

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

In the Matter of)	
)	
Western Wireless Corporation)	
Petition for Designation as an Eligible)	CC Docket No. 96-45
Telecommunications Carrier and for)	DA 99-1847
Related Waivers to Provide Services)	
Eligible for Universal Service Support)	
to Crow Reservation, Montana)	

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of the
RURAL TELEPHONE COALITION

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SUMMARY

The request made by Western Wireless for the Commission to assert federal jurisdiction in order to declare Western Wireless to be an ETC properly falls within the purview of another of the Commission's ongoing proceedings. Further, the request seeks a finding that is not technologically or competitively neutral, and fails to establish that the Commission even holds the authority to grant the desired status in this case.

The questions regarding the interwoven or overlapping jurisdictions (or lack thereof) among tribal authorities, states, and the Commission are complex. In order to achieve clarity prior to making any firm decisions on such controversial matters, the Commission sensibly initiated a proceeding to consider public comments on these and related topics. Western Wireless has not even followed the process the FNPRM outlined for dealing with state jurisdiction questions. Rather than prejudging or otherwise prejudicing the nationwide policy proceeding, Western Wireless's request should await the findings of this ongoing docket, after consideration is nationwide implications and a full rulemaking record.

Western Wireless also requests support for all costs above a \$ 10 benchmark. If granted, this could lead to Western Wireless and its Montana customers obtaining more support than other customers on tribal lands and other ETCs. While more support on tribals lands may well be appropriate, there is no basis for thwarting the principles of technological and competitive neutrality in such a manner. Support should be allocated on a fair and equitable basis.

Before the Commission can take any action to decide Western Wireless's petition, it must first determine that it has jurisdiction to decide the issues. Section 214(e)(6) of the

Communications Act provides the Commission with the authority to designate a common carrier as an ETC (local exchange carrier) for support for its assertion that the state does not.

As in other matters, the Commission must follow the will of Congress. Congress amended the 1996 Telecommunications Act to account for tribal carriers which could not otherwise have been designated as ETCs under the Act as originally written. While Congress was not overly restrictive regarding which carriers the amendment applied to, so long as there is no state designation authority, Western Wireless has not demonstrated that Montana lacks such authority.

Further, Congress required a public interest finding as a precondition for designating additional ETCs in rural telephone company serve areas. Western Wireless has failed to show that the public interest is served by it being declared an ETC in Project Telephone Company=s Service area. Moreover, a premature decision about tribal and CMRS jurisdiction here could jeopardize the ETC designations and operating authority of current universal service providers. And, Western Wireless is not even consistent in the jurisdictional claims it asserts from one state to the next.

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I. THE COMMISSION SHOULD NOT PREJUDGE THE QUESTIONS IN ITS RULEMAKING PROCEEDING ON SERVICE TO TRIBAL, INSULAR AND UNSERVED AREAS OR GRANT PREFERENTIAL WAIVERS BEFORE IT DECIDES ON POLICY TO TREAT ALL TRIBAL LANDS AND THEIR DESIGNATED ETCs EVEN-HANDEDLY

Western Wireless Corporation (WWC), through two wholly-owned subsidiaries, has asked the Commission to assert federal jurisdiction over its request for designation as an Eligible Telecommunications Carrier (ETC) to serve the Crow Reservation in Montana and certain neighboring non-reservation service territory served by Project Telephone Company (Project), a rural telephone company as defined in the Communications Act, as amended, 47 U.S.C. Section 153(37). WWC claims that the Commission has jurisdiction pursuant to Section 214(e)(6), added to the Act to remedy a feared lack of designation authority over a request from a common carrier providing telephone exchange and exchange access that is not subject to the

jurisdiction of a State Commission.≡ WWC also requests that the Commission grant it waivers that would entitle it on an expedited basis to a unique level of support, all provided from federal funding and not available to the ILECs already designated as ETCs for the same area. Under the discriminatory waivers it requests, WWC would recover all costs for providing universal services in its designated ETC area from the federal universal service fund, except for the amount it would recover by charging a \$10 rate. The RTC agrees that extra support and an extra federal share of responsibility may well be appropriate for tribal lands. However, the Commission cannot lawfully bestow on one technology and one provider preferential support and rights that exceed what it has made available to any other customer on tribal lands or ETC serving tribal lands, while requiring all other customers and providers to await the orderly completion of rulemaking based on public participation and a full record.

