

2000

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *WWC Holding Co., Inc v. Public Service Commission of Utah*, No. 20000835.00 (Utah Supreme Court, 2000).
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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.)	

SUPPLEMENTAL ADDENDUM TO
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

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UTAH

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63-46b-17. Judicial review -- Type of relief. (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

Enacted by Chapter 161, 1987 General Session

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Last revised: Wednesday, April 25, 2001

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Western Wireless Corporation)	
Petition for Preemption of an)	
Order of the South Dakota)	
Public Utilities Commission)	

DECLARATORY RULING

Adopted: July 11, 2000

Released: August 10, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this Declaratory Ruling, we provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) of the Communications Act of 1934, as amended, (the Act) requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier (ETC) that may receive federal universal service support.¹ We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the interpretation of section 214(e)(1) in pending state commission and judicial proceedings.² We believe the guidance provided in this Declaratory Ruling will assist state commissions in acting expeditiously to fulfill their obligations under section 214(e) to designate competitive carriers as eligible for federal universal service support.

¹ The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. See 5 U.S.C. § 554(e), 47 C.F.R. § 1.2.

See, e.g., Letter from Competitive Universal Service Coalition, to Chairman William E. Kennard, FCC, dated March 8, 2000 at 2, 6; Letter from Gene DeJordy, Western Wireless, to Chairman William E. Kennard, FCC, dated March 29, 2000 at 1-2; *Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, filed by Western Wireless (June 23, 1999) (*Western Wireless petition*); *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Notice of Appeal to the Supreme Court of South Dakota, Civ. 99-235, filed by the South Dakota Public Utilities Commission (May 10, 2000) (South Dakota PUC Notice of Appeal).

2 We believe that interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of section 253(a) of the Act. We find that such an interpretation of section 214(e)(1) is not competitively neutral, consistent with section 254, and necessary to preserve and advance universal service, and thus does not fall within the authority reserved to the states in section 253(b). In addition, we find that such a requirement conflicts with section 214(e) and stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress as set forth in section 254. Consequently, under both the authority of section 253(d) and traditional federal preemption authority, we find that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress. We believe that the guidance provided in this Declaratory Ruling will further the goals of the Act by ensuring that new entrants have a fair opportunity to provide service to consumers living in high-cost areas.

3 We note that Western Wireless has raised similar issues in its petition for preemption of a decision of the South Dakota Public Utilities Commission (South Dakota PUC).³ In its petition, Western Wireless asks the Commission to preempt, under section 253 and as inconsistent with the Act, the South Dakota PUC's requirement that, pursuant to section 214(e), a carrier may not receive designation as an ETC unless it is providing service throughout the service area. In light of the recent South Dakota Circuit Court decision overturning the South Dakota PUC's decision and granting Western Wireless ETC status in each exchange served by non-rural telephone companies in South Dakota, we believe that it is unnecessary to act on the Western Wireless petition at this time.⁴ In doing so, we note that section 253(d) requires the Commission to preempt state action only "to the extent *necessary* to correct such violation or inconsistency."⁵ We acknowledge, however, that the *South Dakota Circuit Court Order* has been automatically stayed with the filing of the South Dakota PUC's notice of appeal to the Supreme Court of South Dakota.⁶ We therefore place Western Wireless' petition for preemption of the South Dakota PUC Order in abeyance pending final resolution of this appeal.⁷ The Commission

See Western Wireless petition. Comments cited herein are in response to this petition. *See also The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Finding of Facts and Conclusions of Law, Notice of Entry of Order Before the Public Utilities Commission of the State of South Dakota TC98-146 (May 19, 1999).

⁴ *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000) (*South Dakota Circuit Court Order*) (concluding that the South Dakota PUC erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC.)

⁵ 47 U.S.C. § 253(d) (emphasis added).

⁶ *See* South Dakota Codified Laws § 15-26A-38.

⁷ South Dakota PUC Notice of Appeal.

will make a determination at that time as to whether it is necessary to proceed consistent with the guidance provided in this Declaratory Ruling.

II. BACKGROUND

A. The Act

4. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."⁸ Section 214(e)(2) provides that "[a] State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [subsection 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission."⁹

5. Section 214(e)(1) provides that:

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.¹⁰

6. Section 253 establishes the legal framework for Commission preemption of a state statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the competitive provision of telecommunications service. The Commission has interpreted and applied this standard on a number of occasions.¹¹ First, the Commission must determine whether

⁸ 47 U.S.C. § 254(e).

⁹ 47 U.S.C. § 214(e)(2).

¹⁰ 47 U.S.C. § 214(e)(1).

¹¹ See, e.g., *American Communications Services, Inc., MCI Telecommunications Corp. Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act, as amended*, Memorandum Opinion and Order, CC Docket No. 97-100, FCC 99-386 (rel. Dec. 23, 1999); *Pittencreeff Communications, Inc., for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd 1735 (1997) *aff'd* *CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (*Pittencreeff Communications, Inc.*); *Silver Star Telephone Company, Inc., Petition for Preemption and* (continued....)

the challenged law, regulation, or requirement violates section 253(a). Specifically, the Commission examines whether the state provision “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹²

7. If the Commission finds that the state requirement violates section 253(a), then it will determine whether it is nevertheless permissible under section 253(b). The criteria set forth in section 253(b) preserve the states’ ability to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service.¹³ The Commission has held that a state program must meet all three criteria – it must be “competitively neutral,” “consistent with Section 254,” and “necessary to preserve and advance universal service” – to fall within the “safe harbor” of section 253(b).¹⁴ The Commission has preempted state regulations for failure to satisfy even one of the three criteria.¹⁵ If a requirement otherwise impermissible under section 253(a) does not satisfy section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d).¹⁶

B. Federal Preemption Authority

8. The Supremacy Clause of the Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions.¹⁷ As explained by the United States Supreme Court:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation

(Continued from previous page)

Declaratory Ruling, Memorandum Opinion and Order. CCB Pol 97-1, 12 FCC Rcd 15639 (1997) (*Silver Star*) *reconsideration denied*, 13 FCC Rcd 16356 (1998) *aff’d*, *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

¹² 47 U.S.C. § 253(a).

¹³ 47 U.S.C. § 253(b).

¹⁴ *Pittencrieff Communications, Inc.*, 13 FCC Rcd at 1752, para. 33.

¹⁵ For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the “competitive neutrality” criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

¹⁶ 47 U.S.C. § 253(d). (“If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”).

¹⁷ *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986).

and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.¹⁸

It is well established that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations."¹⁹

III. DISCUSSION

A. Section 253(a) Analysis

1. Background

9. In order to determine whether a section 253(a) violation has occurred, we must consider whether the cited statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²⁰ We therefore examine whether the requirement that a carrier must be providing service throughout the service area prior to designation as an ETC "may prohibit or have the effect of prohibiting" carriers that are not incumbent LECs from providing telecommunications service.

2. Discussion

10. We find that requiring a new entrant to provide service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of the new entrant to provide intrastate or interstate telecommunications service, in violation of section 253(a).

11. Legal Requirement. As an initial matter, we find that the requirement that a new entrant must provide service throughout its service area as a prerequisite to designation as an ETC under section 214(e) constitutes a state "legal requirement" under section 253(a). We have previously concluded that Congress intended the phrase, "[s]tate or local statute or regulation, or other State or local requirement" in section 253(a), to be interpreted broadly.²¹ The resolution of

¹⁸ *Id.* at 368-369 (citations omitted).

¹⁹ *Id.* at 369; *Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

²⁰ See 47 U.S.C. § 253(a).

²¹ See *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, CC Docket No. 98-1, FCC 99-402 (rel. Dec. 23, 1999) (concluding that an agreement between a developer and the State creates a "legal requirement" subject to section 253 preemption) at paras. 17-18 (continued . . .)

a carrier's request for designation as an ETC by a state commission is legally binding on the carrier and may prohibit the carrier from receiving federal universal service support. We find therefore that any such requirement constitutes a "legal requirement" under section 253(a).

12. Prohibiting the Provision of Telecommunications Service. We find that an interpretation of section 214(e) requiring carriers to provide the supported services throughout the service area prior to designation as an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service.²² A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.

13. No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support.²³ We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support.²⁴ In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.

14. In addition, we find such an interpretation of section 214(e)(1) to be contrary to the meaning of that provision. Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services.²⁵ The language of

(Continued from previous page)

(*Minnesota Declaratory Ruling*). "We believe that interpreting the term 'legal requirement' broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition." *Id.*

²² See, e.g., ALTS comments at 3-5; AT&T comments at 7-9; CTIA reply comments at 4; Minnesota PUC comments at 2; PCIA comments 4-5; Washington UTC reply comments at 3.

²³ *Western Wireless petition* at 8.

²⁴ See *Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285 (Oct. 27, 1999) (*Minnesota PUC Order*) at 7.

²⁵ 47 U.S.C. § 214(e)(1).

the statute does not require the actual provision of service prior to designation.²⁶ We believe that this interpretation is consistent with the underlying congressional goal of promoting competition and access to telecommunications services in high-cost areas. In addition, this interpretation is consistent with the Commission's conclusion that a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier "and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support."²⁷

15. In addition, we note that ETC designation only allows the carrier to become *eligible* for federal universal service support. Support will be provided to the carrier only upon the provision of the supported services to consumers.²⁸ We note that ETC designation prior to the provision of service does not mean that a carrier will receive support without providing service.²⁹ We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.

16. In addition, we believe the fact that a carrier may already be providing service within the state prior to designation is not conclusive of whether the carrier can reasonably be expected to provide service throughout the service area, particularly in high-cost areas, prior to designation. While a requirement that a carrier be providing service throughout the service area may not affect the provision of service in lower-cost areas, it is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas.³⁰

17. Gaps in Coverage. We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer.³¹ We believe the ETC requirements should be no

²⁶ See, e.g., *Western Wireless Corporation Designated Eligible Carrier Application*, Findings of Fact, Conclusions of Law and Order, North Dakota Public Service Commission, Case No. PU-1564-98-428 (Dec. 15, 1999) (*North Dakota Order*); *Minnesota PUC Order*. See also Washington UTC reply comments at 3-5.

