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WWC Holding Co., Inc v. Public Service Commission of Utah, Stephen F. Mecham, Clark D. Jones, and Constance B. White : Brief of Appellant

Utah Supreme Court

VanCott, Bagley, Cornwall & McCarthy; Matthew F. McNulty, III; Attorneys for WWC Holding Co., Inc; Briggs and Morgan, P.A.; Mark J. Ayotte; Philip R. Schenkenberg; Attorneys for Appellant.
Sander J. Mooy, Attorney for Appellee.

IN THE UTAH SUPREME COURT

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

BRIEF OF THE APPELLANT

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

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

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

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

Attorneys for Appellant

PARTIES TO THE PROCEEDING

WWC Holding Co., Inc., Appellant

Public Service Commission of Utah, Appellee

Stephen F. Mecham, Clark D. Jones, and Constance B. White, Commissioners of the Public Service Commission of Utah, Appellees

Qwest Corporation

Utah Rural Telephone Association

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STATEMENT OF JURISDICTION

This appeal is from the Report and Order dated July 21, 2000 issued by the Public Service Commission of Utah ("Commission") in Docket No. 98-2216-01.[1] DI 198. Appellant WWC Holding Co., Inc., a wholly-owned subsidiary of Western Wireless Corporation (collectively "Western Wireless") timely filed a Request for Reconsideration and Rehearing on August 10, 2000. DI 210. The Commission took no action on Western Wireless' Request for Reconsideration and Rehearing. In accordance with Utah Code Ann. § 54-7-15, Western Wireless' Request for Reconsideration and Rehearing was deemed denied on August 30, 2000. Western Wireless timely filed its Petition for Writ of Review on October 3, 2000. DI 215. The Supreme Court has jurisdiction to hear Western Wireless' appeal of this matter pursuant to Utah Code Ann. § 78-2-2(3)(e)(i).

[1] References to the Docket Index will be cited as "DI __, p. __." The Commission's Order is reproduced in Appellant's Addendum beginning at ADD-1.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the Commission erred by finding there would be no benefits associated with designating Western Wireless as an eligible telecommunications carrier ("ETC") in accordance with 47 U.S.C. § 214(e)(1)-(2). The Court must review this finding to determine whether it is supported by substantial evidence in the record (Utah Code Ann. § 63-46b-16(4)(g)) and whether it is arbitrary and capricious (Utah Code Ann. § 63-46b-16(4)(h)(iv)). This issue was preserved when Western Wireless requested reconsideration of this Commission finding. DI 210, pp. 3-6.

2. Whether the Commission erred by concluding that designating Western Wireless as a competitive ETC in rural areas might increase the size of the State Fund and therefore is contrary to the public interest as contemplated by 47 U.S.C. § 214(e)(2). This conclusion is an error of law reviewed de novo by the Court. MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah, 840 P.2d 765 (Utah 1992). This issue was preserved when Western Wireless requested reconsideration of this Commission finding. DI 210, pp. 6-13.

3. Whether the Commission erred in limiting WWC's reimbursement from the State Fund for only those service offerings priced at or below the rate charged by the incumbent carrier. This is an error of law reviewed de novo by the Court. MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah, 840 P.2d 765 (Utah 1992). This issue was preserved when WWC requested reconsideration of this Commission finding. DI 210, pp. 13-18.

STATUTES, RULES AND REGULATIONS OF CENTRAL IMPORTANCE

47 U.S.C. § 214(e) (ADD- 21 to ADD-22).

47 U.S.C. § 253 (ADD-23 to ADD-24).

47 U.S.C. § 254 (ADD-25 to ADD-30).

47 U.S.C. § 332(c)(3) (ADD-31 to ADD-32).

Utah Code Ann. Ch. 54-8b (ADD-33 to ADD-50).

Utah Code Ann. § 63-46b-16(4) (ADD-51 to ADD-52).

Utah Admin. Code Ch. R746-360 (ADD-53 to ADD-62).

DEFINED TERMS

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

CMRS: commercial mobile radio service.

Commission: the Public Service Commission of Utah.

DPU: Division of Public Utilities.

ETC: eligible telecommunications carrier.

FCC: Federal Communications Commission.

ILEC: incumbent local exchange carrier.

Order: In the Matter of the Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier, Utah Public Service Commission Docket No. 98-2216-01, Report and Order (July 21, 2000).

State Fund: The Utah Universal Service Public Telecommunications Service Support Fund established by the Commission as required by Utah Code Ann. § 54-8b-15.

Universal Service Order: In the Matter of Federal-State Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 88776 (rel. May 8, 1997), as corrected by Federal-State Board on Universal Service, CC Docket No. 96-45 Erratum, FCC 97-157 (rel. June 4, 1997), aff'd in part, rev'd in part, remanded in part sub. nom. Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

URTA: Utah Rural Telephone Association.

Western Wireless: Appellant WWC Holding Co., Inc.

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

STATEMENT OF THE CASE

A. Nature of Case and Disposition By Commission

Western Wireless filed a Petition with the Commission seeking designation as an eligible telecommunications carrier ("ETC") for the purpose of receiving universal service support from the federal and state universal service funds. DI 1, pp. 1-2. The Commission held a hearing on the Petition, and issued its Report and Order ("Order") granting Western Wireless' Petition subject to conditions in some geographic areas, and denying Western Wireless' Petition in other geographic areas. DI 198, p. 16. Western Wireless filed a request for rehearing. DI 210. This request was not acted on by the Commission and thus was deemed denied. This appeal followed.

B. Statement of Facts Relevant to the Issues

Western Wireless is licensed by the Federal Communications Commission ("FCC") to provide commercial mobile radio service ("CMRS"), e.g., cellular service, in certain areas of Utah. DI 223, p. 4. In accordance with federal and state law, Western Wireless filed a Petition with the Commission dated August 31, 1998, seeking designation as an ETC in a number of areas within its existing service area in Utah. DI 1. As an ETC, Western Wireless would be authorized to receive federal and state "universal service" support that is available to carriers providing basic local telephone service. "Universal service" support allows carriers to provide basic local telephone service at an affordable rate to low income consumers and to consumers in rural areas where it is expensive to provide telephone service. Alenco Communications Inc. v. F.C.C., 201 F.3d 608, 614-15 (5th Cir. 2000); Utah Admin. Code § R746-360-1.

Western Wireless' Petition was opposed by the monopoly incumbent local exchange carriers ("ILECs") located in Western Wireless' requested designated service areas. Each of these ILECs was previously granted ETC status by the Commission and is currently the only designated ETC in its respective service area. DI 221, p. 406. The ILECs include Qwest Communications (formerly U S WEST), and five "rural telephone companies." These rural telephone companies are members of the Utah Rural Telephone Association ("URTA"). DI 198, p. 5. Rural telephone companies are generally independent companies located in rural areas.