A. The Commission Should Not Prejudice or Prejudice Its Unserved Areas Rulemaking, Particularly the Sensitive State Jurisdiction Issues

The Commission opened a rulemaking proceeding on August 5, 1999 to determine a number of issues related to extending service to unserved or underserved areas, including certain insular, high cost and tribal areas where telephone penetration is significantly lower than the national average.¹ Prominent among the issues for which it has asked the public and interested parties to provide information, policy analysis and recommendations are the very questions WWC wants decided summarily in its favor here. These include questions about when and to what extent the Commission may supplant state jurisdiction to designate ETCs under Section

¹ Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 99-204, para. 5 (rel. Sept. 3, 1999) (FNPRM).

214(e)(6), whether state ETC designation authority must bow to federal jurisdiction in tribal lands or when the applicant for designation is a CMRS provider, what share of support for service in tribal lands should be provided from federal or state universal service programs, whether traffic to and from exchanges in a tribal area is interstate or intrastate, whether to require separate reservation-based study areas and how the interim cap on universal service funding support for incumbent local exchange carriers (ILECs) should apply when tribal lands are involved.

The FNPRM repeatedly emphasized that these are difficult questions involving federal, state and tribal rights and interests, existing service and regulatory circumstances, as it embarked upon its proper rulemaking process to make nationwide telecommunications policy. The FNPRM identifies many alternatives for interpreting the Communications Act, state laws, tribal laws and treaties and determining how they interact. It expresses concern (FNPRM at para. 85) that

the fact intensiveness and the legal complexity of determining whether a state has jurisdiction over carriers seeking designation may lead to confusion, duplications of efforts and needless controversy among carriers, tribal authorities, state commissions and this Commission, which could undermine efforts to achieve our universal service goals.

Consequently, it proposes a process for such requests (FNPRM at para.85) that includes consultation with the tribe and the state, reliance on state designation whenever the state and the tribal authority Aagree that the state has jurisdiction,≡ application to the Commission only if the tribe challenges a state=s claim of jurisdiction and a demonstration by the tribal authorities and carriers of Awhy Commission designation is appropriate.≡

Instead, WWC has come to the Commission, apparently without consultation with Montana, with a bare assertion (pp. 7-8) that its universal service offering on the Crow

Reservation is not subject to state jurisdiction because it is a CMRS provider that is statutorily exempt from rate and entry regulation by state commissions pursuant to Section 332(c)(3)(A) of the Communications Act and because the areas are within a tribal, rather than state, authority. Rather than demonstrating the lack of state authority or the preemptive tribal authority, however, WWC asserts that the Commission should simply accept an ETC petitioner's representation of its status as a common carrier not subject to the jurisdiction of a state commission and observes (p. 3) that the Tribal Council is interested in providing affordable telephone service and an expanded local calling area and supports [WWC's] universal service efforts.² There is no indication that the Tribal Council asserts a lack of state jurisdiction or that Montana believes that it lacks jurisdiction to designate ETCs. The Commission should not dispense with the very first step of its proposed procedure to determine whether the state claims and has jurisdiction, which rests on respect for both state and tribal rights, when WWC does not even mention the state and tribal positions on jurisdiction.