²⁷ *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8876, 8853, para. 137 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) *cert. granted*, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) (*Universal Service Order*) (emphasis in original).

²⁸ *Universal Service Order*, 12 FCC Rcd 8853, para. 137.

²⁹ Washington UTC reply comments at 4.

³⁰ ALTS comments at 4-5.

³¹ See *Minnesota PUC Order* at 11, concluding that, "[a]ll carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same build-out capacity as the (continued....)

different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC.³² Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.

18. State Authority. Finally, although Congress granted to state commissions, under section 214(e)(2), the primary authority to make ETC designations, we do not agree that this authority is without any limitation.³³ While state commissions clearly have the authority to deny requests for ETC designation without running afoul of section 253, the denials must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service. We believe that this is consistent with sections 214(e), 253, and 254, as well as the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*.³⁴ We reiterate, however, that the state commissions are primarily responsible for making ETC designations. Nothing in this Declaratory Ruling is intended to undermine that responsibility. In fact, it is our expectation that the guidance provided in this Declaratory Ruling will enable state commissions to move expeditiously, in a pro-competitive manner, on many pending ETC designation requests.

B. Section 253(b) Analysis

1. Background

19. Section 253(b) preserves the state's authority to impose a requirement affecting

(Continued from previous page) _____

incumbents, and the potential need for build-out is no reason to deny ETC status." *See also North Dakota Order* at para 36, concluding that, "[a] requirement to be providing the required universal services to 100% of a service area before receiving designation as an ETC could be so onerous as to prevent any other carrier from receiving the ETC designation in any service area and would require the Commission to rescind the ETC designation already given to North Dakota ILECs and Polar Telecom, Inc."

³² *See, e.g., Minnesota PUC Order* at 10-11; *North Dakota Order* at para 36; Washington UTC reply comments at 5-6. *See also South Dakota Circuit Court Order*, Conclusions of Law at para 12.

³³ *See, e.g., Coalition of Rural Telephone Companies* comments at 12 (contending that state decisions under section 214(e) should not be reviewed under section 253); *South Dakota PUC* comments at 9 (contending that preemption may not be granted because the South Dakota PUC exercised a power lawfully delegated to it by Congress in a manner consistent with federal law)

³⁴ *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 n.31 (5th Cir. 1999) *cert. granted*, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) ("if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate' more than one carrier.").

the provision of telecommunications services in certain circumstances.³⁵ Section 253(b) allows states to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.³⁶ Section 253(d) requires that we preempt such requirements unless we find that they meet each of the relevant criteria set forth in section 253(b). The Commission has preempted state regulations for failure to satisfy even one of the relevant criteria.³⁷

2. Discussion

20. We find that a requirement to provide the supported services throughout the service area prior to designation as an ETC does not fall within the "safe harbor" provisions of section 253(b). To the contrary, we find that this requirement is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. We therefore find that a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d).

21. Competitive Neutrality. We find that the requirement to provide service prior to designation as an ETC is not competitively neutral. We believe this finding is consistent with the Commission's determination in the *Universal Service Order* that "[c]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."³⁸ At the outset, we believe that, to meet the competitive neutrality requirement in non-rural telephone company service areas, the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants.³⁹ As discussed above, requiring the actual provision of supported services throughout the service area prior to ETC designation unfairly skews the universal service support mechanism in favor of the incumbent LEC. As a practical matter, the carrier most likely to be providing all the supported services throughout the requested designation area before ETC designation is the incumbent LEC.⁴⁰ Without the

³⁵ 47 U.S.C. § 253(b). Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that inhibits entry may still be acceptable.

³⁶ 47 U.S.C. § 253(b).

³⁷ For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

³⁸ *Universal Service Order*, 12 FCC Rcd at 8801, para. 47.

³⁹ We thus would be troubled by a process in which the incumbent LEC were able to self-certify that it meets the criteria for ETC designation, while new entrants were subject to a more rigorous, protracted state proceeding.

⁴⁰ The 1996 Act required carriers to receive an eligible telecommunications carrier designation under section 214(e) to become eligible for federal high-cost support. 47 U.S.C. § 254(e).

assurance of eligibility for universal service funding, it is unlikely that any non-incumbent LEC will be able to make the necessary investments to provide service in high-cost areas.

22. We are not persuaded that such a requirement is competitively neutral merely because the requirement to provide service prior to ETC designation applies equally to both new entrants and incumbent LECs.⁴¹ We recently concluded that the proper inquiry is whether the *effect* of the legal requirement, rather than the method imposed, is competitively neutral.⁴² As discussed above, we find that the result of such a requirement is to favor incumbent LECs over new entrants. Unlike a new entrant, the incumbent LEC is already providing service and therefore bears no additional burden from a requirement that it provide service prior to designation as an ETC. We therefore find that requiring the provision of supported services throughout the service area prior to ETC designation has the effect of uniquely disadvantaging new entrants in violation of section 253(b)'s requirement of competitive neutrality.

23. Consistent with Section 254 and Necessary to Preserve and Advance Universal Service. We find that the requirement to provide service prior to designation as an ETC is not consistent with section 254 or "necessary to preserve and advance universal service."⁴³ To the contrary, we find that such a requirement has the effect of prohibiting the provision of service in high-cost areas. As discussed above, this requirement clearly has a disparate impact on new entrants, in violation of the competitive neutrality and nondiscriminatory principles embodied in section 254.⁴⁴ We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. If new entrants are not provided with the same opportunity to receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and competition in high-cost areas.⁴⁵ Consequently, under an interpretation of section 214(e) that requires new entrants to provide service throughout the service area prior to designation as an

⁴¹ South Dakota PUC comments at 10; South Dakota Independent Telephone Coalition at 31.

⁴² *Minnesota Declaratory Ruling* at para. 51 (emphasis added). "We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their *effect* on the theory that the non-neutral requirement was somehow *imposed* in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 – ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition."

⁴³ 47 U.S.C. § 253(b).

⁴⁴ *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 ("We agree with the Joint Board that an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework.").

⁴⁵ The Commission recognized that, in order to promote competition and the availability of affordable access to telecommunications service in high-cost areas, there must be a competitively neutral support mechanism for competitive entrants and incumbent LECs. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

ETC, the benefits that may otherwise occur as a result of access to affordable telecommunications services will not be available to consumers in high-cost areas. We believe such a result is inconsistent with the underlying universal service principles set forth in section 254(b) that are designed to preserve and advance universal service by promoting access to telecommunications services in high-cost areas.⁴⁶

24. A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state;⁴⁷ (3) a description of the extent to which the carrier has entered into interconnection and resale agreements;⁴⁸ or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.⁴⁹ We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.

C. Federal Preemption Authority

1. Background

25. State regulatory provisions may be preempted when enforcement of a state legal requirement conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵⁰ Preemption may result not only from action taken by Congress, but also from a federal agency acting within the scope of its congressionally delegated authority.⁵¹

26. In section 254, Congress codified the Commission's historical policy of promoting universal service to ensure that consumers in all regions of the nation have access to

⁴⁶ See 47 U.S.C. § 254(b).

⁴⁷ See *North Dakota Order* at para. 39.

⁴⁸ See *North Dakota Order* at para. 34.

⁴⁹ Washington UTC reply comments at 5.

⁵⁰ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984), citing *Hines v. Davidowitz*, 312 U.S. 57, 67 (1941), *State Corporation Commission of Kansas v. FCC*, 787 F.2d 1421, 1425 (10th Cir. 1986). See also *Louisiana PSC*, 476 U.S. at 368-69.

⁵¹ *Louisiana PSC*, 476 U.S. 368-69, citing *Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691.

telecommunications services.⁵² Congress, recognizing that existing universal service support mechanisms were adopted in a monopoly environment, directed the Commission, in consultation with a federal-state Joint Board, to establish support mechanisms for the preservation and advancement of universal service in the competitive telecommunications environment that Congress envisioned.⁵³ Section 254(b) sets forth the underlying principles on which Congress directed the Commission to base policies for the preservation and advancement of universal service. These principles include the promotion of access to telecommunications services in rural and high-cost areas of the nation.⁵⁴ As noted above, consistent with the recommendation of the Joint Board, the Commission adopted the additional guiding principle of competitive neutrality.⁵⁵ In doing so, the Commission concluded that competitive neutrality will foster the development of competition and benefit certain providers, including wireless carriers, that may have been excluded from participation in the existing universal service mechanism.⁵⁶ Section 254(f) also provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."⁵⁷

2. Discussion

27. We find an interpretation of section 214(e)(1) that requires a new entrant to provide service throughout the service area prior to designation as an ETC to be fundamentally inconsistent with the universal service provisions in the 1996 Act. Specifically, we find such a requirement to be inconsistent with the meaning of section 214(e)(1), Congress' universal service objectives as outlined in section 254, and the Commission's policies and rules in implementing section 254. As discussed above, this approach essentially requires a new entrant to provide service throughout high-cost areas prior to its designation as an ETC. We find that such a requirement stands as an obstacle to the Commission's execution and accomplishment of the full objectives of Congress in promoting competition and access to telecommunications services in high-cost areas.⁵⁸ To the extent that a state's requirement under section 214(e)(1) that a new entrant provide service throughout the service area prior to designation as an ETC also involves

⁵² See generally section 254.

⁵³ According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition" Joint Explanatory Statement of the Committee of Conference, H R Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (Joint Explanatory Statement).

⁵⁴ See 47 U.S.C. § 254(b)(3).

⁵⁵ *Universal Service Order*, 12 FCC Rcd at 8801-8803, paras. 47-51.

⁵⁶ *Universal Service Order*, 12 FCC Rcd at 8802, para. 49.

⁵⁷ 47 U.S.C. § 254(f).