A hearing on Western Wireless' Petition was held from November 30 through December 1, 1999. DI 220-222. Western Wireless offered testimony demonstrating it meets the requirements to be an ETC under federal and state law. DI 223, pp. 8-13, 17-19, 23. Western Wireless also offered evidence that it would be in the public interest to designate Western Wireless as an ETC in areas served by rural telephone companies, because a public interest finding is required to designate an additional ETC in an area served by a rural telephone company. DI 223, pp. 21-23. The evidence showed that as an ETC Western Wireless would provide service to some consumers who currently have no access to basic local telephone service, and to consumers not adequately served by the serving ILEC. DI 222, pp. 632-33. In addition, Western Wireless would make new and innovative competitive services available to consumers currently served only by an ILEC. DI 223, p. 15-16; DI 220, p. 13. The evidence also demonstrated other public interest benefits of designating Western Wireless as an ETC, including a mobility component that would be attractive to consumers in rural areas, and a local calling area larger than that

offered by the ILECs. DI 223, p. 13-14; DI 220, p. 11. Western Wireless also established that the U.S. Congress created universal service funds to promote and accommodate competition in the provision of basic local telephone service. DI 220, p. 10. Because policy makers recognized the well-established benefits of competitive markets, they have required that federal and state universal service support be made available to competitive providers serving low income and high-cost consumers. Alenco Communications, 201 F.3d 608, 614-15. Because each of the URTA companies is currently the only ETC in its respective service area, the public interest would be served by bringing competition to these areas. DI 221, p. 406.

Based on the evidence, the Commission concluded Western Wireless satisfied all of the state and federal requirements to be an ETC, and thus designated Western Wireless as an ETC in the requested exchanges served by Qwest (not a rural telephone company). DI 198, p. 16. The Commission, however, denied Western Wireless' Petition in the areas served by rural telephone companies because it concluded that ETC designation was not in the public interest. DI 198, p. 13. The rationale for the Commission's decision was only that the designation of Western Wireless "might" increase the size of the state universal service fund ("State Fund"). DI 198, p. 13. As a result of such a possibility, the Commission concluded Western Wireless' designation would not be in the public interest. DI 198, p. 13. The Commission stated the State Fund should be available only to the rural telephone companies, thereby ensuring their continued monopoly status. DI 198, pp. 12-13. The Commission speculated that if the rural telephone companies face competition they might lose revenue and seek more money from the State Fund. DI 198,

pp. 12-13. The impact of competition on the size of the State Fund based on the funding rules now in place was not addressed at the hearing, however, because the Commission adopted the funding rules for the State Fund between the time of the evidentiary hearing and the date of the Commission's Order. The Commission failed to make affirmative findings of benefits to consumers that would result from the designation of Western Wireless as an ETC. DI 198, p. 13.

In granting federal and state ETC status to Western Wireless in the Qwest exchanges, the Commission further imposed a limit on the price of Western Wireless' universal service offerings. DI 198, p. 14. The Commission determined Western Wireless' service offerings would be eligible for support from the State Fund only if priced at or below the rate charged by Qwest. DI 198, p. 14.

SUMMARY OF ARGUMENTS

1. The Commission erred when it found there would be no benefits associated with designating Western Wireless as an ETC in rural telephone company areas. The Commission concluded there would be a significant public benefit to designation if Western Wireless would serve consumers who currently are unable to obtain local telephone service, but contrary to the evidence, found Western Wireless' designation would not lead to that benefit. This finding is not supported by substantial evidence in the record as required by Utah Code Ann. § 63-46b-16(4)(g). The Commission also acted in an arbitrary and capricious manner in violation of Utah Code Ann. § 63-46b-16(4)(h)(iv) in its unexplained disregard of uncontradicted evidence of the other public interest benefits that would be realized by designating Western Wireless as an additional ETC. Such benefits include the general benefits of competition in the provision of basic local telephone service, which both the U.S. Congress ("Congress") and the Utah Legislature ("Legislature") have already determined must be a part of universal service programs. The Commission also failed to recognize consumer benefits associated with the ability to choose a competitive local service offering that includes a mobility component and a local calling area larger than the incumbents'. Western Wireless requests the Court to direct the Commission to enter an order recognizing these public interest benefits that would result from designating Western Wireless as an additional ETC in rural telephone company areas.

2. The Commission erred by concluding that designating Western Wireless as a competitive ETC in rural telephone company areas might increase the size of the State Fund and therefore is contrary to the public interest as contemplated by 47 U.S.C. § 214(e)(2). In drawing this conclusion the Commission erroneously interpreted Utah Code Ann. Ch. 54-8b, and 47 U.S.C. § 214(e)(1)-(2), which require universal service support to be available to qualifying competitive carriers, not reserved solely for incumbent providers. The Commission's interpretation that the "public interest" is served by universal service programs that fund only the incumbent providers, thereby ensuring their monopoly status over local telephone service to the detriment of the public, is an error of law in violation of Utah Code Ann. § 63-46b-16(4)(d). The effect of the Commission's Order is to thwart federally-mandated universal service requirements in violation of 47 U.S.C. §§ 253(a), 253(b), and 254(f), and therefore is unconstitutional as applied and beyond the Commission's jurisdiction pursuant to Utah Code Ann. § 63-46b-16(4)(a)-(b). Western Wireless requests that the Court determine the Commission erroneously applied the public interest standard by concluding that the possibility the State Fund might increase due to competition is contrary to the public interest. Western Wireless further requests the Court find that because Western Wireless' designation will result in numerous benefits to consumers, Western Wireless' designation as an ETC is in the public interest in the areas served by URTA companies. The Court should thus order the Commission to designate Western Wireless as an ETC eligible for the receipt of state and federal funding in the areas served by the URTA companies identified in Western Wireless' Petition.

3. The Commission erred in limiting Western Wireless' reimbursement from the State Fund for only those service offerings priced at or below the rate charged by the incumbent carrier. Commission Rule R746-360-7(B) states that support from the State Fund is available only for offerings priced at the Commission-determined "affordable base rate." First, this requirement is preempted as to a CMRS provider, like Western Wireless, because federal law preempts such state rate regulation. See 47 U.S.C. § 332(c)(3)(A). Thus, the Commission's Order violates Utah Code Ann. § 63-46b-16(4)(a)-(b). Second, even if this requirement could be legally applied to Western Wireless, the Commission has not, pursuant to statute, established an "affordable base rate." The Commission instead "presumed" the ILEC's current rate is affordable, and ordered the price of Western Wireless' offerings to be capped at those rates. By this Order the Commission engaged in an unlawful procedure or decision-making process and failed to follow prescribed procedures in violation of Utah Code Ann. § 63-46b-16(4)(e). Western Wireless requests the Court order that Commission Rule R746-360-7(B) does not apply to Western Wireless, or in the alternative that the affordable base rate must be established by the Commission in a rulemaking proceeding conducted in accordance with the requirement of the Utah Administrative Procedures Act.

ARGUMENT

I. BACKGROUND

A. Universal Service: Law and Regulation

Universal service – ensuring all Americans have access to affordable phone service – has been a goal in this country since the FCC was created in 1934. Alenco, 201 F.3d at 615. To accomplish universal service goals, the FCC and state regulatory commissions have historically provided for affordable telephone service to all individuals through a combination of implicit and explicit subsidies available only to ILECs. In the Matter of Federal-State Board on Universal Serv., Report and Order, CC Docket No. 96-45, 12 FCC Rcd 88776, ¶ 10 & n.15 (rel. May 8, 1997) ("Universal Service Order"), as corrected by Federal-State Board on Universal Service, CC Docket No. 96-45 Erratum, FCC 97-157 (rel. June 4, 1997), aff'd in part, rev'd in part, remanded in part sub. nom. Office of Pub. Util. Counsel v. F.C.C., 183 F.3d 393 (5th Cir. 1999). These subsidies have benefited two types of consumers, those in "high cost" areas where it is expensive to serve, and those with low incomes who otherwise might not be able to afford telephone service. Until recently, there was not much impetus to change this universal service support system because local telephone markets were maintained as monopolies.

