

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

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In the Matter of:)	
)	
Western Wireless Corporation)	DA 99-2511
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier to Provide)	
Services Eligible for Universal Service)	
Support in Wyoming)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA) hereby files its comments on the petition filed by Westerns Wireless Corporation (Western Wireless) for designation by the Commission as an eligible telecommunications carrier (ETC) for universal service support in Wyoming in the above-captioned proceeding.¹ USTA is the principal trade association of the local exchange carrier (LEC) industry. Its members provide over 95 percent of the exchange carrier-provided access lines in the United States.

In its petition, Western Wireless seeks Commission designation as an ETC in Wyoming. Western Wireless claims that it is a Commercial Mobile Radio Service (CMRS) provider. It first maintains that the Wyoming Public Service Commission (PSC) lacks jurisdiction to convey ETC status to Western Wireless, based on a Wyoming PSC order attached to its petition. That order relies on a Wyoming statute that precludes the

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Wyoming PSC from regulating “telecommunications services using radio spectrum or cellular technology,” except for quality of cellular service.² The Wyoming PSC concluded that its jurisdiction over CMRS providers is expressly limited by this state statutory provision and that it, therefore, could not act on Western Wireless’ petition seeking ETC status.³ Second, Western Wireless contends that Section 332(c)(3) of the Communications Act of 1934, as amended (the Act)⁴ precludes states from regulating rate and entry issues of CMRS providers. According to Western Wireless’ reasoning, this gives the Commission jurisdiction, pursuant to Section 214(e)(6) of the Act,⁵ over its request to be designated an ETC.

The determinative issues raised by the Western Wireless petition are jurisdictional. Specifically, the issues to be addressed are: (1) whether the Commission has jurisdiction to determine ETC status to a fixed wireless carrier where a state declines to exercise jurisdiction based on the mobile status of the carrier; and (2) whether the Commission should, as a matter of policy, exercise jurisdiction to determine ETC status of a fixed wireless carrier that offers service as a substitute for landline telephone service or whether it should assure regulatory parity among carriers receiving universal service support. For the reasons stated below, USTA concludes that the Commission does not have jurisdiction over the situation raised in the Western Wireless petition and that it should not grant ETC status to Western Wireless in Wyoming.

¹Public Notice, DA 99-2511, released November 10, 1999 (Public Notice).

²Wyoming Statute §37-15-104.

³*Application of Western Wireless for Authority to be Designated as an Eligible Telecommunications Carrier*, Docket No. 70042-TA-98-1, Record No. 4432, Order Granting Motion to Dismiss Amended Application, released August 13, 1999.

⁴47 U.S.C. §332 (c)(3).

⁵47 U.S.C. §214(e)(6).

1. Wyoming Erroneously Declined Jurisdiction Over Western Wireless by Equating Fixed Wireless Service with Commercial Mobile Radio Service

Western Wireless focuses on Section 332 of the Act to establish its federal jurisdictional claim. Since it claims that it is a CMRS provider, Western Wireless maintains that Section 332 gives the Commission preemptive authority over determinations regarding its ETC status in Wyoming. Western Wireless argues that the Commission must consider its request because Wyoming has no jurisdiction over it as a CMRS provider.

Western Wireless' reliance on Section 332 is misplaced for two reasons. First, it is based on the faulty assumption that its service offering in Wyoming qualifies as CMRS. By its own admission, Western Wireless offers service in rural areas through fixed wireless facilities.⁶ The Western Wireless system has recently been described as consisting of "a laptop-like device... which interfaces with standard communications equipment on one side and with the cellular towers on the other side. No cell-site equipment is placed near the house, and the only mobility the system offers is the ability to use battery power to take the laptop size unit outside the house."⁷ It is clear that the purpose of this service is to offer basic service in rural areas that lack wireline service.⁸ It is not to provide a competitive commercial mobile service. The controlling factor for applicability of Section 332 was "to provide that services that provide equivalent mobile services are regulated in the same manner."⁹ Since the nature of Western Wireless' offering is basic service that is not in competition with a true mobile service, Western

⁶See Western Wireless Petition, Appendix B.