⁵⁸ See Joint Explanatory Statement at 113.

matters properly within the state's intrastate jurisdiction under section 2(b) of the Act,⁵⁹ such matters that are inseparable from the federal interest in promoting universal service in section 254 remain subject to federal preemption.⁶⁰

28. Section 214. We find that the requirement that a carrier provide service throughout the service area prior to its designation as an ETC conflicts with the meaning and intent of section 214(e)(1). Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services.⁶¹ The statute does not require a carrier to provide service prior to designation. As discussed above, we have concluded that a carrier cannot reasonably be expected to enter a high-cost market prior to its designation as an ETC and provide service in competition with an incumbent carrier that is receiving support. We believe that such an interpretation of section 214(e) directly conflicts with the meaning of section 214(e)(1) and Congress' intent to promote competition and access to telecommunications service in high-cost areas.⁶²

29. While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements. Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers.⁶³ To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.

30. Section 254. Consistent with the guidance provided above, we find a requirement that a carrier provide service prior to designation as an ETC inconsistent with the underlying principles and intent of section 254. Specifically, section 254 requires the Commission to base policies for the advancement and preservation of universal service on principles that include promoting access to telecommunications services in high-cost and rural areas of the nation.⁶⁴ Because section 254(e) provides that only a carrier designated as an ETC under section 214(e) may be eligible to receive federal universal service support, an interpretation of section 214(e) requiring carriers to provide service throughout the service area prior to designation as an ETC

⁵⁹ 47 U.S.C. § 152(b).

⁶⁰ See *Louisiana Public Service Commission v. FCC*, 476 U.S. at 368-69, *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 730 (1999); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 423.

⁶¹ 47 U.S.C. § 214(e)(1).

⁶² See Joint Explanatory Statement at 113. See also *supra* section III.B for discussion of competitive neutrality.

⁶³ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 418 n.31.

⁶⁴ See 47 U.S.C. § 254(b)(3).

stands as an obstacle to the accomplishment of the congressional objectives outlined in section 254.⁶⁵ If new entrants are effectively precluded from universal service support eligibility due to onerous eligibility criteria, the statutory goals of preserving and advancing universal service in high-cost areas are significantly undermined.

31 In addition, such a requirement conflicts with the Commission's interpretation of section 254, specifically the principle of competitive neutrality adopted by the Commission in the *Universal Service Order*.⁶⁶ In the *Universal Service Order*, the Commission stated that, "competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework."⁶⁷ As discussed above, a requirement to provide service throughout the service area prior to designation as an ETC violates the competitive neutrality principle by unfairly skewing the provision of universal service support in favor of the incumbent LEC. As stated in the *Universal Service Order*, "competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers."⁶⁸ Requiring new entrants to provide service throughout the service area prior to ETC designation discourages "emerging technologies" from entering high-cost areas. In addition, we note that section 254(f) provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."⁶⁹ For the reasons discussed extensively above, we find an interpretation of section 214(e) requiring the provision of service throughout the service area prior to designation as an ETC to be inconsistent with the Commission's universal service policies and rules.

⁶⁵ 47 U.S.C. § 254(e).

⁶⁶ *Universal Service Order*, 12 FCC Rcd at 8801 para. 47.

⁶⁷ *Universal Service Order*, 12 FCC Rcd at 8801-02, para. 48 (emphasis added).

⁶⁸ *Universal Service Order*, 12 FCC Rcd at 8803, para. 50.

⁶⁹ 47 U.S.C. § 254(f).

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 253, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 253, and 254, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, and Article VI of the U.S. Constitution, that this Declaratory Ruling IS ADOPTED.

33. IT IS FURTHER ORDERED that Western Wireless' Petition for Preemption of an Order of the South Dakota Public Utilities Commission shall be placed in abeyance pending resolution of the appeal.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re. Federal-State 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.

I dissent from today's Declaratory Ruling. It is not necessary for the Commission to issue this advisory statement, and its ruling is inconsistent with section 253's plain mandate and with past Commission precedent interpreting that provision. Indeed, the Commission rests its section 253 analysis upon a factual predicate that does not exist. Moreover, the South Dakota PUC has permissibly interpreted section 214(e)(1), and it is inappropriate for the Commission to override the PUC's determination.

This Declaratory Ruling Is Unnecessary. To begin with, there is no need for the Commission to issue an advisory statement concerning the South Dakota Public Utilities Commission's decision. A South Dakota trial court has vacated the PUC's order, and an appeal is currently pending in the South Dakota Supreme Court.¹ There is no reason to think that the state supreme court will not appropriately resolve the issue. Further, contrary to the Commission's assertions,² this order will be of no assistance to other state commissions. No other state commissions have interpreted section 214 in the way that the South Dakota PUC has done, nor have other state commissions indicated that they plan to adopt the South Dakota PUC's interpretation of section 214. There is therefore no need for the Commission to offer "guidance" on this issue.

The Commission Has Improperly Applied Section 253. Not only is the Commission's ruling unnecessary, but also its preemption analysis is faulty. Oddly, although the Commission claims that the purpose of this order is to "provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) . . . requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier,"³ it devotes the bulk of its discussion to preemption under section 253.

First, even if it were appropriate for the Commission to issue a statement regarding its understanding of section 214(e) – which it is not – there is no reason for it also to address section 253 preemption. Moreover, by issuing an advisory statement regarding section 253, the Commission wades into dangerous waters. Section 253(d) specifies that the Commission should

¹ See *Federal-State 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, at ¶ 3 (hereinafter "*Declaratory Ruling*"); *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000).

² See *Declaratory Ruling* at ¶ 1.

³ *Declaratory Ruling* at ¶ 1.

preempt state regulations only "to the extent necessary to correct . . . a violation or inconsistency [with sections 253(a) and (b)]." In view of this statutory directive, it is inappropriate for the Commission to issue *any* advisory statement regarding section 253. Quite simply, how can it be "necessary" for the Commission to act to correct a violation of sections 253(a) or (b) where, as here, a court has vacated the state PUC's order, and no state requirement even exists?

Even assuming that the South Dakota PUC's order presented an issue that could appropriately be addressed under section 253, the Commission's application of that provision to South Dakota's requirement is inconsistent with the statute's plain language. Section 253(a) proscribes only those state requirements that "*may prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."⁴ It is impossible to understand how failing to assign a new carrier eligible telecommunications carrier status could "prohibit" or had the "effect of prohibiting" it from providing service in South Dakota. The Declaratory Ruling asserts that "[a] new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas."⁵ Amazingly, however, the order leaves out the fact that in the non-rural areas of South Dakota, the incumbent does *not* receive federal universal support for *any* of the non-rural lines it serves. In other words – and contrary to the linchpin of the Commission's reasoning here – designation as an ETC confers *no* benefit at all upon the non-rural incumbent carrier that has received that status, and there is no factual basis for concluding that another carrier's lack of ETC status could have the effect of prohibiting that carrier from offering service.

To be sure, incumbent carriers that serve rural areas in South Dakota do receive some federal universal service support. But whether to designate more than one carrier as an ETC in these rural areas lies *entirely* within the South Dakota PUC's discretion, and I do not understand the majority to question that principle, which is dictated by the 1996 Act and our precedent.⁶ A state commission remains free to decline to grant an applicant ETC status for rural areas, based on public interest considerations, and this order can have no effect on its exercise of that discretion.

In addition to being incompatible with section 253's plain language, the Commission's interpretation of this provision is not consistent with this agency's precedent. The Commission

⁴ See 47 U.S.C. § 253(a) (emphasis added).

⁵ *Declaratory Ruling* at ¶ 12.

⁶ See 47 U.S.C. § 214(e)(2) ("Upon request and consistent with the public interest, convenience, and necessity, the State commission *may*, in the case of an area served by a rural telephone company, designate more than one common carrier as an eligible telecommunications carrier for a service area * designated by the State commission, so long as each additional requesting carrier meets the requirements of [§ 214(e)(1)]") (emphasis added), *Federal-State Joint Board On Universal Service*, 12 FCC Rcd 8776 (¶ 135) (1997) ("[T]he 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.")

pretends that its prior decisions support its preemption of the South Dakota PUC's order. But an examination of the facts of these cases demonstrates just the opposite. In its past decisions, the Commission has indicated that section 253 preemption is appropriate only if a state requirement is so burdensome it effectively precludes a provider from providing service, and it previously has refused to preempt state requirements that fall short of that standard.

For example, the majority cites *Pittencrieff Communications Inc.* as support for its preemption analysis here.³ But the Commission did *not* preempt the Texas requirement at issue in that case, which required all carriers, including the petitioner, a commercial mobile radio service provider operating in Texas, to contribute to the state universal service fund.⁹ The Commission ruled that the requirement did not prohibit a CMRS provider from entering the market since it applied to *all* telecommunications providers operating in Texas.¹⁰ Indeed, the logic applied in *Pittencrieff* compels the conclusion that preemption is inappropriate here – the South Dakota PUC's requirement that, in order to qualify as an eligible telecommunications carrier under section 214(e), a carrier must currently be providing service to subscribers, applies to incumbents and new entrants alike.¹¹

The Commission's decision is also at odds with its recent decision rejecting Minnesota's petition for a declaration that its contract with a fiber optics developer was permissible under the 1996 Act. Under the contract at issue, the developer was to receive exclusive access to freeway rights-of-way in Minnesota in exchange for installing 1,900 miles of fiber optic cable and allowing the state to use some of that cable. For procedural reasons, the Commission did not preempt Minnesota's contract.¹² Nevertheless, it determined that the contract posed grave problems under section 253, in that it gave a single developer what amounted to a monopoly on freeway rights-of-way. The contract would essentially have precluded later entrants from gaining access to the freeway rights-of-way to lay their own fiber optic cable for ten years,¹³ and it would have been prohibitively expensive for competitors to purchase alternative rights-of-way.¹⁴ In view of these facts, the Commission determined that the agreement potentially ran afoul of section 253 because it singled out one provider for preferential treatment, while

³ See e.g., *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, CC Docket No. 98-1, ¶ 32 (rel. Dec. 23, 1999) (hereinafter "*Minnesota Declaratory Ruling*").

⁸ *Declaratory Ruling* at ¶ 7.

⁹ See *Pittencrieff*, 13 FCC Rcd 1735 [¶ 2].