In 1996, however, in recognition of the emerging competitive local telecommunications market, Congress passed the Telecommunications Act of 1996, which amended the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (collectively "the Act"). The express purposes of the Act were to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American

telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56. Because competitive local markets would need a different universal service regime, Congress directed the FCC to replace the existing patchwork of implicit subsidy mechanisms with "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5); Texas Office of Pub. Util. Counsel v. F.C.C., 183 F.3d 393, 407 (5th Cir. 1999) ("Texas OPUC").

In response to this statutory mandate, the FCC adopted a series of orders in CC Docket No. 96-45, beginning with its Universal Service Order adopted on May 7, 1997, that established funding mechanisms and rules for states to follow in designating eligible carriers. Consistent with the Act's directives, the FCC concluded, among other things, that "universal service will be sustainable in a competitive environment; this means both that the system of support must be competitively neutral and permanent, and that all support must be targeted as well as portable among eligible telecommunications carriers." Universal Service Order, ¶ 19 (emphasis added).

"Competitive neutrality" and "portability" of support are essential to ensuring the twin goals of competition and universal service are realized. Competitive 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." Universal Service Order, ¶ 47. The FCC concluded this principle would promote emerging technologies that would provide competitive alternatives in rural areas and thus benefit high cost consumers. Universal Service Order,

¶ 50. By adopting the principle of competitive neutrality, the FCC sought to "foster the development of competition and may benefit certain providers, including wireless, cable and small businesses" that previously have been excluded as providers of universal service. Universal Service Order, ¶ 49.

"Portability" is the simple principle that universal service support follows the customer. In other words, if a competitive ETC "wins" a customer from the ILEC, the competitive ETC is entitled to the same support the ILEC would have received for serving the customer. Universal Service Order, ¶ 311. See 47 C.F.R. § 54.305 (2000). The FCC concluded that portability would facilitate competition in rural areas, would fairly reward the carrier that bears the economic cost of serving the customer, and would require less efficient ILECs to become more efficient over time. Universal Service Order, ¶¶ 286-89. These principles of competitive neutrality and portability are central to the FCC's goal of accomplishing competition while preserving universal service.

Upon review of the FCC orders implementing the Act's universal service provisions, the Fifth Circuit Court of Appeals has affirmed the FCC's determination that universal service rules must not only accommodate, but must promote, competition. In Alenco Communications, Inc. v. FCC, the Fifth Circuit addressed various aspects of the FCC's universal service rules and confirmed that competition and universal service are twin goals of the Act:

> The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition.

Alenco, 201 F.3d at 615. To promote these dual goals, the Court upheld the FCC's portability rule as a competitively neutral way of enticing entrants to serve in high-cost areas:

> [T]he program must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this principle is made necessary not only by the economic realities of competitive markets but also by statute. *See* 47 U.S.C. § 214(e)(1) (requiring that all "eligible telecommunications carrier[s] . . . shall be eligible to receive universal service support").

Alenco, 201 F.3d at 616. Thus, the FCC's rules requiring universal service to be accomplished through competition were not only upheld as reasonable, they were mandated by the Act. Id. at 625.

B. ETC Eligibility Criteria and ETC Designation

Under the FCC rules, universal service support is made available to both incumbent and competitive carriers that serve: (1) consumers in high-cost, rural areas where the cost of providing service exceeds an established affordable rate for basic service; and (2) qualified low-income consumers who are eligible to pay reduced rates for basic service.[2] To be eligible to receive universal service support, however, a carrier must first be designated as an ETC by a state commission. 47 U.S.C. § 214(e)(1).

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[2] Low income universal service support is provided through the FCC's Lifeline and Link-Up programs, which allow qualified low-income consumers to pay reduced charges for installation and monthly service once a consumer certifies to an ETC that the consumer participates in at least one specified federal program. The ETC must then make the discounts available to the customer and seek reimbursement from the federal funds. See 47 C.F.R. §§ 54.401 et seq. (2000).

Section 214(e) of the Act and the FCC's rules set forth the eligibility criteria for a state commission to apply in designating an ETC. An applicant must:

(a) be a common carrier as defined by federal law;
(b) demonstrate an ability to offer certain "supported services" which have been prescribed by the FCC in 47 C.F.R. § 54.101(a)(1)-(9);
(c) undertake to advertise the availability of the services and charges using media of general distribution; and
(d) have a designated ETC service area.

47 U.S.C. § 214(e)(1). Further, before designating an additional ETC in an area served by a rural telephone company,[3] the state commission must find that the designation is in the "public interest." 47 U.S.C. § 214(e)(2).

Although the Act does not identify the factors to be considered in the public interest analysis, the FCC recently gave guidance as to how that public interest analysis is to be applied. In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896 (rel. Dec. 26, 2000) ("Wyoming Order") (finding that designating Western Wireless as an ETC in rural telephone company areas is in the public interest).[4] In 1998, Western Wireless filed a request for ETC designation

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[3] The definition of "rural telephone company" is contained in 47 U.S.C. § 153(37). Essentially, a rural telephone company is any local exchange carrier which (1) does not serve any incorporated place of more than 10,000 inhabitants, (2) provides telephone exchange service to fewer than 50,000 access lines, (3) provides service to any local exchange carrier "study area" with fewer than 100,000 access lines, or (4) has less than 15 percent of its access lines in communities of more than 50,000 on the date of the 1996 Act. There is no dispute that the URTA companies opposing Western Wireless' Petition are all rural telephone companies.

[4] The Wyoming Order is reproduced in Appellant's Addendum beginning at ADD-73.

in the state of Wyoming. The Wyoming Commission dismissed the petition on jurisdictional grounds, so Western Wireless refiled the petition with the FCC under 47 U.S.C. § 214(e)(6).[5] Id. ¶¶ 4-5. On December 26, 2000, the FCC issued its Wyoming Order designating Western Wireless as an ETC in both non-rural and rural telephone company areas. It therefore found Western Wireless' designation served the public interest. Id. ¶ 1.

In conducting its public interest inquiry, the FCC identified the factors that should be considered in such an analysis. The FCC first looked to whether Western Wireless' designation would advance federal goals of competition, including increased customer choice, new services, new technologies, and incentives for all carriers to provide services at just, reasonable and affordable rates. Id. ¶¶ 16-17.

Once this threshold showing of benefits was made, the FCC shifted the burden of proof to opposing rural ILECs to show that consumers would be harmed by the designation. Id. ¶ 18. Specifically, the FCC stated:

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

[5] Section 214(e)(6) sets forth standards for designation by the FCC that are identical to the standards for state commissions under Section 214(e)(1)-(2).

Id. ¶ 18.[6] In other words, the FCC stated that the public interest test was intended to prevent adverse impact to consumers that might result if an incumbent carrier were driven out of business by the new competitor.

The FCC found no evidence on the record that ILECs would go out of business, and found Western Wireless was capable of serving all consumers if that unlikely event were to occur. Id. ¶¶ 19-20. Having found benefits without adverse impact, the FCC found the public interest was advanced by designating Western Wireless as an ETC in rural telephone company areas in Wyoming. Id. ¶ 22.

C. The Role of a State Commission in Implementing Universal Service Reforms

In 47 U.S.C. § 214(e), Congress delegated to state commissions the responsibility to assist in the implementation of the new universal service program. Because state commissions have traditionally overseen basic local telephone service, Congress directed state commissions to take primary responsibility for designating ETCs, establishing ETC service areas, and determining whether the public interest would be served by designating an additional ETC in areas served by a rural telephone company. 47 U.S.C. § 214(e)(1)-(2).

