

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 02 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
WESTERN WIRELESS CORPORATION)
)
Petition for Preemption, Pursuant to)
Section 253 of the Communications Act, of)
An Order of the South Dakota Public Service)
Commission)

CC Docket No. 96-45

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice DA 99-1356 (released July 19, 1999), AT&T Corp. ("AT&T") submits these comments on the petition for preemption filed by Western Wireless Corporation ("Western") in the above-entitled proceeding on June 23, 1999.

AT&T agrees with Western that the May 19, 1999 order ("Order") of the South Dakota Public Utility Commission ("SDPUC") conflicts with sections 214 and 253 of the Communications Act of 1934 (the "Act") in material respects, and therefore is preempted. In violation of section 214(e), the Order sets an impossibly high standard for the granting of eligible telecommunications carrier ("ETC") status by requiring that a competitive carrier be "actually providing a universal service offering throughout the state" before it can be designated an ETC. This standard, which essentially requires a competing carrier to match the service offerings of an incumbent local exchange carrier ("ILEC") before even being eligible for Federal universal service funding, is a barrier to entry in the South Dakota market and thus violates section 253(a) of the Act.

The Order is not saved from preemption by section 253(b), because it is not competitively neutral, necessary, or consistent with section 254. To the contrary, the SDPUC's imposition of

No. of Copies rec'd 0/1/1
List ABCDE

requirements on competing carriers seeking to become ETCs in addition to those requirements set forth in section 214(e) of the Act is blatantly inconsistent with the Congressional goals for universal service expressed in section 254 of the Act, which strengthens the case for preemption.

DISCUSSION

The Order is based on the SDPUC's erroneous interpretation of section 214(e)(2) as requiring that "an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC." Order at Conclusions of Law, par. 6.^{1/} The barrier to entry created by this mistaken interpretation of section 214(e)(2) is exacerbated by the SDPUC's imposition of the additional requirement that a competing carrier submit "a definitive financial plan for offering service at comparable prices to ILECs in South Dakota" before being granted ETC status. Order at Findings of Fact par. 23-24. The Order's anti-competitive effect and its hostility toward the goals of competitive neutrality and universal service require that it be preempted.

A. The Commission Has Authority to Preempt the Provisions Identified in Western's Petition

The Commission has long-standing authority to preempt state statutes or regulations that would negate or interfere with federal regulatory objectives.^{2/} Sections 214(e) and 254 of the

^{1/} See also Findings of Fact at par. 22: "Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that [Western] has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

^{2/} See, e.g., Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986); California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994); Maryland Public Service Comm'n v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1332-33 (D.C. Cir. 1989); National Ass'n of Regulatory Utility Comm'rs v. FCC, 880 F.2d 422, 429-31 (D.C. Cir. 1989).

1996 Act, in particular, establish federal standards for the funding and provisioning of universal service support. To the extent a state commission's order imposes requirements contrary to or inconsistent with these Federal standards, the order is preempted by operation of the Supremacy Clause of the United States Constitution.^{3/}

The Act also contains express preemption provisions. Section 253(a) provides that no State "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Congress was sufficiently adamant that States and local government not erect barriers to entry into telecommunications markets that it directed the FCC to preempt attempts to do so:

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.

47 U.S.C. § 254(d).

Congress allowed States to impose additional requirements "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," but only if such requirements are imposed "on a competitively neutral basis and consistent with section 254." 47 U.S.C. § 253(b). Congress clearly intended that States not use the authority delegated to them

^{3/} See generally Louisiana Public Service Comm'n v. FCC, *supra*, at 376 n.4. State law is preempted where it is in "irreconcilable conflict" with federal law, Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982), where compliance with both state and federal law is an "impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

under the Act, including the authority to designate ETCs, “in a way that has the effect of imposing entry barriers” in violation of section 253(a).^{4/}

B. The SDPUC’s Order Conflicts with Section 214

Western’s petition demonstrates that the Order, and the erroneous conclusions of law that underlay it, conflict with section 214(e) to such an extent that the Order must be preempted. The SDPUC interpreted section 214(e) as requiring that an ETC “must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC.” Section 214 contains no requirement that a carrier already have its services fully in place and operational throughout the service area before it is even designated an ETC. Rather, section 214(e)(2) requires State to designate more than one carrier as an ETC “so long as each additional requesting carrier meets the requirements of paragraph (1).”^{5/} Paragraph 1 states that

A common carrier designated as an eligible telecommunications carrier . . . 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 . . . and (b) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1).

The SDPUC’s requirement that the requesting carrier have its service offerings fully in place throughout the service area before it may even receive ETC designation (as distinct from

^{4/} H.R. Rep. No. 104-458, 104th Cong., 2d Sess., p. 126.