¹⁰ See *id.* at 1751-1752, ¶ 32.

¹¹ See *Declaratory Ruling* at ¶ 23.

¹² See *Minnesota Declaratory Ruling*, *supra* note 21, at ¶ 64.

¹³ See *id.* at ¶¶ 1 & 19.

¹⁴ See *id.* at ¶¶ 22-36.

effectively prohibiting others from entering the market altogether. Similarly, in *New England Public Communications Council Petition for Preemption Pursuant to Section 253*,¹⁵ a state requirement had the effect of completely preventing independent payphone providers from entering the payphone market, in direct contravention of section 276 of the 1996 Act.¹⁶ Consistent with section 253(a), the Commission preempted the requirement.

The South Dakota PUC, by contrast, has not accorded preferential treatment to any carrier. Rather, it has simply directed that a carrier that wishes to be designated an eligible telecommunications carrier under section 214 show that it currently provides service in the areas in which it seeks ETC status. Even if ETC status conferred some benefit on a carrier (which it clearly does not), I do not understand how a generally applicable rule such as this one could "prohibit" or have the "effect of prohibiting" the ability of a carrier to provide telecommunications services within the meaning of section 253.

The South Dakota PUC's Construction of Section 214(e) Is Permissible. The South Dakota PUC, in ruling that a carrier may not receive ETC designation unless it currently provides service throughout the service area, has permissibly construed section 214(e)(1). That provision states that a common carrier designated as an eligible telecommunications carrier "*shall, throughout the service area for which the designation is received . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c).*"¹⁷ The verbs "shall" and "offer" are used the present tense, and the South Dakota PUC reasonably concluded that these terms mean that a carrier must *presently* offer its service throughout the service area before it may be designated an ETC and may not merely *intend* to offer that service at some point in the future. Although other state commissions might interpret section 214(e)(1) differently, the South Dakota PUC's interpretation of that provision is clearly permissible.

Indeed, in order to override the South Dakota PUC's determination and reach the outcome it prefers, the Commission must manufacture a far more strained definition of the term "to offer." "To offer," the Commission reasons, has nothing to do with whether an entity actually provides service or is immediately capable of providing that service upon a customer's request. The Commission stretches the statute's language past the breaking point. If Congress had intended for carriers to be eligible telecommunications carriers based simply on a readiness to provide service, it could easily have said so. And the Commission's construction of section 214(e)(1) effectively reads out of the Act one of the provision's chief requirements. If carriers may qualify for ETC status based merely on their "readiness" to make service available, section 214(e)(1) becomes nothing more than a self-certification provision, a result that is plainly at odds with the statute's intent. It is elementary that a construction that renders a statutory provision superfluous must be avoided, and the Commission has ignored that principle here.¹⁸

¹⁵ 11 FCC Rcd 19713 (1996) (hereinafter "*New England Public Communications*")

¹⁶ See *New England Public Communications*, 11 FCC Rcd at 19726-19727 [¶¶ 27-30].

¹⁷ 47 U.S.C § 214(e).

¹⁸ See, e.g., *Kawaauhau v. Geiger*, 523 U.S. 57, 62 118 S.Ct. 974, 977 (1998); *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519-520 (1955).

* * * * *

Because the Commission's decision is unnecessary, inconsistent with sections 253, and improperly overrides the South Dakota PUC's application of section 214(e), I dissent from this Declaratory Ruling.

IN DISTRICT COURT, COUNTY OF BURLEIGH, STATE OF NORTH DAKOTA

Western Wireless Corporation,

Appellant,

vs.

Rural Telephone Company Group,
US West Communications, Inc., and
North Dakota Public Service
Commission,

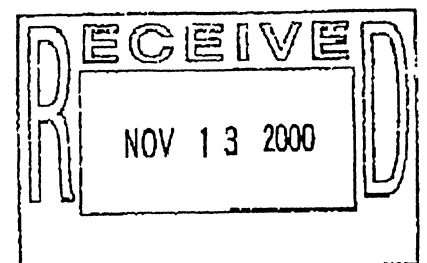
Appellees.

Civil No. 00-C-1800

MEMORANDUM OPINION
AND ORDER

In August 1998, Appellant, Western Wireless, filed an application with the North Dakota Public Service Commission (PSC). Western Wireless requested that the PSC designate it as an eligible telecommunications carrier (ETC) in North Dakota. The Appellees, Rural Telephone Company Group and U S West Communications, opposed the designation of Western Wireless as an ETC in North Dakota.

On December 15, 1999, the PSC issued its Findings of Fact, Conclusions of Law and Order (hereinafter, "First Order"). In the First Order, the PSC conditionally designated Western Wireless as an ETC in the non-rural service areas of North Dakota, which in effect designated Western Wireless as an ETC in the urban areas served by U S West. The PSC also indicated in the First Order that it did not have sufficient evidence to determine whether it would be in the public interest to designate Western Wireless as an ETC in the rural service areas of North Dakota. Therefore, another hearing before the PSC took place on January 31, 2000.



After the hearing on January 31, 2000, the PSC issued its Second Findings of Fact, Conclusions of Law and Order on April 26, 2000. (hereinafter, "Second Order"). In the Second Order, the PSC determined that it would not be in the public interest to designate Western Wireless as an ETC in North Dakota's rural service areas. Based on that determination, the PSC denied the application of Western Wireless to be designated as an ETC in the rural service areas served by the Rural Telephone Company Group member companies. Western Wireless filed a Notice of Appeal dated May 26, 2000, appealing the PSC's Second Order. Western Wireless raises three issues in this appeal.

The first issue raised by Western Wireless is whether the PSC made adequate findings of fact to support its decision to deny Western Wireless' ETC application in its Second Order. An agency is required to state explicit and concise findings of fact. N.D.C.C. § 28-32-13(1). Recitation of testimony is not equivalent to stating findings of fact. Matter of Estate of Dittus, 497 N.W.2d 415, 419 (N.D. 1993); Evans v. Backes, 437 N.W.2d 848, 850 (N.D. 1989).

Paragraphs nine through thirty-three of the PSC's Second Order merely recite some of the testimony and arguments presented by the parties. Paragraph thirty-four concludes that "it is not in the public interest to grant Western (Wireless) ETC status." However, it is unclear from the Order just how the PSC reached this conclusion as the findings of fact only recite the arguments of the parties. The Court finds that the PSC failed to make adequate findings of fact in its Second Order to support its decision to deny Western Wireless' ETC application.

The second issue raised in this appeal by Western Wireless is whether the PSC should have relied on the sufficiency of the Federal Communications Commission's (FCC) federal universal service support mechanisms or lack of a state universal service fund to support its denial of Western Wireless' ETC application based on the "public interest." In paragraph two of the PSC's Second Order, the PSC stated that it would (if requested) re-open this case "after the FCC Federal-State Joint Board on Universal Service recommends and the FCC provides funds to adequately support universal service in high cost areas. The same consideration will prevail when the North Dakota Legislature establishes a state universal service fund. . . ." Second Order p. 13, ordering paragraph 2.

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. See Alenco Communications, Inc. v. FCC, 201 F.3d 608 (5th Cir. 2000) (upholding the FCC's funding rules against these exact challenges and finding that the FCC has successfully provided for specific, predictable and sufficient mechanisms to support competitive universal service).

The Telecommunications Act of 1996 contemplates that separate universal service funds would be established at both the state and federal levels. See 47 U.S.C. § 254(a) and (e) (regarding federal universal service support), and § 254(f) (regarding state authority to adopt universal service regulations not inconsistent with the Act). 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.

This Court must affirm the decision of the PSC unless it is not in accordance with the law. N.D.C.C. § 28-32-19(1). The Court finds that the Second Order is not in accordance with federal law because the PSC considered the sufficiency of the FCC's federal universal support mechanisms and the lack of a state universal service fund when it denied Western Wireless' ETC application based on the "public interest."

The third and final issue raised by Western Wireless in this appeal is whether the PSC properly applied its stated "public interest" standard in considering Western Wireless' ETC application. Western Wireless argues that in the Second Order, the PSC failed to properly apply the "public interest standard" that the PSC had identified in paragraph forty-seven of the First Order of December 15, 1999.

The appealing party of an administrative agency decision is required to file specifications of error "specifying the grounds on which the appeal is taken." N.D.C.C. § 28-32-15(4). The North Dakota Supreme Court has said that "(t)he time has come to compel compliance with the specificity requirement of § 28-32-15(4), N.D.C.C. Summary affirmance of an administrative agency decision is appropriate if an appellant's specifications of error 'fail to specifically identify any error with any particularity.'" Vetter v. North Dakota Workers Compensation Bureau, 554 N.W.2d 451, 454 (N.D. 1996) (citing Maginn v. North Dakota Workers Compensation Bureau, 550 N.W.2d 412, 417 (N.D. 1996) (Sandstrom, J., concurring); Held v. North Dakota Workers Compensation Bureau, 540 N.W.2d 166, 171 (N.D. 1995) (Sandstrom, J., concurring)).

Western Wireless is the appealing party in this matter. Western Wireless did not raise the issue of misapplication of a previously stated "public interest standard" in its May 26, 2000 Specifications of Error. Therefore, Western Wireless is precluded from raising and arguing that issue in this appeal.

ORDER

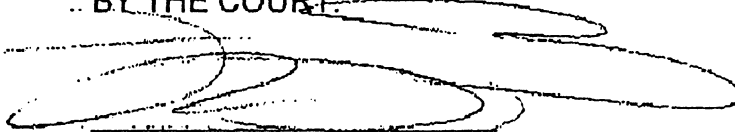
Based on the foregoing, the Second Order of the PSC, dated April 26, 2000, is **REVERSED AND REMANDED**. On Remand the PSC is instructed to issue an Order consistent with the requirements of N.D.C.C. Chapter 28-32. More specifically, the PSC is instructed to:

1. Prepare more specific findings of fact to support its decision to deny Western Wireless' ETC application.
2. Not consider the sufficiency of the FCC's federal universal support mechanisms or lack of a state universal service fund in making its public interest determination.