When a state commission acts, however, it is implementing federal law and must do so consistent with the Act and the FCC's regulations. The Act includes specific limitations on state actions in matters governed by the Act. Section 253(a) of the Act

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[6] Section 214(e)(4) provides that in an area with multiple ETCs, any ETC can seek to abrogate its ETC designation. The state Commission must allow that to happen, but can

mandates that no state or local legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Section 253(b) limits states to actions that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service. 47 U.S.C. § 253(b).

In addition, the U.S. Supreme Court has confirmed that the Act has preemptive effect, and that states must follow the lawful directives of the FCC when implementing their obligations under the Act. As the U.S. Supreme Court noted:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378, 119 S. Ct. 721, 730 n.6 (1999). Based on this, the Court held that states are bound to follow FCC rules and guidelines in carrying out the goals of this federal legislation. 525 U.S. at 378, 119 S. Ct. at 730.

Congress directed states to establish and implement state universal service funding mechanisms to work in conjunction with the federal fund (47 U.S.C. § 254(b)(5)), and gave states that authority in the Act:

> A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

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order remaining carrier(s) to build or buy facilities necessary to ensure all consumers will continue to be served.

47 U.S.C. § 254(f). This authority clearly requires that state universal service programs must be consistent with the Act and not thwart Congress' goals.

The FCC recently discussed circumstances in which a state universal service program could be preempted as being at odds with the Act. In its KUSF Memorandum and Order, the FCC addressed one part of the Kansas Universal Service Fund ("KUSF") that was reserved to benefit only universal service providers that were also ILECs. In the Matter of Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Serv. Fund, Memorandum Opinion and Order, File No. CWD 98-90, FCC 00-309, ¶ 11 (rel. Aug. 28, 2000) ("KUSF Memorandum and Order").[7] The FCC observed that a program that favored ILECs would give ILECs a competitive advantage in the universal service market, and would likely prevent competition from developing. Id. ¶ 8. The FCC cautioned that such state universal service mechanisms would likely be viewed as "prohibiting such competitors from providing telecommunications service" in violation of Section 253(a) of the Act, would not be "competitively neutral" as required by that Section, and could be preempted as inconsistent with and contrary to important Congressional and FCC goals. Id. ¶¶ 8, 11. The FCC also expressed concern that such a program could be preempted as not "consistent with Section 254" and not "necessary to preserve and advance universal service" as required by Section 254(f). Id. n.37.

[7] The KUSF Memorandum and Order is reproduced in Appellant's Addendum beginning at ADD-63.

In accordance with the Congressional directive to establish state universal service mechanisms, the Utah Legislature directed the Commission to establish a State Universal Service Fund "consistent with the Federal Telecommunications Act." Utah Code Ann. § 54-8b-15(4)(c). The Legislature further directed that the:

> Operation of the fund shall be nondiscriminatory and competitively and technologically neutral in the collection and distribution of funds, neither providing a competitive advantage for, nor imposing a competitive disadvantage upon, any telecommunications provider operating in the state.

Id. § 54-8b-15(5) (emphasis added). The Legislature also required that the State Fund be portable among qualifying universal service providers. Id. § 54-8b-15(8).

To meet this mandate the Commission created a State Fund and rules for the distribution of state universal service support. Utah Admin. Code Ch. R746-360.[8] Although the funding rules have been subject to amendment, the current rules (which were adopted subsequent to the hearing in this matter but before the Commission's Order) promise the rural ILECs support sufficient to guarantee a statutory rate of return based on the embedded costs of their networks, regardless of whether the ILECs succeed in winning and retaining universal service customers. Utah Admin. Code § R746-360-9(A)(1). A competitive carrier (if designated) would be entitled to the same per-line support received by the ILEC, multiplied by the number of lines served, but is not guaranteed any level of financial success. Id. § R746-360-9(A)(2). In other words, the current funding rules guarantee rural telephone companies a specific market outcome, whether or not they win customers in a competitive market.

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[8] These rules are reproduced in Appellant's Addendum beginning at ADD-53.

It is against this background of federal and state universal service regulation that WWC challenges the Commission's Order.

II. THE COMMISSION ERRED BY FAILING TO MAKE APPROPRIATE FINDINGS AS TO THE BENEFITS TO UTAH CONSUMERS THAT WILL RESULT FROM WESTERN WIRELESS' ETC DESIGNATION

Western Wireless' first challenge to the Commission's Order is the Commission's failure to make proper findings as to the benefits of designating WWC as an ETC in areas served by rural telephone companies. The recognition of these benefits – which are based on the undisputed record evidence – is essential to a fair determination of whether Western Wireless' designation as an additional ETC in the areas served by rural telephone companies is in the public interest. Because the Commission did not make these findings, and did not include these benefits in its public interest balancing test, the Commission's public interest test is flawed and unsupportable.

A. Burden of Proof

Western Wireless recognizes that it has the burden of proving that the Commission's factual findings are not supported by the record, or are arbitrary and capricious. Utah Code Ann. § 63-46b-16(4). Only one of Western Wireless' challenges seeks to reverse a specific finding of fact, and the evidence clearly shows the record to be directly contrary to this finding. Western Wireless' other challenges relate to findings not made by the Commission. Although the Commission purported to balance benefits of designating Western Wireless as an ETC against harms that might occur, the Commission failed to recognize certain benefits that were not challenged on the record. The Commission's failure to make these findings is unsupported by substantial evidence in the

record (Utah Code Ann. § 63-46b-16(4)(g)), and arbitrary and capricious (Id. § 63-46b-16(4)(h)(iv)).

The use of the "arbitrary and capricious" standard to challenge the Commission's unexplained failure to make findings supported by undisputed facts is consistent with Utah law. In US WEST Communications v. Public Serv. Comm'n of Utah, 901 P.2d 270 (Utah 1995), US WEST sought a rate increase that reflected, among other things, certain marketing expenses for services rendered by its affiliate. Id. at 273. The Commission denied recovery of these expenses after concluding the services provided by US WEST "may be duplicative" of services provided by another affiliate. Id. US WEST, however, had offered testimony that there was no duplication, and this testimony was unchallenged and unopposed on the record. Id. at 274. The Court found the Commission's determination that the expenses might be duplicative was arbitrary and capricious and subject to reversal due to "unexplained disregard of credible, uncontradicted evidence" to the contrary. Id.

Western Wireless will show that the Commission disregarded credible, unchallenged evidence of specific benefits that would result from designating Western Wireless as an ETC, and as a result the Commission's public interest balancing test is flawed. This is fully supported by the record evidence and consistent with the Court's holding in US WEST Communications v. Public Service Commission.

B. It is in the Public Interest to Bring Competition to Rural Consumers

The Commission erred in failing to recognize the undisputed benefits of bringing competitive universal service offerings to consumers in rural telephone company service

areas. As explained above, "an important goal of the Act is to open local telecommunications markets to competition. Designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies." Wyoming Order, ¶ 17 (footnote omitted). The Utah Legislature has also mandated that it is the policy of the state to:

> (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;
>
> . . .
>
> (8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;
>
> (9) enhance the general welfare and encourage the growth of the economy of the State through increased competition in the telecommunications industry.

Utah Code Ann. § 54-8b-1.1 (emphasis added). Because each of the URTA companies is currently the only designated ETC in its respective service territory (DI 221, p. 406), designation of Western Wireless as an additional ETC will bring competitive universal offerings to areas where there are none.