^{5/} This directive is permissive with respect to carriers seeking to serve areas served by a rural telephone company, and mandatory in the case of all other areas, provided that the designation is consistent with the public interest, convenience, and necessity. 47 U.S.C. § 214(e)(2).

Federal universal service funding) is nowhere in the statute. Indeed, the Commission has interpreted section 214(e)(2) in a manner that conflicts with the SDPUC's interpretation. In its Universal Service First Report and Order, the Commission held that a

carrier must meet the section 214(e) criteria as 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.

Universal Service First Report and Order, 12 FCC Rcd at 8853 par. 137 (1997) (emphasis in original). The designation as an ETC comes first, then the obligation to provide the designated services attaches.

As recounted in Western's petition, the FCC and other State commissions have applied section 214(e)(2) in precisely this manner in designating carriers as ETCs. Petition at 14-15, citing Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Providers Pursuant to Section 214(e)(6) of the Communications Act, 12 FCC Rcd 22947 par. 11, 13 (CCB 1998) and Provision of Universal Service to Telecommunications Consumers, Case No. 8745, Order No. 73802, 88 Md. PSC 239, 1997 WL 1008436, *3 (1997).

The Commission's interpretation of section 214(e)(2) is the only one possible when one considers the conditions that gave rise to the need for universal service support mechanisms in the first instance. Congress recognized that market forces alone have not and will not bring to consumers in rural and high-cost areas access to telecommunications and information services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). Yet, the SDPUC expects that, in the face of both unfavorable market conditions in rural and high-cost areas and the presence of an incumbent that is already eligible

for and receiving Federal universal service funding, a competing carrier will have its service offerings in place and fully operational even before seeking ETC status and the eligibility for funding that comes with it.

Under the SDPUC's interpretation of section 214(e)(2), a competing carrier must engage in economically irrational behavior. First, it must commit the capital and operational resources to build facilities and roll out service throughout the area in which it will seek to be designated an ETC, all with no guarantee that such status will be granted. Then, it must price its service offerings either (a) at a price equal to its long run marginal cost, which will certainly be higher than the subsidized price charged by the incumbent, in which case the competing carrier will have no customers, or (b) at a price less than the subsidized price charged by the incumbent, in which case the competing carrier will have no profits. Congress did not intend that competing carriers face such a Hobson's choice before gaining merely the eligibility for Federal universal funding. The SDPUC's interpretation of section 214(e) clearly conflicts with Congress' intent to create competition among ETCs in rural and high-cost areas by encouraging the designation of more than one ETC in those areas.

The Commission has found that this competition among multiple ETCs should proceed on a competitively neutral basis, and specifically that it should include wireless as well as wireline carriers.^{6/} By requiring that a carrier actually be providing service throughout an entire

^{6/} The Commission also encouraged state commissions to take the special characteristics of wireless service into account by "disaggregating a non-contiguous service area of a rural telephone company into service areas composed of the contiguous portions of that area because some wireless carriers may be unable to provide service in non-contiguous service areas." Universal Service First Report and Order, at ¶ 25.

service area before being designated an ETC, however, the Order puts the innovative technologies used by wireless carriers, such as the wireless local loop proposed by Western, at a distinct disadvantage. The SDPUC approach would deny ETC status to a carrier in the process of building out its network, ignoring the fact that construction of new facilities is an ongoing process. In effect, the SDPUC would make it nearly impossible for any carrier other than the ILEC or a reseller of ILEC services to gain ETC designation. The Commission should preempt the Order to the extent it requires a carrier to “be actually offering or providing the services supported by the federal universal support mechanisms throughout the service area before being designated an ETC.”

C. The SDPUC’s Order Violates Section 253(a)

The SDPUC’s interpretation of section 214(e) creates such an impossible standard for a competing carrier to meet in being designated an ETC that it constitutes a barrier to entry in violation of section 253(a). In determining whether the Order violates section 253(a), the Commission will consider whether it “materially inhibits and limits the ability” of new entrants to compete with an entrenched incumbent that will continue to receive a subsidy or funding unavailable to the new entrant.⁷¹

⁷¹ See California Payphone Association, CCBPol 96-26, FCC 97-251, Memorandum Opinion and Order (1997), par. 31 (“we consider whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”); In the Matter of the Public Utility Commission of Texas et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCBPol 96-13, CCBPol 96-14, CCBPol 96-16, CCBPol 96-19, Memorandum Opinion and Order, FCC 97-346 at ¶ 73 (rel. Oct. 1, 1997) (preempting provisions of the Texas Public Utility Regulatory Act of 1995 that “effectively prohibited” the ability of new entrants to provide service by making competitive entry “not economically viable”); In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCB Pol 97-1, Memorandum Opinion and Order, FCC 97-336 (1997), at ¶ 38