The Commission should not sidestep the issues it admits are complex and difficult and

² WWC bases its claim that it is Commission policy to rely on carrier assertions that a state lacks jurisdiction on a Common Carrier Bureau order dealing with telephone companies owned by tribal authorities. The tribal companies were in a position to know whether their state had asserted jurisdiction over their operations in conflict with their own claim of sovereignty. The case also turned on carrier certifications that were not challenged by any party or the state, despite notice to the state. WWC is not a tribal authority, its petition does not even show service on state officials in Montana, it knows (pp.13-14) that Project already provides universal service to part of the Crow Reservation, so that WWC must make a public interest showing to be designated as an Additional ETC and it must be aware that Project and US West both are providing universal service by Montana's grant of state ETC designations that include their entire service areas, including portions within the reservation.

fraught with jurisdictional tensions either to prejudge or to ignore the notice and comment process it has set in motion to craft national policy that will decide how to accommodate different state, tribal and carrier circumstances. It should not eviscerate the proceeding intended to determine whether state jurisdiction applies for designations involving wireless or satellite carriers, in spite of the FNPRM's offer (para. 80) to consider requests on a case by case basis, by accepting WWC's breezy claim that Section 332 precludes state ETC designation jurisdiction. The Commission should at least ascertain whether Montana considers WWC's universal service offering as the kind of substitute for telephone service that enables a state to petition the commission for jurisdiction over even the rates and entry of wireless carriers.³ Accordingly, the Commission should reject WWC's effort to secure a premature and hasty statutory interpretation in its favor here on Section 332 and a preemptive assertion of federal authority for ETC designations involving tribal lands B matters of nationwide importance. To adopt such legal holdings here will necessarily prejudice the carriers, tribes and states that are relying on participating in a fair rulemaking process where their comments and evidence will be taken into account, rather than a proceeding that will merely

³ Fundamental logic and sound public policy both suggest that a carrier seeking ETC designation for its entire wireless service territory in Montana, a designation which would allow any existing ETC to withdraw as a universal service provider under section 214(e)(4), must at least be providing a substitute for telephone service throughout that cellular service area.

go through the motions of rulemaking on issues the Commission will already have prejudged.⁴

- B. The Commission Should Not Grant Preferential Waivers to Western Wireless
 Instead of Deciding Policy for All Carriers and Customers Affected
by ETC Designations For Tribal Lands or CMRS Providers

⁴ The need to employ Commission resources to decide the FNPRM issues for all states and carriers, rather than prematurely diverting resources to cases of limited applicability and discriminatory effect, is apparent from recent state actions. For example, Wyoming has held that it lacks jurisdiction over wireless providers as a matter of state law, although WWC argued that the state had ETC designation jurisdiction. Order Granting Motion to Dismiss Amended Application, Wyoming PSC Docket No. 70042-TA-98-1 (issued Aug. 13, 1999). In contrast, Minnesota, at the urging of WWC, has held that it has statewide jurisdiction to designate a wireless carrier as an ETC. See, Telecommunications Reports, AWWC Wins ETC Status in Minnesota,≡ p.17(October 4, 1999).

As noted above, the RTC agrees with the suggestion in the FNPRM (para. 64) that the Commission may need to assume a higher burden of federal responsibility for high cost support and provide a greater level of support in tribal areas. However, it would be fundamentally unfair and both competitively and technologically non-neutral for the Commission to develop a new policy here by granting waivers to let only WWC obtain total support for all costs above a unique benchmark for its service to the Crow Reservation. Project already offers universal services throughout the portion of the Crow Reservation within its service area. As discussed further below, it reports 71% penetration in that area, although WWC claims a 45.1% penetration rate throughout the reservation. If greater federal cost recovery is the key to improving penetration for this segment of the Crow Reservation, it would obviously help Project to increase subscribership to recover 100% of its costs beyond the high cost benchmark or, as WWC seems to intend, all costs shown by the Commission=s as yet inapplicable proxy cost model that are above the \$10 rate WWC proposes.⁵

In contrast, it would provide WWC and wireless technology with a blatant competitive advantage for the Commission to stretch Section 332 to seize ETC designation jurisdiction for wireless carriers alone. To waive its rules to provide WWC with more federal support than Project or any other ETC serving an area also served by wireless technology can receive would only increase to WWC advantage. Moreover, to do so here just for WWC would be unjust to

⁵ The Commission has held that the proxy cost model has not yet been shown to be sufficiently accurate for use in a rural carrier=s study area, such as Project=s study area that contains part of the Crown Reservation and, common sense suggests, even the new reservation-based study areas proposed in the FNPRM. See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776, para. 309 (May 8, 1997).

customers in the nation=s other tribal areas and their existing or potential ETCs. Thus, the Commission should fashion an even-handed solution for supporting service to tribal areas with low subscribership and a generally applicable, well-reasoned interpretation of when state jurisdiction is unavailable, not a one-carrier or one-technology windfall.