DPU witness and economist Dr. George Compton proffered testimony recognizing the national presumption that competition is in the public interest. DI 300, p. 3. DPU witness Henningsen also affirmed that the DPU strongly supports bringing competition to rural consumers. DI 222, p. 549. Dr. Compton testified that an increased level of competition is presumed to be in the public interest because it leads to increased consumer choice (DI 300, p. 11), and better service (DI 222, p. 626). He also testified that these benefits are most substantial when a monopoly market is made competitive. DI

222, p. 621. Western Wireless witness Mr. Blundell also testified as to the reasons why competition is expected to benefit consumers, including increased consumer autonomy (DI 220, p. 13) and increased investment (DI 220, p. 15). Qwest's witness also agreed competition is generally in the public interest. DI 221, p. 255.

Despite the federal and state mandates recognizing the benefits of competition, and testimony that the public interest is served by bringing competition to monopoly areas, the Commission failed in any way to acknowledge these benefits in its public interest analysis. DI 198, pp. 12-13. The fact that designating Western Wireless as an ETC will bring competition in the provision of universal service to the areas now served only by the URTA companies must be found to be a consideration that weighs in favor of a public interest finding.

The Commission's failure to find a public interest benefit associated with bringing competition to monopoly markets ignores federal and state law, and undisputed record evidence. Accordingly, the Commission erred by failing to find the public interest would be served by the introduction of universal service competition in the URTA areas currently limited to monopoly service.

C. The Public Interest is Served by Increased Subscribership in Utah

The Commission erred by finding Western Wireless would not provide universal service to customers who currently do not have telephone service. The undisputed evidence shows Western Wireless' designation would provide this benefit. The Court should thus reverse the Commission's Order and enter a finding that designating Western

Wireless as an ETC would serve the public interest because Western Wireless would bring service to those currently without access to the network.

The Commission recognized the substantial benefit that would result if a new ETC could provide universal service to some customers not currently served by an ILEC:

> [T]he primary potential benefit of designating Western Wireless as a "rural" ETC could have been that areas that are not currently being served by any incumbent . . . could now be served by Western Wireless.

DI 198, p. 13. The Commission determined WWC would not serve these types of consumers based on its requested service areas. DI 198, p. 13. The record, however, is undisputed that there are still consumers today within Western Wireless' requested designated service areas who have not been connected to the ILEC network because of the high cost of constructing new facilities. DPU witness Dr. Compton provided the only record evidence on this point. He testified "there are large areas within the incumbents' certificated territories where new service would not be immediately available, and where the line extension costs are such as to make new service prohibiting expensive without a substantial number of customers to spread the costs among." DI 300, p. 21. On the witness stand, Dr. Compton confirmed that Western Wireless' current signal would allow it to provide such unserved consumers a universal service offering:

> Q. The next goal is service in new and remote areas. Do you understand that Western Wireless's application is limited to those physical boundaries that are currently served by either US West or one of the rural LECs?
>
> . . .
>
> A. Right. Okay, the service area goes well beyond where [LECs] actually have lines and equipment.

Q. And I'm trying to find out if you're talking about unserved consumers within an assigned territories or unassigned territories?

A. Both. But primarily unserved customers within the assigned territory.

Q. Okay. Why are they currently unserved?

A. It's just too expensive to serve them.

Q. Because of the income [sic] it's going to charge them to build out to their house?

A. Right.

Q. That's going to be a big benefit to these consumers, is it not?

A. Yes.

DI 222, pp. 632-33 (emphasis added). There is no evidence in the record that contradicts this testimony of a public interest benefit associated with designating Western Wireless as an ETC.

The Commission erred by confusing unserved consumers in an unassigned territory with unserved consumers in an assigned territory. DI 198, p. 13. An "unassigned territory" is an area for which no ILEC has been granted a certificate, and for which there is no designated ETC. In such a case, the Act allows a commission to undertake a separate proceeding to determine the carrier best able to serve as an ETC. 47 U.S.C. § 214(e)(3). In its Order, the Commission properly noted that Western Wireless was seeking designation only in areas which currently have an assigned ETC. DI 198, p. 13. Because of this, the Commission erroneously determined Western Wireless necessarily would not serve any currently unserved consumers. Id. As made clear by Dr. Compton's unchallenged testimony, however, there currently are unserved consumers

within assigned ILEC territories, who are within Western Wireless' existing signal coverage. DI 222, pp. 632-33. These customers do not have access to basic telephone service, but will if Western Wireless is designated as an ETC as requested. Id.

It is therefore undisputed that Western Wireless will bring universal service offerings to some consumers currently without access to the network. The Commission's determination otherwise is not supported by substantial record evidence, and rejects undisputed testimony of the DPU economist. The Court should correct this fact finding, and should also determine that in conducting the public interest balancing test, the fact that Western Wireless will serve some customers not currently connected to the network weighs in favor of the public interest. This is consistent with the Commission's own statement that this would be a benefit (DI 198, p. 13) and is consistent with the record evidence.

D. The Public Interest is Served by Giving Customers the Option to Have an Expanded Local Calling Area

Western Wireless challenges the Commission's failure to find public interest benefits as a result of Western Wireless providing services and features currently unavailable to consumers from ILECs. The evidence is undisputed that 1) Western Wireless will offer the services, 2) the services are not currently available in universal service offerings of the ILECs, and 3) some consumers will value and benefit from these services. The Commission's failure to recognize these benefits as weighing in favor of the public interest is without substantial evidence in the record and arbitrary and capricious.

The first feature or service that Western Wireless will provide that is currently unavailable is a larger, or expanded, local calling area. It is undisputed that Western Wireless will offer consumers a local calling area larger than the ILEC's. DI 223, p. 16; DI 220, p. 13. This would allow consumers in rural areas to be charged for fewer toll calls. DI 223, p. 22. Western Wireless testified that this expanded local calling area is a principle aspect of its service package, and that in every case, Western Wireless' universal service customers will have this benefit. DI 220, p. 162; DI 221, pp. 336-37.

The Commission's Order specifically recognized this larger local calling area in its discussion of Western Wireless' ETC designation in the areas served by Qwest:

> The Commission is relying on Western Wireless' testimony that the free local calling area in every area served will be as large, or larger, than the local calling area currently provided by [Qwest] in the exchanges in its signal coverage area if it is granted state level approval.

DI 198, p. 14. The Commission did not explain its failure to consider this benefit of Western Wireless' service offering in its public interest analysis for the rural telephone company areas.

The evidence is undisputed that some consumers will find this new service option beneficial. Western Wireless explained that due to the nature of rural areas, some consumers' calls to businesses, doctors, government offices or the like are currently toll calls. DI 223, p. 22. An expanded local calling area will give consumers more freedom to make these important calls. Id. Western Wireless testified that when a similar offering was made by the Company in Regent, North Dakota, customers "flocked" to the service due to the expanded local calling area. DI 220, p. 14. In fact, the ILEC in that area

responded by increasing its own local calling area, which was something not done before a competitive offering was available. DI 221, pp. 334-35. DPU witness Compton also agreed this expanded local calling area was a specific benefit of designating WWC as an ETC. DI 222, pp. 622-23. CCS witness Bullock testified that a larger local calling area would be "highly desired by many consumers." DI 222, pp. 519-20. There is no evidence on the record to contradict this testimony that customers will benefit from an expanded local calling area once Western Wireless is designated as an ETC.

The FCC recently designated Western Wireless as an ETC in rural telephone company areas of Wyoming, and specifically found that its expanded local calling areas are a customer benefit that serves the public interest:

> We believe that rural consumers may benefit from expanded local calling areas by making intrastate toll calls more affordable to those consumers.

Wyoming Order, ¶ 21.

