c)(3)(A) Clearly Overrides Sections 214 and 254.

The arguments of the Commission and URTA on the applicability of Section 332(c)(3)(a) to ETCs is quite odd. Incumbent carriers opposing competition from Western Wireless generally claim that Western Wireless must be a state certificated local exchange carrier to be an ETC. These carriers take the position that Section 214(e) overcomes Section 332(c)(3)'s ban on entry regulation. No incumbent carrier, however, has ever won this argument. In addition, the FCC has issued clear authority on this point.

We re-emphasize that the limitation on a state's ability to regulate rates and entry by wireless service carriers under section 332(1)(3) does not allow states to deny wireless carriers ETC status.

In the Matter of Federal-State Joint Board on Universal Service, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, CC Docket No. 96-45, FCC 99-119, ¶ 72 (rel. May 28, 1999). See also Universal Service Order, ¶ 147 ("Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an [ETC].").

Just recently, the Colorado Commission determined that Section 332(c)(3)(A) prohibited any requirement that a CMRS provider be certificated to be eligible for state universal service funding:

Federal law (47 U.S.C. § 332(c)(3)(A)) (no State or local government shall have any authority to regulate the entry of or the rates charged by any CMRS providers) prohibits the states from imposing a certification requirement on wireless providers; therefore, the Commission has no legal authority to certificate wireless carriers. Qwest's and CTA's interpretation of § 40-15-208(2)(a), C.R.S., would, in effect, preclude wireless providers such as Western Wireless from providing service as EPs within the state.

...

[A]n interpretation that would preclude wireless providers from participating in the [Colorado state fund] as EPs would likely violate 47 U.S.C. § 253

In the Matter of Western Wireless Holding Co., Inc., Colorado Pub. Utils. Comm'n Docket No. 00K-255T, Decision on Exceptions, pp. 8-9 (rel. May 4, 2001) (Supp. ADD-34).

The opposition to Western Wireless in Utah raised this same issue – the Commission was urged to impose a requirement that Western Wireless obtain a state certificate to be an ETC because Section 214(e) overcomes Section 332(c)(3)(A). See, e.g., DI 248, p. 10; DI 222, p. 509.¹⁴

The Commission, however, agreed with Western Wireless on this point and did not impose a certification obligation as a condition of ETC designation. DI 198, p. 15.

¹⁴ Interestingly, URTA's initial prefiled testimony conceded Western Wireless could not be subjected to any rate and entry oversight. DI 292, p. 6. URTA's argument on appeal (URTA Br., p. 6) is both unsupported and contradicts its position below.

However, after agreeing in the Order that Section 332(c)(3)(A) preempts certification requirements, the Commission nevertheless argues that Section 332(c)(3)(a) does not preempt rate regulation. Com Br., pp. 28-29. The Commission's argument that Section 214(e) overcomes Section 332(c)(3)(A) rate regulation is contrary to FCC mandates, court and other Commission decisions, and its own Order. The real question, is not whether Section 332(c)(3)(A) overcomes Section 214(e). The question (answered below) is whether a rate cap on a wireless ETC is rate regulation prohibited by Section 332(c)(3)(A).

B. A Rate Cap Is Rate Regulation For The Purposes Of Section 332(c)(3)(A).

As argued in Western Wireless' Initial Brief, a rate cap is clearly rate regulation, no matter the context. WW Br., pp. 39-41. The Commission's only real argument is that the Sprint Spectrum case held that assessing universal service contributions is not rate regulation, and thus does not violate Section 332(c)(3)(A). Sprint Spectrum v. Kansas City SMSA, 149 F.3d 1058, 1062 (10th Cir. 1998). However, the Sprint Spectrum case is not implicated here. The treatment of a universal service assessment is far different than the Commission's Order requiring Western Wireless to price its service at a specific rate. A universal service requirement that sets a specific rate for a CMRS provider clearly constitutes rate regulation. As was decided in Cellular Telecommunications Indus. Assoc. v. F.C.C., a state can set rate and entry requirements on wireless universal service providers only after meeting the "substitutability" exception of Section 332(c)(3)(A), which has not happened here. 168 F.3d 1332, 1336 (D.C. Cir. 1999) (discussed in WW

Brief, pp. 41-42). This precedent requires the Court to strike the rate cap imposed by the Commission through the State Fund rules.

C. In A Competitive Market, Affordable Rates Are Accomplished By Market Forces And Explicit Subsidies, Not By Rate Caps.

Both the Commission and URTA argue that a rate cap is the only way for the Commission to meet its obligation that basic local service rates be "affordable." Com. Br., p. 29; URTA Br., p. 39. Once again, the Commission and URTA fundamentally misunderstand how competitive markets work. Congress made clear in the Act that there should be "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5) (emphasis added). Sufficient funding is funding that leads to affordable rates. Universal Service Order, ¶ 2. The Utah Legislature established its State Fund to provide "sufficient" funding to allow competitors to provide service at affordable rates. Utah Code Ann. § 54-8b-15(9). As competition pushes the price of services down and prompts carriers to become more efficient (Wyoming Order, ¶¶ 13, 17, 22), federal and state universal service subsidies are then applied to reduce what the consumer pays to an affordable level.

It is a fundamental truism of American democracy that government cannot keep the cost of bread low simply by mandating a maximum price. Instead, government ensures competition among farmers, millers, and bakers, and grocers, and allows the market to produce an efficient, affordable price. The Commission and URTA are wrong to suggest that a rate cap is the only way to achieve affordable pricing. This Court,

unlike the Commission, should recognize the benefits and requirements of bringing universal service competition to its citizens.

VII. THE COMMISSION FAILED TO FOLLOW THE REQUIREMENTS OF THE APA

Western Wireless maintains that the Commission established a "rule" without a formal rulemaking when it mandated that each incumbent's rates (which were not part of the record) represents the "Affordable Base Rate" under the State Fund rules. WW Br., pp. 42-45. The Commission's response is not persuasive – the Commission does not have carte blanche to create rules in the context of an administrative adjudication. Com. Br., pp. 33-34. The Affordable Base Rate was not put at issue in this case, did not need to be determined, and is of general applicability to all ETCs and prospective ETCs. An Affordable Base Rate should be established on record evidence in accordance with the rulemaking provisions mandated by the Legislature.

CONCLUSION

For the above reasons, the Court should reverse the Order as requested, and grant the relief sought by Western Wireless.

Respectfully submitted this
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VAN COTT, BAGLEY, CORNWALL
& McCARTHY

By Matte
Matthew F. McNulty, III
Attorneys for Plaintiff
50 South Main Street, Suite 1600
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

BRIGGS AND MORGAN, P.A.
Mark J. Ayotte (#166315)
Philip R. Schenkenberg (#260551)
2200 First National Bank Building
Saint Paul, Minnesota 55101
Telephone: (651) 223-6600

ATTORNEYS FOR APPELLANT
WWC HOLDING CO., INC.