II. WESTERN WIRELESS HAS NOT ESTABLISHED THAT THE FCC HAS JURISDICTION TO GRANT IT ETC STATUS

Before the Commission can decide if it will take any action regarding WWC=s petition, it must first determine that it has the jurisdiction to decide the issues. In the absence of specific statutory authority, the FCC can not act on WWC=s petition.

1. Western Wireless Failed to Show that it Is Not Subject to the Jurisdiction of a State Commission

Section 214(e)(6) of the Communications Act provides the Commission with the authority to designate a common carrier as an ETC only in those situations where the carrier is not subject to the jurisdiction of a State Commission.⁶ The Commission=s jurisdiction under section 214(e)(6) thus does not supplant a state=s jurisdiction over state wireless ETC designations. Commission procedures require petitioners seeking ETC designation from it under 214(e)(6) to provide a certification and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission . . . ⁶ WWC fails in this regard.

The state of Montana has had and continues to possess and exercise jurisdiction over non-

⁶ FCC 97-419, Dec. 29, 1997.

tribal providers, including WWC , in their quest for ETC designation within the state.⁷ Since the beginning of state regulation of telephone companies, states have asserted jurisdiction over companies providing service to tribal lands and actively regulated rates provided there. An FCC ruling that the state lacks jurisdiction to grant ETC status to WWC on the Crow Reservation is a finding that the state lacks ETC designation jurisdiction over the other carriers in the state where they serve on a reservation. It could even call into question their authority to serve reservations at all. A Commission decision to this effect could have tremendous implications on the universal service funds received by many carriers. The carriers could be forced to refund funds they had been receiving without proper authority. The implications to the service and rates charged to residents and businesses situated on reservations are enormous.

⁷ Mont. Code Ann, Section 69-3-80.

1. Western Wireless Offers no Support for its Assertion that the State Lacks Jurisdiction

WWC supports its assertion that its proposed universal service offering falls within tribal rather than state authority by citing, in a footnote, one paragraph of non-relevant dicta of a Supreme Court case. The opinion of the Court in that case involves a determination that title to the bed of the Big Horn River passed to the state of Montana upon its admission to the Union, and that the tribe has no power to regulate non-Indian fishing and hunting on reservation land that was owned by nonmembers of the tribe.⁸ The FCC=s exercise of jurisdiction in this instance would have far-reaching consequences; and there is no indication that the Supreme Court would apply its statement to these particular facts. The Commission should decline to exercise jurisdiction based on speculation of the High Court=s intent. WWC=s misplaced reliance on the Supreme Court=s ruling fails to establish that its proposed offering falls within tribal authority. It therefore fails to demonstrate that the FCC has jurisdiction. The issue is particularly complex. WWC does not begin to show that the state lacks authority to grant it ETC status for the Crow Reservation.

2. Western Wireless Implicitly Consents to State Jurisdiction, Where Convenient

⁸ *Montana v. U.S.*, 450 U.S. 544 (1980) .

WWC=s assertion that the state of Montana lacks jurisdiction to grant ETC status over the Crow Reservation is directly contrary to the position it has taken in the other states where it has requested ETC designation. Many, if not all, of the 13 states for which WWC has filed for ETC designation contain Indian reservations. In each instance, WWC filed with the state for ETC designation for the entire state, including tribally owned land. WWC has not indicated why Montana jurisdiction is unique compared to the jurisdiction of other states. By filing its statewide applications, WWC concedes that the state has jurisdiction to grant it ETC status for tribally owned lands. In the State of Minnesota, where WWC is claiming an ETC designation victory, WWC recognized that the state Commission was Afully empowered to decide its petition for designation as ETC throughout the entire state.⁹ This was true despite the fact that the state of Minnesota encompasses tribally-owned lands.