The Commission in its Order thus acknowledged this beneficial feature in Western Wireless' proposed offering and heard unanimous testimony that larger local calling areas would provide benefits to some consumers. Without explanation, however, the Commission failed to make a finding as to these benefits or to consider Western Wireless' expanded local calling areas in the public interest analysis. The failure to make these findings is not supported by substantial evidence in the record and is arbitrary and capricious. The Court should order that the Commission should have found that Western Wireless' expanded local calling area is a beneficial service feature that advances the public interest.

E. The Public Interest is Served by Giving Customers a "Mobility" Option in a Universal Service Package

The second feature or service that Western Wireless will make available for the first time to universal service customers is a mobility component. Western Wireless testified that its universal service customers will use a 3 watt "wireless access unit" to make and receive calls rather than a conventional .5 watt cellular handset. DI 223, p. 14; DI 220, p. 11. This larger unit allows for increased signal strength, but still provides the user with the benefit of mobility, as the unit can be moved from a customer's premises and has battery backup. DI 220, p. 91. No party challenged Western Wireless' evidence that its universal service customers will have a mobility component, which is a feature unavailable from a landline ILEC.

It is also undisputed that some consumers would find this new service to be a beneficial service to have in a universal service package. Mr. Blundell testified that a rural customer would be able to take the wireless access unit to the barn or down the road and still remain connected to the network. DI 220, p. 91. CCS witness Bullock agreed this is a beneficial service that some consumers will find valuable. DI 222, pp. 519-20. There is no evidence on the record disputing Western Wireless' contention that some consumers will be benefited by having access to a universal service package that provides a mobility component.

The Commission erred in ignoring undisputed testimony that designating WWC as an ETC would bring the benefit of a mobile universal service offering to Utah's rural consumers. This lack of a finding is not supported by substantial evidence in the record

and is arbitrary and capricious. The Court should order that Western Wireless' designation as an ETC will advance the public interest by providing this new service option to rural consumers of universal service.

III. THE COMMISSION ERRED IN CONCLUDING THE POSSIBILITY THAT THE STATE FUND WOULD INCREASE WITH AN ADDITIONAL ETC IS CONTRARY TO THE PUBLIC INTEREST

The Commission's reasoning for denying Western Wireless federal ETC status in the areas served by rural telephone companies is based entirely on its concerns that such designation might increase the size of the State Fund. DI 198, pp. 12-13. In effect, the Commission determined that because the State Fund might grow as a result of competition, that it is not in the public interest to have any competition. This determination that the Utah State Fund is incompatible with competition violates the Act, FCC mandates, directives of the Legislature, and the Commission's own rules. The Court should determine that a potential impact on the State Fund cannot be a consideration in the public interest analysis under 47 U.S.C. § 214(e)(2).

A. The Commission's Public Interest Standard Is Contrary to FCC Mandates

Since the Commission issued its Order, the FCC issued its Wyoming Order, which for the first time identified public interest criteria to be applied in designating an additional ETC. On the issue of adverse impact, the FCC ruled that the public interest analysis was intended to protect consumers from the possibility that the incumbent carrier could go out of business if made subject to competition. Wyoming Order, ¶ 18. In Utah, however, the Commission's funding rules for the State Fund make such a result

impossible, which as a matter of law precludes any finding of adverse impact. In addition, the FCC's public interest analysis shows the Commission was wrong to consider a possible increase in the size of the State Fund to be contrary to the public interest under federal law.

The Commission has created a State Fund funding mechanism that applies to rate of return regulated companies (like the URTA companies) and competitive ETCs in those areas. Utah Admin. Code § R746-360-9. Pursuant to that Rule, a rate of return regulated ILEC is entitled to state universal service funding to make up the difference between its total embedded costs plus statutory rate of return and its total revenues. Id. § (A)(1); DI 198, p. 12. This same per-line support available to the ILEC is also available to a designated competitive ETC on a per-line basis. Utah Admin. Code § R746-360-9(A)(1). The State Fund, then, eliminates any possibility that competition will hurt incumbent carriers, much less put them out of business. Because the FCC has interpreted the public interest analysis to address an adverse impact that is precluded by the operation of the Commission's funding rules, there can be no finding of adverse impact resulting from Western Wireless' ETC designation.

Consistent with the FCC's mandate in the Wyoming Order, the Commission's finding of a possible adverse impact due to a possible increase in the size of the State Fund violates the intent of Congress and must be set aside. Because the Commission's rules operate to preclude the possible adverse impact recognized by the FCC, there can be no adverse impact attributed to Western Wireless' ETC designation, and the Court should find the public interest standard is met.

B. The Commission's Application of the Public Interest Standard Is Inconsistent with the Goal of Competition

The Commission's funding rules for the State Fund guarantee ILECs a rate of return. By ensuring specific market outcomes, these rules reduce any incentive for a rural ILEC to be more efficient or succeed as a competitor.[9] The Commission's Order, however, determines that because competition could erode ILEC revenue, and the State Fund must foot the bill for any ILEC revenue losses, competition does not advance the public interest. DI 198, pp. 12-13. In effect, the Commission has speculated that it will be less expensive to fund only rate of return regulated monopoly providers, and so concluded that continued monopolies are in the public interest. Id.

Whether the Commission's Rule guaranteeing rural ILECs a rate of return is good policy (or even consistent with 47 U.S.C. § 254 and Utah Code Ann. § 54-86-15(4)(c)) is not the issue at bar. The issue is whether the Commission, having favored ILECs in its funding rules, can use the public interest standard in Section 214(e)(2) of the Act to ensure favoritism by insulating ILECs from competition. As discussed below, the answer is clear that it cannot.

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[9] It is significant that the Legislature has determined that rate of return regulation is disfavored because it fails to properly protect consumers:

The Legislature finds that:

(a) traditional rate of return regulation cannot guarantee that customers who do not have the choice of alternative providers will be protected from the economic responsibility for making up for an incumbent telephone corporation's competitive losses or from providing for the recovery of past, regulated investments . . . .

Utah Code Ann. § 54-8b-2.4.

C. The Application of the Commission's Public Interest Standard Violates Federal Law

Federal law requires the Commission to implement federal and state universal service support mechanisms in ways that accomplish universal service goals through competition, are competitively neutral and have funding that is portable among competitive providers. Because the Commission's public interest determination is inconsistent with competition, prefers incumbent monopolists over competitors, and does not allow funding to be portable, it violates federal law and should be reversed.

As detailed above, the Act requires that universal service goals be accomplished through competition. Supra, pp. 12-15. The Alenco Court has confirmed that both competition and universal service must be achieved, and "one cannot be sacrificed in favor of another." Alenco, 201 F.3d 608, 615. Contrary to this mandate, the Commission's Order determines the public interest is served by funding only a single carrier. DI 198, pp. 12-13. This rationale must be rejected as a matter of federal law.

In addition, federal law requires competitive neutrality among carriers, and portability of support. Supra, pp. 14-15. Contrary to these mandates, the Commission's Order determines that all federal and state universal service funding in these areas should go to the ILECs. DI 198, pp. 12-13. This prefers ILECs simply due to their status as ILECs, which is not competitively neutral. The Alenco Court has called guaranteed market outcomes and protection from competition for rural ILECs "the very antithesis of the Act" and a "guarantee that conflicts with competition." Alenco, 201 F.3d 608, 622, 625. Further, by denying federal ETC designation to Western Wireless based on State

Fund considerations, the Order does not allow federal funding to be portable because it allows "government regulators [to determine] who shall compete for and deliver services to customers." Alenco, 201 F.3d at 616.