Dated this 9th day of November, 2000

CV-00-C-1800

.. BY THE COURT:



Norman J. Backes
Judge of the District Court
East Central Judicial District

Decision No. C01-476

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00K-255T

DOCKET NO. 00A-174T

IN THE MATTER OF WESTERN WIRELESS HOLDING CO., INC.'S
APPLICATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS
PROVIDER PURSUANT TO 4 CCR 723-41-8.

DOCKET NO. 00A-171T

IN THE MATTER OF WESTERN WIRELESS HOLDING CO., INC.'S
APPLICATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS
CARRIER PURSUANT TO 4 CCR 723-42-7.

DECISION ON EXCEPTIONS

Mailed Date: May 4, 2001
Adopted Date: March 14, 2001

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MAY 08 2001

I. BY THE COMMISSION

A. Statement

This matter comes before the Commission for consideration of Exceptions to Decision No. R01-19 ("Recommended Decision"). In that decision, the Administrative Law Judge ("ALJ") recommended that Western Wireless Holding Company, Inc.'s ("Western Wireless") applications be granted, and that the Stipulation between Western Wireless and intervenors, the Office of Consumer Counsel ("OCC") and Commission Staff ("Staff") be approved. Pursuant to § 40-6-109(2), C.R.S., the Colorado Telecommunications Association ("CTA") and Qwest Corporation ("Qwest") filed Exceptions to the Recommended Decision. Western Wireless, the OCC, and Staff filed a Joint Response to the Exceptions. Now being duly advised in the premises, we will deny the Exceptions, in part, and grant them, in part.

B. Discussion

1. Introduction

a. This consolidated proceeding (Docket No. 00K-255T) concerns Western Wireless' application for designation as an Eligible Telecommunications Carrier ("ETC") and its application for designation as an Eligible Provider

("EP").¹ The Commission consolidated the two applications. Designation as an ETC will enable Western Wireless to receive federal universal service support to provide certain telecommunications services. See 47 U.S.C. § 214(e), and Federal Communications Commission ("FCC") Rule 47 C.F.R. § 54.101. Designation as an EP will permit Western Wireless to receive monies from the state High Cost Support Mechanism ("HCSM") to provide telephone service. See § 40-15-208, C.R.S., and Commission Rules Prescribing the High Cost Support Mechanism and Prescribing the Procedures for the Colorado High Cost Administration Fund, 4 *Code of Colorado Regulations* ("CCR") 723-41 ("HCSM Rules"). Both the federal universal service fund and the state high cost fund are intended to promote universal telecommunications service in high cost areas.

b. Under the applicable federal statute and implementing FCC regulations, the state commission designates telecommunications carriers as ETCs within a state. 47 U.S.C. § 214(e), 47 C.F.R. §§ 54.101 and 54.201. Only common carriers may be designated as ETCs and only if, throughout the service area for which they seek ETC designation, they offer all those services eligible for federal universal service support

¹ Western Wireless' application for designation as an EP is Docket No. 00A-174T; the application for designation as an ETC is Docket No. 00A-171T.

(Rule 54.101), and they advertise the availability of such services and the charges therefor in media of general distribution. Where a carrier seeks ETC designation in an area served by a rural telephone company, the state commission must also find that such designation is in the public interest. See 47 U.S.C. § 214(e)(2).

c. The requirements for designation as an EP are set forth in Rule 8, 4 CCR 723-41. Carriers seeking EP designation must demonstrate "substantial compliance with the Commission's rules applicable to the provision of basic local exchange service." Such carriers must apply for designation as an ETC and, provide "such basic local exchange service as described in Sections 214(e) and 254 of the Communications of 1934" throughout the geographic support area. The Commission must also find that such designation serves the public convenience and necessity, as defined in §§ 40-15-101, 40-15-501, and 40-15-502, C.R.S.

d. Before the ALJ, Western Wireless, the OCC, and Staff entered into a Stipulation and Settlement Agreement ("Stipulation"). That Stipulation provides that Western Wireless will receive ETC and EP designation under the conditions specified there. For example: Western Wireless will be designated an ETC immediately in those exchanges (Attachment 1 to the Stipulation) now served by Qwest. In exchanges now

served by CenturyTel (Attachment 2 to the Stipulation), Western Wireless will be designated an ETC pending approval of service area changes by the FCC.² In exchanges served by rural telephone companies (Attachments 3 and 4 to the Stipulation),³ Western Wireless will receive ETC designation effective September 1, 2001, pending any necessary FCC approval of service area changes.⁴ Furthermore, Western Wireless will be designated an EP immediately in Qwest and CenturyTel exchanges. Western Wireless will receive EP designation in rural exchanges effective September 1, 2001.

e. Western Wireless operates as a commercial mobile radio services ("CMRS") provider, and proposes to provide its basic universal service ("BUS") offering to meet ETC and EP requirements through its wireless network. As a CMRS provider, Western Wireless is exempt from state regulation pursuant to 47 U.S.C. § 332. Nevertheless, the Stipulation requires that

² As discussed *infra*, in many instances Western Wireless does not propose to serve the entire service areas of existing rural telephone companies. In these instances, the FCC and the Commission must both approve the revised service areas proposed by Western Wireless.

³ CenturyTel also meets the legal definition of a "rural telephone company" under federal statute, 47 U.S.C. § 153(37). However, the Stipulation distinguishes between CenturyTel and other rural companies because CenturyTel serves many more customers than the other companies, and, as such, is more similar to Qwest than to the small rural carriers.

⁴ Western Wireless will serve the entirety of those rural exchanges listed on Attachment 3 to the Stipulation. However, Western Wireless does not propose to serve the entire service area for those exchanges listed on Attachment 4 to the Stipulation.

Western Wireless provide its BUS offering in accordance with the rates, terms, and conditions contained in Attachments 5 through 7 to the Stipulation. Those Attachments set forth requirements similar to those applicable to local exchange service providers subject to regulation by the Commission. Pursuant to the Stipulation, the Commission may enforce those requirements against Western Wireless.⁵ For example, Western Wireless' BUS customers will be able to file formal complaints with the Commission, and the Commission may enter appropriate orders directing Western Wireless to take certain actions.

f. The ALJ recommended approval of the Stipulation with certain modifications discussed in the Recommended Decision. Qwest and CTA object to the Recommended Decision for the reasons discussed here.

2. Designation of Western Wireless as an EP

a. Both Qwest and CTA challenge Western Wireless' designation as an EP. According to the Exceptions: Western Wireless cannot be designated an EP as a legal matter.

⁵ The stipulating parties recognize that the Commission may not assert regulatory jurisdiction over Western Wireless in contravention of federal statutes. The rates, terms, and conditions set forth in the Stipulation with respect to the BUS offering and the Commission's enforcement authority all relate to Western Wireless' designation as an ETC and an EP. That is, the Stipulation provides for Commission oversight of Western Wireless for purposes of its designation as an ETC and an EP and, consequently, its receipt of federal and state universal support monies. The Commission, under the Stipulation, will not regulate Western Wireless' operations as a CMRS provider.

Section 40-15-208(2)(a), C.R.S., authorizes the Commission to establish the HCSM. Pursuant to that statute, only an entity certificated as a local exchange carrier ("LEC") can be designated as an EP. Certification as a LEC requires that a carrier offer local exchange service, as defined by Commission rules, and comply with all Commission rules applicable to local exchange service, such as the quality of service standards set forth in Commission Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2. Western Wireless is not now certificated as a LEC, and Western Wireless does not intend to obtain such certification. Therefore, Qwest and CTA argue, Western Wireless is legally precluded from being designated an EP.

b. Qwest and CTA further argue that designation of Western Wireless as an EP is discriminatory because it will not be subject to the same regulatory standards as other EPs (i.e., the certificated LECs such as Qwest and the rural LECs). For example, all LECs are required to provide equal access to interexchange carrier service. Western Wireless, however, will not be subject to this requirement under the terms of the Stipulation. Qwest and CTA argue that, to obtain EP status, Western Wireless should be certificated as a LEC, and should comply with all rules and standards applicable to land-line LECs.

c. We disagree with these arguments. While § 40-15-208(2)(a), C.R.S., does state that the purpose of the HCSM is to provide support to "local exchange providers to help make basic local exchange service affordable," the statute does not require certification as a LEC to participate in the HCSM as an EP. Moreover, the interpretation of § 40-15-208(2)(a), C.R.S., advocated by Qwest and CTA would be inconsistent with state and federal law. 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.

d. In §§ 40-15-501 et seq., C.R.S., the Colorado legislature has established the policy of encouraging competition in telecommunications markets, including the basic local exchange market, "to ensure that all consumers benefit from such increased competition." See § 40-15-501(1), C.R.S. We note that for telephone end-users in some high-cost rural areas, it is possible that the only realistic alternatives to incumbent land-line carriers will be wireless providers.