WWC states that it is a CMRS provider that is Astatutorily exempt from rate and entry regulation by state commissions≡ under section 332 of the Communications Act.¹⁰ To the extent that WWC=s universal service will be Afixed≡ service, it is not within the plain language of the state preemption for commercial or private Amobile≡ service in Section 332(c)(3). Even if WWC=s fixed wireless service offering were classified as CMRS, ETC designation is not about entry or rates, the preempted actions, but about jurisdiction to regulate Aother terms and conditions,≡ which section 332(c)(3) reserves for states. WWC is a carrier subject to the

⁹ Minnesota Public Utilities commission, Staff Briefing Paper for p. 5695/m-98-1285, p.11.

¹⁰ WWC=s Petition at pp. 7-8 (citations omitted).

jurisdiction of a state at least in its application for ETC designation, as it successfully argued in securing statewide ETC status in Minnesota.

WWC already serves the Crow Reservation and the surrounding area with its existing cellular network infrastructure and spectrum,¹¹ but claims that it will provide the fixed wireless service for just \$10 a month, if federal universal service support picks up the difference.¹² WWC seems to concede that the state of Montana has jurisdiction over the ETC designation request it has pending before the state commission for the entire state,¹³ an area that includes the Crow Reservation, even though Section 332(c), if applicable to bar state jurisdiction, would apply there as well. If Section 332(c) exempts WWC from state ETC jurisdiction, one can only wonder why it has urgently pursued state ETC designations in 13 states. Furthermore, in its request for ETC designation in the state of Minnesota, WWC **argues** that legislation has authorized the state commission to exercise jurisdiction over authority to implement federal and state universal service mechanisms.¹⁴

¹¹ WWC Petition, p. 5.

¹² WWC does not state whether its \$10 monthly fee would include the cost of its wireless local loop customer premises equipment.

¹³ WWC Petition, p 7, n.12.

¹⁴ Minnesota Public Utilities Commission, Staff Briefing Paper for p. 5695/m-98-

3. Western Wireless= Petition is Unworkable

1285, p.11.

What WWC proposes is a jurisdictional morass. It seeks designation as an ETC for all of the Crow Reservation and some limited adjacent areas.¹⁵ It conveniently plies the Commission with alternatives to help the Commission get around the mess. WWC respectfully requests that it receive ETC designation for the entire study area currently served by Project,¹⁶ including the area outside the boundaries of the Crow Reservation, as well as the entire territory of the Crow Reservation. As alternatives, WWC suggests that the Commission waive the study area requirement, forbear from enforcing it, designate a different service area, or designate WWC as an ETC for only the area included within the boundaries of the Crow Reservation, which amounts to a study area change. WWC fails to explain how any of these alternative regulatory schemes is consistent with section 214(e). The Commission cannot unilaterally waive the study area provision in section 214(e)(5) for Project's study area. Congress provided that such a change could only be made with Joint Board participation, which the Commission has translated into an elaborate proceeding, which nevertheless does not give it sole authority to rewrite the law. Nor has WWC shown that it could meet the standard for forbearance in Section 10(a), even if it were appropriate to use forbearance to sidestep Congress's careful allocation of state and federal

¹⁵ WWC Petition, p. 14.

¹⁶ Project is a rural telephone company as defined in the Act and Section 214(c)(1) and (5) required a competitive entrant designated as an ETC within a rural telephone company's study area to provide service to the entire study area.

and joint authority in Section 214(e). Thus the Commission should not accept WWC=s invitation to ride roughshod over the state of Montana=s statutory authority to designate WWC as an ETC.