The Commission's public interest analysis defeats the universal service purposes, goals, and intent of Congress and the FCC. It thwarts competition in favor of continued monopolies, it is not competitively neutral, and it prevents federal universal service support from being distributed as intended by Congress and the FCC. It also burdens federal universal service support mechanisms in violation of Section 254(f) by preventing competitive markets and portable funding. Accordingly, the Commission's determination that it is against the public interest to use federal funds to support competition in rural areas is clearly contrary to the Act, the FCC's mandates, and the Alenco Court's analysis, and it must be reversed.

D. The Commission's Public Interest Rationale Violates State Law

In addition to violating federal law, the Commission's determination that competition should be sacrificed to prevent a potential increase in the size of the State Fund is plainly contrary to the universal service mandate imposed on the Commission by the Utah Legislature. As a result, the Commission's public interest analysis must be reversed.

The Utah Legislature could not have been more clear in requiring the Commission to take actions that are consistent with federal law, promote competition, and make state universal service support portable:

(4)(c) The [Commission's universal service rules] shall . . . be consistent with the Federal Telecommunications Act.

(5) Operation of the fund shall be nondiscriminatory and competitively and technologically neutral in the collection and distribution of funds, neither providing a competitive advantage for, nor imposing a competitive disadvantage upon, any telecommunications provider in the state.

* * *

(7) To the extent not funded by a federal universal service fund or other federal jurisdictional revenues or by the fund established pursuant to Section 54-8b-12, the fund shall be used to defray the costs, as determined by the commission, of any qualifying telecommunications corporation . . . .

(8) The fund shall be portable among qualifying telecommunications corporations.

Utah Code Ann. § 54-8b-15 (emphasis added). There is nothing in these mandates that directs the Commission to minimize the size of the State Fund by discouraging competition. Thus, the Commission's public interest rationale violates state law by being inconsistent with the Act, discriminatory, competitively and technologically biased by providing a competitive advantage to the incumbent, and by preventing funding from being portable.

E. The Commission's Action is Subject to Reversal

For the above reasons, the Commission's conclusion that a potential increase in the size of the State Fund caused by competition mitigates against the public interest must be reversed on several grounds. This determination should be reversed as an error of law in accordance with Utah Code Ann. § 63-46b-16(4)(d) because it misinterprets the public interest in Section 214(e)(2) of the Act, and is contrary to the Commission's mandate to

implement competitive universal service mechanisms. This action is also reversible as unconstitutional under Utah Code Ann. § 63-46b-16(4)(a) because it thwarts federally-mandated universal service requirements resulting in action that is preempted by federal law, and thus unconstitutional. Further, by exceeding its authority to implement the universal service provisions of the Act, the Commission took action beyond its jurisdiction under Utah Code Ann. § 63-46b-16(4)(b). For these reasons, all of which are errors of law reviewed de novo by this Court (supra p. 2), the Commission's public interest determination should be reversed.

IV. THE COURT SHOULD REVERSE THE COMMISSION'S ORDER REQUIRING WESTERN WIRELESS TO PRICE AT OR BELOW QWEST'S RATES

The Commission's Order mandates that Western Wireless charge "no more than the Affordable Base Rate" for its state universal service offering to be eligible for reimbursement from the State Fund in areas served by Qwest. DI 198, p. 14. The basis for this is Commission Rule R746-360-7(B), which conditions receipt of state universal service funding on pricing that is not "in excess of the Commission determined Affordable Base Rate for basic telecommunications service." Utah Admin. Code § R746-360-7(B). Commission Rule R746-360-2(A) defines the Affordable Base Rate, and provides that the "Affordable Base Rate shall be established by the Commission." Utah Admin. Code § R746-360-2(A). The Commission's Order acknowledges it has not established an Affordable Base Rate, and so it instead "presumes" the "affordable" rate is the rate currently charged by Qwest, the ILEC in Western Wireless' designated exchange areas. DI 198, p. 14.

This price cap requirement imposed by the Commission must be reversed for two reasons. First, the Commission's Rule establishing a rate cap for State Fund eligibility is preempted rate regulation as applied to a CMRS provider like Western Wireless. Second, if it is enforceable, the Commission erred by ordering WWC to price at Qwest's retail rates, rather than the Affordable Base Rate to be established by the Commission through a lawful rulemaking proceeding.

A. Conditioning Eligibility for State ETC Funding to a CMRS Provider on Specific Pricing Levels Violates 47 U.S.C. § 332(c)(3)(A)

The imposition of a rate cap on a CMRS provider's eligibility for universal service funding is preempted by 47 U.S.C. § 332(c)(3)(A), and the Court should determine that Western Wireless' retail rates do not need to meet this standard.

Section 332(c)(3)(A) of the Act provides, in relevant part: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by a commercial mobile radio service . . . ." 47 U.S.C. § 332(c)(3)(A). While there are limited exceptions to this prohibition, a state must file a petition with the FCC to be granted regulatory authority under one of these exceptions, which has not been done in Utah. See 47 C.F.R. § 20.13 (2000). Consistent with this preemption, the Utah Legislature has excluded CMRS providers from the definition of "telephone corporation" (Utah Code Ann. § 54-2-1(22)(b)(i)), so that the Commission's rules on entry, rates, and provision of local service do not apply to CMRS offerings. Utah Admin. Code §§ R746-320, R746-340, R746-349.

Absent the universal service provisions of the Act, then, Section 332(c)(3)(A) unquestionably prevents a state from "'prescribing, setting or fixing rates' of wireless service providers." Cellular Telecomms. Indus. Assoc. v. F.C.C., 168 F.3d 1332, 1336 (D.C. Cir. 1999) (citing 13 F.C.C.R. 1735, 1745). See also Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 986-87 (7th Cir. 2000) ("There can be no doubt that Congress intended complete preemption when it said 'no state or local government shall have any authority to regulate the entry or the rates charged by any commercial mobile service.'"). The question for this Court, then, is whether a state's authority to create state universal service mechanisms overcomes Section 332(c)(3)(A) preemption and allows the state to impose an otherwise unlawful rate cap. A review of the applicable law makes clear that Congress gave the state no such right.

First, the Act specifically provides that "Nothing in this section shall affect the application of Section 332(c)(3) of this title to commercial mobile service providers." 47 U.S.C. § 253(e). Therefore, nothing in the universal service provisions of the Act can be read to give the FCC or states the authority to overcome state rate and entry preemption of a CMRS provider. The FCC agrees that "[t]he treatment granted to certain wireless carriers under Section 332(c)(3)(A) does not allow states to deny wireless carriers [ETC] status." Universal Service Order, ¶ 145.

Moreover, the Fifth Circuit Court of Appeals has specifically held that the universal service provisions of the Act must not be read to overcome Section 332(c)(3)(A). In Texas Office of Public Utility Counsel v. F.C.C., the Court ruled that states could require CMRS providers to contribute to state universal service funds

notwithstanding Section 332(c)(3)(A). The Court found states could impose such assessments because taxing a CMRS provider did not constitute setting a retail rate. Id. at 332. In its discussion, however, the Court stressed that this interpretation was vital to its ruling because it would not – and could not – interpret any portion of the Act to overcome the preemptive effect of Section 332(c)(3)(A). Texas OPUC, 183 F.3d at 431. The Court based this on "Congress's instruction that § 254 be construed in ways that do not conflict with other federal laws," and in particular Section 332(c)(3)(a), and cautioned that this must be respected. Texas OPUC, 183 F.3d 431, 433 (citing Section 601(c) of the Act, reprinted in 47 U.S.C. § 152 (Addendum A-1)).