Qwest's and CTA's interpretation of § 40-15-208(2)(a) contravenes the legislature's desire that even consumers in high-cost rural areas benefit from competitive alternatives. Furthermore, in directing the Commission to establish universal support mechanisms for "basic service" in high-cost areas, the legislature mandated that funds from these mechanisms "shall be distributed equitably and on a nondiscriminatory, competitively neutral basis." See § 40-15-502(5), C.R.S. Precluding one class of telecommunications providers (i.e., wireless carriers) from participating in the HCSM as EPs is directly inconsistent with these provisions.

e. With respect to federal law, the Joint Response points out that Qwest's and CTA's interpretation of § 40-15-208(2)(a), C.R.S., an interpretation that would preclude wireless providers from participating in the HCSM as EPs, would likely violate 47 U.S.C. § 253 (state regulation shall not prohibit any entity from providing any telecommunications service). Section 253(b) preserves a state's ability to impose requirements to preserve and advance universal service, providing these requirements are imposed "on a competitively neutral basis." Qwest's and CTA's position here would not result in a competitively neutral outcome.

f. Pursuant to the Stipulation, Western Wireless agrees to provide those services necessary for

designation as an ETC under federal law. Those services include: voice grade access to the public switched telephone network; local usage; dual tone multi-frequency signaling; single-party service; access to emergency service; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income customers. This package of services is substantially similar to the local exchange service offered by regulated LECs. Western Wireless has also agreed to provide its BUS offering subject to the rates, terms, and conditions specified in the Stipulation. Those rates, terms, and conditions are also substantially similar to the rules and standards applicable to regulated LECs. In sum, Western Wireless has agreed to provide service substantially similar to that offered by certificated LECs, at rates, terms, and conditions applicable to these LECs. As such, certification of Western Wireless as an EP fully complies with § 40-15-208(2)(a), C.R.S.

g. Qwest and CTA also object to the Stipulation because Western Wireless will not be required to comply with the identical regulatory requirements applicable to LECs. This, the parties argue, is improperly discriminatory. We disagree. First, we note that presently not even all jurisdictional LECs are regulated in precisely the same manner under federal and state law. For example, both federal and state statutes

recognize that it is appropriate to regulate incumbent LECs ("ILECs") differently than competitive LECs ("CLECs"). ILECs are subject to substantially different requirements than those applicable to CLECs. See 47 U.S.C. §§ 251-252; § 40-15-503, C.R.S. Our rules also recognize that it is appropriate to impose different regulatory requirements on CLECs as compared to ILECs. See Rule 3, Rules Regulating Applications by Local Exchange Telecommunications Providers for Specific Forms of Price Regulation, 4 CCR 723-38. Therefore, the observation that Western Wireless, with respect to its designation as an EP (and ETC), will not be subject to the identical Commission oversight as the LECs is not significant by itself.

h. Second, the requirements applicable to Western Wireless (in its provision of its BUS offering), as specified in the Stipulation, are substantially similar to those applicable to regulated LECs. Witnesses for Staff and the OCC testified that they identified important regulatory standards now applicable to regulated LECs, and included those in the Stipulation to be applicable to Western Wireless. Our review of the Stipulation indicates that Western Wireless' BUS offering will be subject to substantially similar standards as now apply to regulated carriers. Qwest and CTA identify only a few specific instances where Western Wireless will not be subject to the same requirements as apply to incumbent LECs: Western

j. Next, we note that Colorado law does not require that an EP be a POLR. At the present time, only ILECs have been designated as POLRs; no CLEC has received or requested such designation. Designation of all ILECs as POLRs was appropriate. When the local exchange market was opened to competition by state and federal law, the ILECs owned (and still own) ubiquitous telephone networks that were funded, in large part, with monies from ratepayers. Neither Western Wireless nor any other new entrant is in the same position. Therefore, it is insignificant that Western Wireless will not act as a POLR when it becomes an EP and an ETC.

k. CTA's observation that Western Wireless' BUS offering will not be subject to the statutory rate cap is of little moment.⁶ We note that the initial price for the BUS offering is \$14.99, a price comparable to the statutory rate cap applicable to regulated LECs. While Western Wireless may increase the residential BUS rates above that amount, it must notify the Commission of any proposed rate change and the Commission may investigate and disapprove of such a change. Moreover, Western Wireless' rates in excess of any cap applicable to the LECs would give the LECs another competitive

⁶ The "rate cap" referenced by CTA is contained in § 40-15-502(3)(b), C.R.S. That statute sets a cap for residential basic local exchange rates, but does allow for rate increases above the cap for the reasons set forth in the statute.

advantage. As such, this difference in the oversight of Western Wireless, with respect to its designation as an EP, is likely to have no adverse effect on the LECs.

l. The final example of alleged preferential treatment of Western Wireless cited by CTA is that it will be able to establish local calling areas different than those of existing LECs. We agree with the Joint Response that this aspect of Western Wireless' BUS offering may be beneficial to end-users, and is the kind of service differentiation that should come with competitive markets. Some consumers may desire a local service with an expanded local calling area. It is in the public interest to allow for such consumer choice. There is no evidence that this component of Western Wireless' service will significantly harm existing LECs, not even the small rural LECs.

m. In general, the different regulatory oversight of Western Wireless, as compared to existing LECs, entailed in the Stipulation is appropriate. The Stipulation properly recognizes that not all existing regulatory standards that are applicable to land-line carriers should apply to a wireless provider. The Stipulation also establishes standards for the BUS offering that are substantially similar to those standards applicable to regulated local exchange service. Finally, neither Qwest nor CTA presented credible evidence or

argument that the different treatment for Western Wireless adversely affects existing LECs. We agree with the ALJ that Western Wireless' application for certification as an EP should be approved subject to the conditions discussed in this order.

3. ETC Designation and the Public Interest

a. Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. See 47 U.S.C. § 214(e); 47 C.F.R. § 54.201. In its Exceptions, CTA argues that designation of Western Wireless as an ETC in the areas served by rural telephone companies is not in the public interest. According to CTA, such action will have a significant, adverse impact on the rural companies. Those companies now serve few access lines, and likely cannot withstand the competitive challenge from Western Wireless. The Stipulation attempts to address this concern by delaying Western Wireless' entry into the rural areas until September 1, 2001. However, CTA asserts that this provision is insufficient to allow the rural companies to prepare for competition from Western Wireless. In light of the low customer densities and the slow rate of growth in access lines in rural exchanges, delaying designation of Western Wireless as an ETC until

September 1, 2001 will not assist the rural companies in any meaningful way. We disagree with these arguments.⁷

b. The Recommended Decision finds, and we agree, that CTA presented no evidence of any adverse impact on the rural ILECs as a result of granting Western Wireless' applications here. CTA's argument is based upon initial testimony (i.e., prior to the Stipulation) from Staff witness Mitchell raising questions about the potential adverse financial effect on rural carriers if Western Wireless' applications were granted. However, Staff eventually addressed this concern in the Stipulation by agreeing to delay designation of Western Wireless as an ETC until September 1, 2001. This delay, Staff concluded, is sufficient to allow the rural companies to prepare for competition from Western Wireless.⁸

c. The ALJ also concluded that designation of Western Wireless as an ETC would benefit the public in certain respects. Both federal and state statutes establish the public policy of promoting competition in telecommunications markets.

⁷ CTA also asserts that the public-interest standard is unmet because Western Wireless will not provide E9-1-1 and will not, in many instances, serve the entire study area of the rural companies. As discussed, however, an ETC is not legally obligated to provide E9-1-1 service, and Western Wireless will provide the emergency services required of a wireless carrier. Additionally, the discussion *infra* explains that we are not now approving the disaggregated service areas proposed in the Stipulation for Attachment 2 and 4 exchanges.

⁸ Given our decision on disaggregation of rural study areas, the rural ILECs may have even more time to prepare for Western Wireless' entry into their service areas.

See 47 U.S.C. §§ 251-252; §§ 40-15-501 et seq., C.R.S. The ALJ determined that designating Western Wireless an ETC would bring the benefits of competition to the rural areas. These benefits include increased customer choice for basic telephone service, product, and service innovation by telecommunications carriers, and incentives for efficiency on the part of competing carriers. The ALJ further noted that in some rural areas the ILECs cannot serve end-users without the installation of new facilities necessitating line extension charges. As a wireless carrier, Western Wireless could possibly serve these end-users without the need for service extension charges.

d. We agree with this analysis and conclude that designating Western Wireless as an ETC will result in benefits to the public. In light of CTA's failure to offer credible evidence of countervailing adverse impacts on the rural companies, we affirm the ALJ's conclusion that it is in the public interest to designate Western Wireless as an ETC.

4. Commission Oversight of Western Wireless

a. CTA argues that the Commission oversight of Western Wireless, as provided for in the Stipulation, is inadequate in certain ways: (1) the Stipulation does not ensure that the Commission can hear all customer complaints that might arise relating to the BUS offering; (2) the Stipulation fails to provide "meaningful remedies" against Western Wireless in

complaint cases; (3) the Stipulation is silent regarding Commission authority to correct rate abuses and rate discrimination; and (4) the Stipulation inappropriately delegates to Western Wireless the authority to establish local calling areas. The Recommended Decision determined that the Commission oversight provided for in the Stipulation is appropriate and we agree.

b. Notably, implicit in CTA's contention is the suggestion that Western Wireless should be subject to precisely the same requirements as regulated LECs. We rejected that argument in the above discussion. As for CTA's specific objections to the nature of Commission oversight provided for in the Stipulation, we respond: First, the Recommended Decision (pages 10 and 11) confirms that the Commission will have authority to hear formal customer complaints regarding the BUS offering:

Western Wireless has agreed in the Stipulation to a set of terms and conditions under which it will provide its BUS offering...Key provisions of the terms and conditions include the customer service policies, which require customer care personnel to be available 24 hours per day, 7 days per week. The customer care service personnel will attempt to resolve complaints, but will refer persons to the Commission Staff to resolve their complaints. It was clarified at hearing that should the informal mechanism prove insufficient, a customer of Western Wireless's BUS offering would have the right to file a formal complaint with this Commission concerning service problems...