2. The Commission=s Exercise of Jurisdiction in this Case Would Thwart Congressional Intent

WWC=s jurisdiction demand for universal service support from this Commission completely distorts Congressional intent in enacting section 214(e)(6). Section 214(e)(6) and its related provisions were added as a technical correction of the Telecommunications Act of 1996 because the original language in Section 214(e) did not account for the fact that state commissions in a few states have no jurisdiction over certain carriers.¹⁷ WWC strains to read the technical correction as applying to it as a carrier simply because it seeks to provide service on tribal land, let alone that the remedial provision covers all CMRS providers.

All of the legislative history surrounding the technical amendment to section 214 indicates that it was to correct an inequity in the law as originally written. It was not meant to expand the powers of the FCC or curtail the ETC designation jurisdiction of the states. The original law did not provide carriers, such as those that are tribally-owned, access to universal service. In statements, the sponsor of the bill, Senator McCain, stated the following:

Typically, states have no jurisdiction over tribally owned companies which may or may not be regulated by a tribal authority that is not a state commission *per se*. The failure to account for these situations means that carriers not subject to the jurisdiction of a state commission lacked a way of becoming an eligible carrier that can receive universal service support. This would be the case whether these

¹⁷ NTCA has several members that are tribally-owned LECs. NTCA recognized the inequity of section 214(e) and brought the fact that it failed to address the needs of tribally-owned companies to the attention of Senator McCain, who introduced the bill containing the technical amendment to section 214 on October 31, 1997.

carriers are traditional local exchange carriers that provide services otherwise included in the supported services, have previously obtained universal service support, or will likely be the carrier that continues to be the carrier of last resort for customers in the area.¹⁸

¹⁸ 141 Cong. Rec. S12568, Nov. 13, 1997. (emphasis added).

Senators Campbell, Stevens, Inouye, Daschle and Dorgan cosponsored the bill. Every member of Congress who spoke out on the bill mentioned that it would correct an inequity in section 214 which did not take into account that some tribally owned telephone companies were not subject to a state=s jurisdiction. Congressman Hayworth stated that, ASome, not all, but some States have no jurisdiction over tribal-owned carriers, which may or may not be regulated by a tribal authority that is not a State commission per se.≡ In Congressman Hayworth=s home state of Arizona, there are four tribal authority telephone cooperatives that are not subject to state jurisdiction. The Congressman stated that Apassing [the] bill would ensure that [tribal authority cooperatives] can continue to serve their customers as eligible carriers.≡¹⁹ The amendment was not passed to provide a wireless company such as WWC with a way to circumvent a state=s ETC designation process and go directly to the FCC for universal service support simply because a portion of its service territory happens to cover tribally owned land. Nor is there an iota of support in the Act of the legislative history for the notion that Section 332(c) deprives any state of ETC designation jurisdiction under Section 214(e). The technical amendment made no change in the existing authority of the states. WWC is a company subject to the jurisdiction of the state of Montana, except for rate and entry regulation, as long as Montana does not successfully invoke the substitute service provision in Section 332(c)(3) to regain that jurisdiction. To use section 214(e)(6) to allow WWC to circumvent Montana=s ETC designation process would completely subvert the Congressional intent of this narrow remedial technical amendment.

III. WESTERN WIRELESS HAS FAILED TO DEMONSTRATE THAT MULTIPLE ETC

¹⁹ Id.

DESIGNATIONS IN PROJECT TELEPHONE COMPANY=S SERVICE AREA
WOULD SERVE THE PUBLIC INTEREST

In its petition, WWC correctly recognizes that because a portion of the service area for which it is seeking ETC status includes the service area of Project Telephone Company -- a rural telephone company as defined by the 1996 Act²⁰ -- its designation as an ETC must first be found to be in the public interest.²¹ However, WWC has failed to show how the public interest would be served by its designation as an ETC in Project=s service area.

²⁰ 47 U.S.C. §153 (37).

²¹ Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.≡ 47 U.S.C. §214(e)(2).