Finally, one of the exceptions to Section 332(c)(3)(A) allows states to regulate CMRS providers as "necessary to ensure the universal availability of telecommunications service at affordable rates" if and only if CMRS as a whole is determined to be a "substitute for land line telephone exchange service for a substantial portion of the communications within such State." 47 U.S.C. § 332(c)(3)(A). The FCC and the Circuit Court for the District of Columbia have read that exception to relate to state attempts to regulate rates of CMRS providers that are also ETCs, and have held that such rate regulation must be preceded by the appropriate "substitutability" finding. This issue was reached in Cellular Telecommunications Indus. Assoc. v. F.C.C., 168 F.3d 1332 (D.C. Cir. 1999), another case related to a state's ability to levy universal service assessments on CMRS providers. In attempting to craft a proper reading of Section 332(c)(3)(A) in conjunction with Section 254(f), the Court recognized the FCC's view that the substitutability exception "represents an exception for state laws that frame their

universal service requirement in terms of a regulation of rates and meet the specified [substitutability] condition." Id. at 1336. After analysis, the Court adopted this reading because it gives meaning to each sentence and "fairly reflects the statute's purpose to limit state rate and entry but not universal service regulation." Id. at 1336-37. As determined by the FCC and the D.C. Circuit Court of Appeals, then, CMRS rate regulation in a state universal service program is permissible only when a substitutability determination has been made, which unquestionably has not been done here.

The conclusion is inescapable. Section 332(c)(3)(A) prohibits rate regulation of a CMRS provider, and the substitutability exception must first be met to allow such rate regulation within the context of a state universal service program. Any authority the state has to implement state universal programs comes from Section 254(f), which, consistent with Section 332(c)(3)(A), does not authorize rate regulation of a CMRS provider. Instead, Congress has directed that Section 254(f) cannot overcome Section 332(c)(3)(A). As a result, the Commission's imposition of a rate cap on Western Wireless' universal service offerings violates Section 332(c)(3)(A), and is thus reversible as an error of law, as unconstitutional, and as beyond the Commission's jurisdiction under Utah Code Ann. § 63-46b-16(4)(a), (b) and (d).

B. By Establishing an Affordable Rate Based on The Incumbent's Charges, the Commission Has Engaged in Unlawful Rulemaking

If the Commission's Rule requiring pricing at the Affordable Base Rate is enforceable as to Western Wireless, the Commission erred by ordering Western Wireless to price at Qwest's current retail rates. Instead, the Commission should have ordered

pricing at the Affordable Base Rate once such a rate is lawfully determined. The failure to do so is an error of law and constitutes unlawful rulemaking, and must be reversed.

The Commission's Order can be rejected very simply as a misapplication of the existing rule. While Rule R746-360-7(B) requires pricing of a universal service offering at the Affordable Base Rate, the Commission ordered Western Wireless' pricing at a different rate. DI 198, p. 14. This is not a fair or reasonable application of the rule, and thus should be reversed.

The Order should also be reversed because the Commission sua sponte decided that existing ILEC rates (which are not a part of the record) constitute the Affordable Base Rate referred to in the rule. DI 198, p. 14. Determining an Affordable Base Rate that will apply to ETCs serving customers throughout the state is a substantial undertaking. An affordability determination presumably must look at services to be provided, consumers' willingness and ability to pay for service, and the carrier's costs of providing service, and will require the Commission to make significant policy decisions. Moreover, how the Affordable Base Rate is set will impact the State Fund, which will be used to bring rates down to that Affordable Base Rate. Utah Admin. Code § R746-360-8(A).

Pursuant to the Utah Administrative Rulemaking Act ("ARA"), Utah Code Ann. Ch. 63-46a, an agency must follow rulemaking procedures whenever it changes the law in a way that is generally applicable to a class of persons. Utah courts have rejected agency attempts to bind parties with unlawfully created rules. Under Utah law, a "rule" is defined generally as an agency's written statement that has the effect of law, implements

or interprets a state or federal legal mandate, and applies to a class of persons generally. Utah Code Ann. § 63-46a-2(16). Before a rule can be effective, the agency must engage in formal rulemaking, which includes notice to interested parties and an opportunity to comment. Utah Code Ann. § 63-46a-3.

This Court has adopted a test to determine whether an agency order is void for failure to engage in a formal rulemaking. In Williams v. Public Service Commission of Utah, 720 P.2d 773 (Utah 1986), the Commission, in contravention of prior practice and policy, determined in an adjudicative proceeding that it was without jurisdiction over one-way mobile telephone paging service. Id. at 775. Petitioners challenged this determination as void for failure to conduct a formal rulemaking. Id.

The Court recognized that the pivotal issue was whether the Commission's decision amounted to a "rule" under the ARA.[10] Id. at 776. The Court determined that agency action that was generally applicable, interpreted the law, and changed the law, would meet the definition of a "rule" and would require a rulemaking under the ARA. Id. at 776-77. Because the Commission had changed its regulation of one-way mobile paging carriers in a way that affected all paging carriers, its determination in the adjudicative proceeding was void, and could only be accomplished by formal rule. Id. As the Court explained:

> [T]he November adjudicative hearing certainly cannot be considered an adequate substitute for a rule making proceeding. Many of the protections

[10] Although Williams was decided under the predecessor to the ARA, the Court noted that the result would have been the same under either statute. Id. at 775 n.7. See also C.P. v. Utah Office of Crime Victims' Reparations, 966 P.2d 1226, 1230 n.5 (Utah Ct. App. 1998).

> provided for by the Act were missing from that proceeding, including adequate advance notices to all affected parties, an opportunity to participate, and an opportunity to comment on the proposed rule . . . . Because the requirements of the Act are not satisfied, the rule is vacated and the matter is remanded for further proceedings.

Id. at 777 (citations omitted). A similar result was reached in C.P. v. Utah Office of Crime Victims' Reparations, where the Utah Court of Appeals rejected an agency determination that required applicants for reparations benefits to use any available Medicaid benefits before making application with that office. 966 P.2d 1226, 1229-30 (Utah Ct. App. 1998). The agency's conditioning of benefits on compliance with a generally applicable requirement not found in the applicable rule was unlawful, and rejected by the court. Id. at 1231.

Here, the Commission's own rules refer to an Affordable Base Rate that will be generally applicable, is to be determined by the Commission, but has not yet been established. Utah Admin. Code § R746-360-2(A). Nevertheless, in this adjudicative proceeding the Commission has acted to set that Affordable Base Rate. The Commission's determination applies to all ETCs and prospective ETCs, and represents a clear change in the existing law. This determination is an unlawful rule, and (if enforceable at all) must be reversed until such time as the Commission establishes an Affordable Base Rate in accordance with law.

CONCLUSION

The Commission has misapplied federal and state law and is attempting to prevent universal service competition that consumers are entitled to have in rural areas. For the reasons set forth herein, Western Wireless respectfully asks the Court to:

1) identify the undisputed benefits of designating Western Wireless as an ETC;

2) reject possible impacts on the size of the State Fund as a factor weighing against the public interest in Section 214(e)(2) of the Act;

3) based on the above, find the benefits of designating Western Wireless as an ETC outweigh any detriments, and that the designation of Western Wireless as an ETC in the areas served by the URTA companies is in the public interest; and

4) order that any price cap for receipt of support from the State Fund is unenforceable as to Western Wireless, or in the alternative, order the Commission to establish an Affordable Base Rate by rule in accordance with applicable rulemaking procedures.

Respectfully submitted this 26th day of February, 2001.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By _____

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

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

ATTORNEYS FOR APPELLANT
WWC HOLDING CO., INC.