Western Wireless does not dispute the Recommended Decision's clarification. We find that this complaint authority over the BUS offering is appropriate and adequate. As stated above, the Stipulation sets forth comprehensive terms and conditions for the BUS offering. Those terms and conditions are substantially similar to the requirements applicable to regulated LECs. Therefore, we disagree with the suggestion that the complaint authority provided for in the Stipulation is somehow inadequate.

c. The allegation that the Stipulation fails to provide "meaningful remedies" against Western Wireless in complaint cases is also mistaken. The terms and conditions for the BUS offering established in the Stipulation provide for credits and refunds for various occurrences (e.g., interruptions in service, billing errors, and failure by Western Wireless to provide service within prescribed time periods). Additionally, the Recommended Decision points out (page 13) that the Commission has the authority to revoke or suspend Western Wireless' ETC or EP status, or could alter the level of high cost support. Further, the market will provide a more immediate and unforgiving remedy than the Commission ever could. A Western Wireless customer dissatisfied with his service can switch. We conclude that these potential remedies are adequate to ensure that Western Wireless provides acceptable service to

consumers. CTA provided no credible evidence or argument to the contrary.

d. We also disagree with CTA's assertion that the Stipulation gives the Commission no authority to address "rate abuses" or "rate discrimination." Notably, the Stipulation (Attachment 7) specifies the rates and charges for the various components of the BUS offering. Western Wireless has agreed to impose these rates and charges on all BUS customers for the various services. These charges are comparable to those for similar services provided by regulated LECs. Moreover, under the Stipulation, the Commission is empowered to investigate proposed changes to these rates and charges (page 12 of the Stipulation), and Western Wireless will be required to change its rates and charges in response to Commission orders after investigation. These provisions give the Commission ample authority to oversee Western Wireless' BUS service.

e. Finally, CTA's argument that the Stipulation improperly delegates to Western Wireless the authority to establish local calling areas is misguided. The Stipulation (Attachment 6, pages 5 through 7) requires that Western Wireless establish local calling areas considering the community of interest principles and standards set forth there. Those principles and standards are essentially the same as those that

apply to regulated LECs. See Rule 17.3, Commission Rules Regulating Telecommunications Service Providers and Telephone Utilities, 4 CCR 723-2. Additionally, the Stipulation (Attachment 6, page 5) requires that Western Wireless, "...provide local calling areas that include access to a comparable or greater number of access lines as that required of the incumbent carrier...." To the extent Western Wireless will offer to customers expanded local calling areas under the Stipulation, this is to consumers' benefit.

f. For these reasons, we reject CTA's arguments that Commission oversight of Western Wireless, with respect to its BUS offering and for purposes of its continuing designation as an ETC or an EP, is inadequate.

5. Disaggregation of Rural Study Areas

a. As discussed above, designation as an ETC or an EP permits a carrier to receive high cost support for service provided in the "service area" for which the designation is received. Section 214(e)(5) states:

The term 'service area' means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the (Federal Communications) Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

(emphasis added) FCC Rule 47 C.F.R. § 54.207 sets forth specific procedures to be followed by a state commission proposing to define a service area served by a rural company to be other than such company's study area. For example, the petition to the FCC by the state commission must contain the commission's official reasons for adopting a service area different than the rural company's study area. That petition must also include "an analysis that takes into account the recommendations of any Federal-State Joint Board convened to provide recommendations with respect to the definition of a service area served by a rural telephone company." 47 C.F.R. § 54.207(c)(1)(ii).

b. Western Wireless will not serve the entire study areas of those existing rural telecommunications companies listed on Attachments 2 (exchanges now served by CenturyTel) and 4 of the Stipulation.⁹ Western Wireless does not propose to serve the entirety of those study areas due to limitations on its licenses or because of limitations on its existing network. In the Stipulation, Western Wireless, the OCC, and Staff suggest that the Commission "disaggregate" certain rural study areas by

⁹ Attachment 1 relates to Qwest service areas. Because Qwest is not a rural telecommunications company, there is no legal requirement that Western Wireless serve the entirety of the listed study areas in order to be designated an ETC or EP. Neither is Attachment 3 at issue here, because Western Wireless does propose to serve the entire study areas listed there.

adopting each of the exchanges listed on Attachments 2 and 4 as its own ETC and EP service area. In those instances where Western Wireless will not serve the entire study areas of existing rural companies, the Commission, according to the Stipulation, would submit a formal petition to the FCC requesting approval of the new ETC service areas. The Stipulation further proposes that the Commission conduct further proceedings to disaggregate all ETC study areas in the state, especially those study areas not addressed in the Stipulation itself. CTA excepts to these proposals.

c. CTA argues that in order to protect universal service, "avoid gaming of the support system," and to ensure that high-cost monies go to support service to truly high-cost customers, any disaggregation proceedings must involve a two-step process: (1) allocation of support between exchanges; and (2) targeting of support by zone within each exchange. The Stipulation fails to do this. Furthermore, CTA contends, neither does the Stipulation take into account recent guidance from the Joint Board on disaggregation of rural company study areas. CTA suggests that the Commission consider disaggregation of rural study areas in a single proceeding; disaggregated study areas and the amounts of targeted support should be established in that proceeding and be applied to all companies seeking designation as an ETC or EP in rural areas. Finally, CTA

objects to the Stipulation's treatment of CenturyTel. Specifically, CTA notes that CenturyTel is a rural telephone company under federal and state law. Therefore, there is no acceptable reason to treat CenturyTel differently from other rural companies. The Stipulation, nevertheless, would result in immediate designation of Western Wireless as an EP in CenturyTel's study area, even though Western Wireless will not serve the entirety of that study area.

d. The Joint Response states that neither Western Wireless, the OCC, nor Staff objects to future disaggregation proceedings as suggested by CTA. However, the parties contend, Western Wireless' present application should not be delayed pending those future proceedings. Such delay would improperly defer competition in rural areas. The Joint Response suggests that the Commission has already determined that EP designation should be on a wire center basis rather than a study area basis (citing Rule 41-8.2.1.2). Establishing ETC service on a wire center basis is consistent with that existing policy. The Joint Response notes that the Stipulation contemplates further disaggregation proceedings before the Commission (*i.e.*, the long-term disaggregation docket) and the FCC (*i.e.*, the Commission's petition to the FCC to establish new service areas in accordance with the Stipulation). CTA's concerns can be fully addressed in those future cases.

e. We will grant CTA's exceptions on this point. We agree with CTA that, in cases where new entrants will act as ETCs or EPs in rural areas, it is important to "target" high cost support for those areas. This step is necessary to prevent inappropriate practices that could seriously affect the existing rural ILECs, such as "cream-skimming" of customers, especially where a new entrant will not serve the entire study area.

f. With respect to designation of Western Wireless as an ETC, we note that the FCC must specifically agree to the new service areas reflected on Attachments 2 and 4. The Commission, by approving the Stipulation, would essentially endorse the service areas on those Attachments and would commit to filing a formal petition with the FCC consistent with that endorsement. The Commission's petition to the FCC must explain our reasons for suggesting the specific service areas listed in the Attachments and must provide an analysis taking into account the recommendations of the Joint Board. Notably, there is insufficient evidence in this record that would permit us to take these steps--steps that would be necessary to any petition to the FCC. Inasmuch as we are unable at this time to commit to filing a petition with the FCC reflecting the specific service areas suggested in Attachments 2 and 4, we will not approve this portion of the Stipulation.

g. As for Western Wireless' request for EP status in the disaggregated study areas: We again emphasize the importance of targeting all high cost support, including support from the HCSM, before designating additional EPs for rural areas, especially where new entrants do not propose to serve the entirety of the study areas. We also agree with CTA that the Commission should consider disaggregation of rural areas in a proceeding of general applicability. Presently, other companies besides Western Wireless have requested EP designation in rural areas. We also observe that the Joint Response is incorrect in stating that the Commission has already determined that EP designation should be on a wire center basis, rather than a study area basis, for rural companies. Rule 41-8.2.1.2 requires that an EP provide service "throughout the entire Geographic Support Area." Rule 41-2.8 does define "Geographic Area" as an area of land "usually smaller than an incumbent provider's wire center" (emphasis added). However, Rule 41-2.10 defines "Geographic Support Area" as an area "where the Commission has determined that the furtherance of universal basic service requires that support be provided by the HCSM." With respect to rural telephone companies, the HCSM now provides support on a study area basis. Therefore, at this time, the Commission has not endorsed service areas smaller than study areas for rural companies.

h. The Commission agrees with Western Wireless that, as a general matter, telephone competition in all rural areas is likely to be in the public interest. For that reason, the Commission will undertake to disaggregate rural study areas as soon as practically possible. Until that time, however, we do not approve of the Stipulation's proposed disaggregation of Attachments 2 and 4 exchange areas.

i. Finally, we agree with CTA that, because CenturyTel does meet the legal definition of a rural telecommunications company, it should be treated in the same manner as other rural companies with respect to disaggregation of its study areas. Our ruling on Attachment 2, *supra*, resolves CTA's concern.

6. Commission Jurisdiction Over Western Wireless

a. Next CTA argues that the Commission has full regulatory jurisdiction over Western Wireless' BUS offering either as basic local exchange or as a fixed wireless service. The Recommended Decision, CTA notes, concluded that the Commission is preempted from regulating the BUS offering because it is CMRS service under § 332(c)(3) of the Communications Act of 1934. However, CTA points out that the FCC is presently considering whether Western Wireless' BUS offering in Kansas is fixed wireless service and, as such, subject to state regulation.

b. CTA observes that Western Wireless will provide its service using customer premises equipment manufactured by the Telular Corporation ("Telular"). That equipment, unlike a conventional cellular or PCS handset, does not itself provide access to the public switched network. Rather, the Telular unit can provide dial tone only when connected to a telephone, fax, or modem. CTA asserts that in light of the Telular unit's size--it weighs over six pounds equipped with batteries--and the necessity of operating it in conjunction with a telephone, fax, or modem, the BUS offering is really fixed wireless service. This service is subject to full regulation by the Commission.

c. The Joint Response contends: The ALJ correctly determined that the BUS offering is CMRS service not subject to Commission regulation. The Telular unit is a "mobile station" as defined by the FCC (47 C.F.R. § 22.99); it is not affixed to a particular location and can operate while moving. In any event, the Commission need not determine this issue (i.e., whether the BUS offering is exempt from Commission regulation as CMRS) in this docket. As CTA points out, the FCC is now considering whether Western Wireless' BUS offering is CMRS or fixed wireless service.¹⁰ The FCC, not this Commission,

¹⁰ *In the matter of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Order*, Docket No. WT-00-239.

is the proper agency to determine whether Western Wireless' BUS offering is exempt from state regulation as a result of § 332(c)(3). Moreover, even if the BUS offering does not qualify as CMRS service under federal law, the Commission still cannot assert regulatory authority here because cellular service is exempt from regulation under state law, specifically § 40-15-401(1)(b), C.R.S.

d. We agree with the Joint Response that we need not decide whether the BUS offering is subject to Commission regulation as fixed wireless service. At this time, the FCC is the appropriate agency to consider whether Western Wireless' service is CMRS service and exempt from state regulation under § 332(c)(3). In light of the pendency of this issue at the FCC and inasmuch as the Stipulation now ensures appropriate Commission oversight over Western Wireless in its role as an EP and ETC provider, no reason exists to address the issue at this time. We defer all questions concerning the Commission's regulatory jurisdiction over the BUS offering. Therefore, this decision should not be interpreted as an agreement with the ALJ's ruling that § 40-15-401(1)(b), C.R.S., precludes Commission regulation here.