⁷Lois Mentrup, *Pulling Out All of the POTS*, *Wireless Review*, November 1, 1999, at 66.

⁸*Id.* at 64.

⁹H.R. Rep. No. 111, 103d Cong., 1st Sess. at 259 (1993).

Wireless cannot rely on Section 332 for the state regulatory exemption that it erroneously claims.

The second reason why Section 332 does not apply to Western Wireless is that the statutory provision specifically recognizes instances where services provided by mobile technology are a substitute for land line telephone exchange service. In those instances, the statute negates the mobile exemption from state regulation and specifically provides that state requirements imposed “on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates” apply to such carriers. That provision also provides that a state can petition the Commission for authority to regulate the rates of commercial mobile service providers if the service “is a replacement for land line telephone exchange service” and certain market conditions exist. The Western Wireless offering clearly falls within the exception from the prohibition against state regulation of mobile service providers.

This exemption found in Section 332(c)(3) demonstrates that Congress recognized the legitimate role that states perform in assuring that local exchange service is provided at affordable rates to all areas of the state. It acknowledges the necessity of applying the expertise that state commissions bring to the process of making the critical determinations that are necessary in certifying carriers to serve local areas. Furthermore, Section 214(e)(2) of the Act¹⁰ specifies that state commissions are given authority to determine whether a carrier is an ETC. This is undisputed. Nothing in that section of the Act gives the Commission jurisdiction over the states’ authority to determine ETC status of an individual carrier. In fact, the Commission has acknowledged that Section

¹⁰47 U.S.C. §214(e)(2).

214(e)(2) confers exclusive grant of eligibility authority on the states.¹¹ The Commission should decline to exercise jurisdiction over Western Wireless' offering in Wyoming and should send Western Wireless's request back to Wyoming with the admonition to reconsider its Order and consider Western Wireless' request for ETC status on the merits.

2. All Eligible Telecommunications Carriers Receiving Universal Service Support Should be Treated with Regulatory Parity

USTA has consistently supported universal service portability.¹² Applied to this case, if Western Wireless is found by the appropriate jurisdiction to be an ETC, it would be entitled to receive universal service support for those areas it proposes to serve. If Western Wireless does, in fact, take universal service, it should be subject to the same regulatory rules as other ETCs. USTA has repeatedly justified its call for the Commission not to adopt asymmetric regulatory requirements which apply only to incumbent LECs, but to establish a level playing field for all participants.¹³ By doing otherwise, the Commission handicaps the market, limits competition and reduces consumer benefits.

In instances where a state, such as Wyoming, has chosen to decline to exercise jurisdiction over a carrier that provides local exchange service through fixed wireless service and the Commission does not take the action advocated in Section (1) above, the Commission should invoke its authority under Section 214(e)(6) and defer to the state for regulation of rates, conditions of service and other related issues, as provided in Section 332(c)(3).

¹¹ *Texas Office of the Public Utility Counsel, et al. v. FCC*, No. 97-60421 at Section (III)(A)(2)(c) (5th Cir., July 30, 1999) (*Texas v. FCC*).

¹² See USTA Comments in the Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 Fourth Report & Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, FCC 99-119, filed July 23, 1999 at 6.

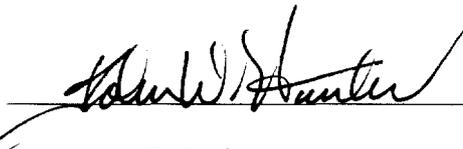
¹³ See USTA Petition for Rulemaking, ASD File No. 98-64, filed September 30, 1998.

Conclusion

USTA urges the Commission to dismiss the Western Wireless petition for lack of jurisdiction and send it back to Wyoming for further action. In the alternative, USTA urges the Commission to defer to Wyoming for regulation of rates, conditions of service and other related issues.

Respectfully submitted,

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