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

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In the Matter of	)	
	)	
Western Wireless Corporation	)	CC Docket No. 96-45
	)	
Petition For Designation as an Eligible Telecommunications Carrier and For Related Waivers To Provide Universal Service To The Crow Reservation in Montana	)	

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COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of itself and its subsidiaries, hereby submits its comments on the petition filed by Western Wireless Corporation ("Western Wireless") to be designated an eligible telecommunications carrier ("ETC") for the purpose of providing universal service on the Crow Reservation in Montana and for related waivers of the Commission's universal service rules.

1. The Telecommunications Act of 1996 required the Commission, in cooperation with a federal-state Joint Board, to establish rules that would insure the preservation of universal service throughout the United States. The Act provided principles to guide the Commission's and Joint Board's efforts to create a federal universal support mechanism. Since the passage of the Telecommunications Act, the Commission, Joint Board and the telecommunications industry have labored to create and implement an approach to universal service that fulfills the objectives of the statute. The result of these efforts is a framework for universal service support that is intended to be equitable, sufficient and competitively neutral.

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2. Western Wireless' petition represents the antithesis to the universal service process that has been undertaken. Before the new universal service rules are even implemented, the Commission is supposed to set them aside and create special treatment for Western Wireless. The fact that the rules for which Western Wireless seeks a waiver have not been implemented in-and-of itself calls into question whether such a waiver could possibly be justified. A waiver requires the petitioner to demonstrate unique and special circumstances that renders application of the general rule inappropriate. Such a demonstration is not made by Western Wireless nor could it be made. Absent implementation of the new rules, Western Wireless cannot show that the impact of the rules has a disparate or unintended consequence on it, relative to any other provider of universal service.

3. As Western Wireless' petition indicates, there are other carriers that serve parts of the Crow Reservation and the surrounding areas for which Western Wireless seeks ETC status. Yet, Western Wireless offers no explanation why its circumstances are so different from these other exchange carriers that it should not be subject to the same rules. Even if Western Wireless attempts to "justify" its waiver because of its intent to serve the Crow Reservation, such an excuse simply does not pertain to areas beyond the reservation. Even as to serving the Crow Reservation, Western Wireless does not distinguish its circumstances from other carriers so as to meet the standards that would justify a waiver. Indeed, were the Commission to grant Western Wireless' waiver request, the Commission would violate its own principle of competitive neutrality and disparately treat similarly situated wireline and wireless carriers.

4. As laudable as Western Wireless' putative objective may be—to increase telephone penetration on the Crow Reservation—the policy that creates special conditions for a class of

users such as Native Americans is one that should not be established through a waiver of general rules. Indeed, the Commission has already commenced a rulemaking proceeding to comprehensively address issues surrounding telecommunications deployment in unserved and underserved areas.[1] As part of its inquiry, the Commission is specifically considering steps that it should take to address increase telephone subscribership on tribal lands.

5. The request for waiver aside, the jurisdiction of the Commission to grant Western Wireless ETC status is also questionable. As the Notice in the pending rulemaking proceeding correctly notes, the issue of jurisdiction is anything but clear-cut.[2] While Western Wireless presents its petition as if the Commission has jurisdiction to grant Western Wireless' request, the only attempt to support its claim of jurisdiction lies in a single footnote.[3] All that footnote addresses is tribal authority over non-Indians on tribal lands. The issue of jurisdiction, however, has nothing to do with tribal authority. The question, unaddressed by Western Wireless' petition, is the extent of state authority. The fact that there is an activity that extends on to tribal lands does not in and of itself divest the state of its jurisdiction under the Communications Act. Indeed, state commissions have in fact been regulating telecommunications activities conducted on Indian reservations. A state's jurisdiction or regulatory authority over non-tribal members' activities on tribal lands could be barred if it were preempted by the operation of federal law. Certainly Western Wireless has made no case of preemption. Even the Commission, in its

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1 *In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas,* Further Notice of Proposed Rulemaking, CC Docket No. 96-45, (FCC 99-204), released September 3, 1999 ("*Notice*").

2 *Notice* ¶¶ 33-39.

3 Western Wireless Petition, n. 14.

Notice recognizes that there is no clear case of preemption in the Communications Act.[4] At best, a case of preemption has to be built upon inference and evaluation of all relevant factors including the states' interests and the express language of the statute. Based on the statute's clear preference that the states determine ETC status, an argument that there is a clear federal regulatory scheme to the contrary or that there is a conflict with Indian sovereignty is highly problematic. In any event, Western Wireless has failed to establish the jurisdictional predicate for Commission action.

6. Accordingly, the Commission should deny Western Wireless petition for ETC status and deny its request for waiver of the universal service rules.

Respectfully submitted,

BELLSOUTH CORPORATION

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4 *Notice* ¶45.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of October 1999 served the following parties to this action with a copy of the foregoing COMMENTS by hand delivery or by placing a true and correct copy of the same in the United States, postage prepaid, addressed to the parties listed below.

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