7. Primary Line Designation

a. CTA finally objects to the ALJ's recommendation concerning which provider, where both Western

Wireless and the existing ILEC provide basic local service to a customer, is entitled to receive support from the HCSM. (Under the HCSM Rules, only the first access line at residential or business premises is eligible for HCSM support.) The ALJ recommended that where both Western Wireless and the ILEC provide service to a customer, the customer should designate which carrier receives the high cost support. CTA argues that the evidence fails to support the Recommended Decision on this point. Further, CTA suggests, this decision is premature. Specifically, CTA contends that many policy and administrative questions are raised by the ALJ's recommendation. For example, how would the HCSM administrator track which carrier has been designated for support by specific customers; how would the customer change the designation regarding the carrier eligible to receive HCSM support; what protections would exist to prevent "slamming" of a customer's HCSM designation; etc.

b. We will grant CTA's exceptions on this point. In addition to the administrative questions left unaddressed in this docket by the Recommended Decision, we note one further concern. Pursuant to Rule 3, Commission Rules Prescribing the Procedures for Designating Telecommunications Service Providers as Providers of Last Resort or as an Eligible Telecommunications Carrier, 4 CCR 723-42, existing ILECs have been designated POLRs in their service areas. This status

requires the ILECs to serve all customers in their service territories. As part of this obligation to serve, the ILECs are even required to extend facilities to meet all new demand for service. Western Wireless, in contrast, has not requested and will not be designated a POLR. Inasmuch as the ILECs, as POLRs, are legally obligated to meet all demand for service, it is appropriate that high-cost support go to the ILEC in all cases where it provides service to a customer. The ALJ's recommendation that the end-user choose whether the ILEC or Western Wireless will receive high-cost support, in cases where both carriers provide service to a customer, will not be accepted.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Decision No. R01-19 filed by Qwest Corporation are denied.

2. The Exceptions to Decision No. R01-19 filed by the Colorado Telecommunications Association are granted only to the extent consistent with the above discussion and are otherwise denied.

3. The Stipulation and Settlement Agreement between Western Wireless Holding Co., Inc., the Colorado Office of Consumer Counsel, and Commission Staff dated November 14, 2000

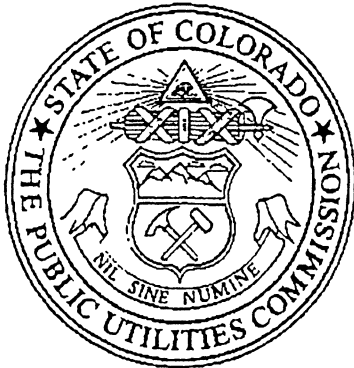
is approved subject to those modifications set forth in Decision No. R01-19, and only to the extent consistent with the above discussion. In particular, Western Wireless Holding Company, Inc.'s request for designation as an Eligible Telecommunications Provider and an Eligible Provider in those exchanges listed in Attachments 2 and 4 of the Stipulation is denied. Additionally, where Western Wireless Holding Company, Inc., and an existing incumbent local exchange carrier provide service to the same customer's premise, the designated provider of last resort shall receive support from the High Cost Support Mechanism.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 14, 2001.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

ROBERT J. HIX

Commissioners

COMMISSIONER POLLY PAGE ABSENT.

2000.05.19 15:27:13
Kansas Corporation Commission
9/ Jeffrey S. Bateman

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: John Wine, Chair
Cynthia L. Claus
Brian J. Moline

In the Matter of GCC License Corporation's Petition)
for Designation as an Eligible Telecommunications) Docket No. 99-GCCZ-156-ETC
Carrier.)

Application of Sprint Spectrum L.P. (d/b/a Sprint PCS))
for Designation as an Eligible Telecommunications) Docket No. 99-SSLC-173-ETC
Carrier for Purposes of Receiving Federal and State)
Universal Service Support.)

ORDER No. 10

The above matters come before the State Corporation Commission of the State of Kansas (Commission) for consideration. After examining its files and being fully advised of all matters of record, the Commission finds as follows:

1. A hearing on these matters was held on May 9 and 10, 2000. Notice of the hearing was given in Order #6, dated January 18, 2000. Appearances of counsel were as follows: Lisa C. Creighton, Mark Ayotte and Philip R. Schenkenberg on behalf of GCC License, LLC (Western Wireless); Jeffrey M. Pfaff on behalf of Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint PCS); Eva Powers on behalf of Commission Staff and the public generally (Staff); Allen Brady Cantrell on behalf of the Citizens' Utility Ratepayer Board (CURB); Mark Caplinger on behalf of the State Independent Alliance (SIA); Thomas E. Gleason, Jr., on behalf of the Independent Telecommunications Group (ITG); and Michelle O'Neal on behalf of Southwestern Bell Telephone Company (SWBT).

2. The Commission has jurisdiction over the parties and the issues in this proceeding pursuant to K.S.A. 1999 Supp. 66-104; K.S.A. 1999 Supp. 66-2004(c); and the Kansas Telecommunications Act, K.S.A. 66-2001, *et seq.*

3. On the day before the hearing, SIA and ITG filed a Motion for Clarification and Contingent Motion for Continuance. Comments and argument on this motion were made at the hearing. After consideration, the Commission determined that it would proceed with the hearing as scheduled, and that the concerns raised would be addressed in the order issued after the hearing.

4. At the hearing, the Commission took administrative notice of the following matters: 1) the February 3, 1997 Order on Reconsideration in Docket No. 190,492-U (In the Matter of a General Investigation Into Competition within the Telecommunications Industry in the State of Kansas); and 2) the Federal Communications Commission October 26, 1998 Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in CC Docket 96-45.

5. The issue before the Commission is whether it is in the public interest to designate additional eligible telecommunications carriers (ETCs) in rural telephone company study areas. See Section 214(e)(2) of the Federal Telecommunications Act of 1996. Briefs and comments on the public interest standard were filed in July of 1999 by Sprint PCS, Western Wireless, SIA, ITG, CURB, SWBT, and AT&T Communications of the Southwest, Inc.

6. The public policy underlying the Kansas Telecommunications Act is given in K.S.A. 1999 Supp. 66-2001. This statute provides:

It is hereby declared to be the public policy of the state to:

(a) Ensure that every Kansan will have access to a first class telecommunications infrastructure that provides excellent service at an affordable price;

- (b) ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates;
- (c) promote consumer access to a full range of telecommunications services, including advanced telecommunications services that are comparable in urban and rural areas throughout the state;
- (d) advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to internet providers and others; and
- (e) protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience and necessity.

7. The Commission must be guided by K.S.A. 1999 Supp. 66-2001 when making determinations that affect telecommunications customers in Kansas. The clear and unmistakable public policy imperative from both the federal and state legislatures is that competition is a goal, even in rural areas. Arguments have been made that competition is not in the public interest in any rural telephone company service area because it may jeopardize universal service. However, there has been no basis presented for reaching the broad conclusion that competition and universal service are never able to exist together in rural areas. The Commission does not accept the assertion that designating additional ETCs in rural areas will necessarily threaten universal service. The benefits of competition and customer choice are available to Kansans living in non-rural areas. General concerns and speculation are not sufficient justification for adopting a policy that would result in benefits and services that are available to other Kansans not also being available to rural telephone customers. The Commission finds, as a general principle, that allowing additional ETCs to be designated in rural telephone company service areas is in the public interest.

8. This general public interest finding is a presumption which may be rebutted by individual rural telephone companies. The Commission has the discretion to find that in a particular discrete rural area, competition is not in the public interest. The obligation to establish that additional ETCs are not in the public interest is on the rural telephone company serving that area. Such a determination must be based on the facts shown to exist in a specific study area.

9. The only company currently seeking ETC designation for Kansas Universal Service Fund support in rural areas is Western Wireless. Western Wireless is directed to file with the Commission the details of its universal service offering, including the price and terms of the offering, and a copy of the customer service agreement.

10. After the universal service offering filing is made, discovery may be conducted. Within 45 days of the date of the filing, any rural telephone company providing service in an exchange in which Western Wireless has filed for ETC designation may file with the Commission a specific and detailed statement of why it is not in the public interest to designate Western Wireless in its area. This filing is not for the purpose of rearguing whether economic or regulatory theories and principles, in general, support a public interest determination. The filing is to focus on the particular factual circumstances existing in a service area and on the effect on customers in the area. The filing may include affidavits and other information necessary for the rural company to fully present its position to the Commission. If no timely and sufficient ETC objection is filed within 45 days, the ETC designation for that rural study area will become effective, unless otherwise ordered by the Commission. Upon a filing being made by a rural telephone company, discovery relating to the filing will be permitted. Responses by Western Wireless and Staff to the rural company's filing are due 60 days after the filing is made. After review of the filings, the Commission will determine

what further proceedings, if any, are necessary to resolve the specific service area public interest issue.

11. For federal universal service purposes, Sprint Telephone Company - Kansas/United Telephone Company of Kansas (Sprint/United) is considered to be a rural telephone company. The Commission finds that it is in the public interest to allow Sprint PCS to be designated as an additional ETC in the study area served by Sprint/United.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

- (A) The motion of ITG and SIA is addressed as stated above.
- (B) The findings and conclusions stated above are made.
- (C) The procedural schedule set forth above is ordered.
- (D) A party may file a petition for reconsideration of this Order within fifteen (15) days of the date of this Order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.
- (E) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

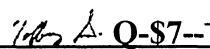
BY THE COMMISSION IT IS SO ORDERED.

Wine, Chr.; Claus, Corn.; Moline, Corn.

Dated: MAY 19 2000

ORDER MAILED

MAY 19 2000

 **O-S7** Executive Director
Jeffrey S. Wagaman
Executive Director