In addressing the public interest requirement, WWC=s primary argument is that its designation as an additional ETC would facilitate competition Ato the benefit of consumers in the service area.²² To bolster its case, WWC cites the 1996 Act=s goal to establish a Apro-competitive. . . national policy framework.²³ Indeed, in order to facilitate competition, Sec. 214(e)(2) requires state commissions to designate additional ETCs in areas served by non-rural ILECs. However, Congress had reservations as to whether the introduction of subsidized competition into the areas served by rural telephone companies would immediately, or in all cases, be beneficial to the provision of universal service. These concerns led Congress to carve out an exception to its general rule favoring multiple ETC designations by adding the requirement of a public interest determination prior to the designation of additional ETCs in rural company service areas. It follows, then, that the introduction of competition into a rural service area cannot be considered a demonstration of serving the public interest, since this is exactly the issue Congress required the states to determine as a prerequisite for designating an additional ETC in a rural telephone company=s study area. Were the FCC to consider the facilitation of competition into Project=s service area as a valid basis for a public interest showing, it would render meaningless the universal service safeguard Congress purposefully included in the law.²⁴

In addition, WWC contends that one of the public interest benefits designating it as an

²² WWC Petition, p. 15.

²³ Pub. L. No. 104-104, 110 Stat. 56, Joint Explanatory Statement at 1.

²⁴ In fact, when Congress intended increased competition to qualify as an affirmative public interest showing, it found it necessary to say so explicitly.

ETC would be the availability of new telephone services that are not available today.²⁵ Yet, WWC fails to mention exactly what those services are. To be sure, WWC details how it is capable of providing all of the services the Commission has determined to be supported by universal service, but that is all. Of course, as an ETC, Project also makes all of the supported services available throughout its service area, including the portion within the Crow Reservation. It is therefore unclear exactly what new services WWC would be making available.²⁶ Offering mobile service cannot qualify WWC for universal service support because mobility is not included in the current Section 254(a)(b) definition of the services that are supported by Federal universal service support mechanisms,[≡] and Section 254(c) requires that a carrier use support only for the provision, maintenance and upgrading of services for which the support is intended.[≡]

²⁵ *Id.*, p. 16.

²⁶ While not a new service, per se, the RTC agrees that a larger local calling area on the reservation would be beneficial to its residents. To address this, Project has filed a petition with state regulators to broaden the local calling scope to include Billings, which is the economic center of the reservation.

To conclude its public interest showing, WWC postulates that its designation as an ETC would not have a significant impact on Project given the extremely low penetration rate on the Crow Reservation.²⁷ While the RTC cannot confirm or deny WWC's claim that only 45.1% of the households on the Crow Reservation have access to basic phone service,²⁸ it must be emphasized that service to the reservation is provided by two carriers B Project and U S West. Within the portion of the reservation served by Project, basic service is available to 99.2% of households and the subscriber penetration rate is 71%. Thus, it is far from conclusive that an additional ETC would not be detrimental to Project and its subscribers.

Furthermore, the FCC cannot unilaterally forbear from the Sec. 214(e)(5) rural service area definition, as WWC suggests, to avoid designation for Project's territory outside the Crow Reservation,²⁹ which would not qualify commission jurisdiction rests on serving tribal lands. Prior to any service area redefinition of a rural telephone company, the FCC must confer with the state(s), after taking into account the recommendations of the Universal Service Joint Board, as Sec. 214(e)(5) requires. Here, too, WWC seeks Commission action in derogation of legitimate state rights and interests.

CONCLUSION

²⁷ WWC Petition, p. 16.

²⁸ *Id.*, pp. 2-3.

²⁹ *Id.*, p. 14, n. 26.

The Commission has already initiated a proceeding to examine many of the complex jurisdictional questions that would inevitably arise. Such questions should be resolved within the context of that proceeding. Congress established that states, not the federal Commission, have the authority to declare which carriers are ETCs. The Commission is presently undertaking a proceeding to determine how to apply the limited exception process for in Section 214(e). This proceeding should not be undermined by premature case-by-case decisions. Furthermore, a public interest, finding is required prior to designation in areas served by rural telephone companies. Based on procedural concerns, legislative directives, and public interest requirements, Western Wireless's request should be denied.

Respectfully submitted,

THE RURAL TELEPHONE COALITION

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