(footnote continued on next page)

The Order clearly “inhibits and limits the ability” of a competing carrier to compete with incumbents in the South Dakota market by imposing on it an irrational entry requirement from which the incumbent is immune. According to the SDPUC, competing carriers must commit their resources to make service fully available in this rural and high-cost State before becoming eligible for ETC status, while incumbents, whose facilities were built under a cost-of-service regime, become eligible for Federal universal service support simply by being the incumbent. Of course, if competing carriers could compete with the subsidized incumbent in rural and high-cost areas without first being designated ETCs, there would be no need for universal service support in such areas. The SDPUC’s Order not only “inhibits and limits” the ability of new entrants to compete, it makes it virtually impossible for them to do so. The Order is thus expressly preempted by section 253(d), as well as by general principles of preemption.

The SDPUC’s Order also does not qualify for the “safe harbor” provisions of section 253(b). That section allows a State to impose on carriers additional requirements not found in the Act, but only under conditions that are not met here. First, the requirement imposed on competing carriers by the Order is not “competitively neutral.” It gives wireline incumbents an insurmountable advantage in rural and high cost states, as competing carriers would have to commit their resources before knowing whether they would be eligible for Federal universal service funding.

(footnote continued from previous page)

(preempting a provision of the Wyoming Telecommunications Act of 1995 that protected small rural carriers from competition until the year 2005).

Second, the Order is not “consistent with section 254.” To the contrary, in addition to requiring a new entrant to compete with a subsidized incumbent before being designated an ETC, the Order imposes other requirements that are inconsistent with the goal of providing access in rural and high cost areas expressed in section 254(b)(3). In denying the Western application, the SDPUC cited the fact that Western could not provide definitive pricing information about the services it would offer in South Dakota. Order at Findings of Fact par. 23-24. Requiring that a carrier applying for ETC status disclose “definitive” pricing information before it knows what subsidies it may receive puts an unreasonable burden on carriers seeking to provide service in competition with an incumbent that has already been designated an ETC.^{8/}

Finally, the requirements imposed by the Order are not “necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” Indeed, the SDPUC made no findings with respect to this requirement of section 253(b). Rather, the SDPUC based its conclusion on its finding that Western “is not currently offering the necessary services to support the granting of ETC designation,” and not on any consideration of the public interest. Order at Conclusions of Law par. 7. In so doing, the SDPUC went far beyond the discretion granted to it by either of sections 241(e) or 253(b). “To be sure, 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.’” Texas Office of

^{8/} The Order’s requirement that a wireless carrier provide detailed pricing information in order to qualify for ETC status also violates the limitation on State regulation of wireless service carriers’ rates and entry. 47 U.S.C. § 332(c)(3). See also Universal Service Seventh Report and Order, __ FCC Rcd. at ____ ¶ 72.

Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. July 30, 1999), at n.31. That is precisely what the SDPUC has done here, with the result that the Order must be preempted.

CONCLUSION

The SDPUC's Order in this case violates section 214(e)(2) and section 253(a) of the Act, and does not fall within the "safe harbor" of section 253(b). For the reasons set forth above, the Commission should preempt the Order.

Respectfully submitted,

AT&T CORP.

Mark C. Rosenblum / *all*

Howard J. Symons
Christopher H. Kallaher
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

Mark C. Rosenblum
Stephen C. Garavito
Room 1131M1
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-8100

Douglas I. Brandon
AT&T Wireless Services
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 223-9222

September 2, 1999

LITDOCS: 1144122.1 (_\$t601!.doc)

CERTIFICATE OF SERVICE

I, D. Ellen Love, hereby certify that, on this 2nd day of September, 1999, I served a copy of the attached Comments of AT&T Corp. via hand-delivery on the following:

Lawrence E. Strickling, Chief
Common Carrier Bureau
Federal Communications Commission
The Portals, Room 5B 303
445 12th Street, S.W.
Washington, D.C. 20554

Irene Flannery, Chief
Universal Service Branch
Federal Communications Commission
The Portals, Room 5A 520
445 12th Street, S.W.
Washington, D.C. 20554

Thomas J. Sugrue, Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals, Room 3C 207
445 12th Street, S.W.
Washington, D.C. 20554

Sheryl Todd (3 copies)
Accounting Policy Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 5B 540
Washington, D.C. 20554

Richard D. Smith
Accounting Policy Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 5B 448
Washington, D.C. 20554

International Transcription Service (ITS)
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554



D. Ellen Love