

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

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In the Matter of)
)
Petitions for Expedited Declaratory) CC Docket No. 97-100
Ruling Preempting Arkansas)
Telecommunications Regulatory)
Reform Act of 1997)

COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless"), by counsel, hereby submits Comments on the Public Notice seeking to refresh the record for consideration of the universal service issues in the captioned proceeding. 1/ Western Wireless agrees that many of the universal service provisions of the Arkansas Telecommunications Regulatory Act of 1997 ("Arkansas Act") cited in this proceeding are inconsistent with Sections 214(e) and 254 of the Communications Act of 1934, as amended, 2/ and the Commission's rules implementing those provi-

1/ *Commission Seeks Comment Regarding Whether Universal Service Provisions of Arkansas Act Comport With Federal Law*, CC Docket No. 97-100, Public Notice, DA 00-50 (rel. Jan. 14, 2000). This proceeding was commenced when MCI Telecommunications Co., Inc., now MCI WorldCom, Inc. ("MCI"), filed a Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 on June 3, 1997 ("MCI Petition"), and American Communications Services, Inc. (now e-spire Communications, Inc. ("e-spire")), filed a Petition for Expedited Declaratory Ruling Preempting Arkansas Public Service Commission on March 25, 1997 ("e-spire Petition").

2/ 47 U.S.C. §§ 214(e), 254 ("Act").

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sions, and are therefore subject to preemption. As explained below, the Commission should preempt those provisions that prohibit or have the effect of prohibiting entry in all or parts of Arkansas. These provisions are neither competitively neutral nor necessary to preserve or advance universal service, and therefore they trigger preemption under Section 253 of the Act. 3/ Many provisions of the Arkansas Act are also subject to preemption under *Louisiana Public Service Commission v. FCC* 4/ and its progeny, because they directly conflict or are inconsistent with the federal Act and/or the FCC's rules and policies.

Section 5(b)(5) of the Arkansas Act, for example, requires the Arkansas Public Service Commission ("Arkansas Commission") to make a public interest determination before designating a carrier as an eligible telecommunications carrier ("ETC") for federal support anywhere in Arkansas. 5/ However, Section 214(e)(2) requires state commissions to make such public interest determinations only with respect to rural telephone company ("RTC") service areas, so no general public interest finding is necessary or permitted for prospective ETCs wishing to provide universal service outside RTC service areas. 6/ Any attempt to impose a general

3/ See 47 U.S.C. § 253.

4/ 476 U.S. 355 (1986).

5/ See MCI Petition at 17; e-spire Petition at 18.

6/ See, e.g., *Western Wireless Corporation Designated Eligible Carrier Application*, Case No. PU-1564-98-428 at ¶ 36 (ND PSC Dec. 15, 1999) ("[W]e believe that a

public interest requirement into the ETC analysis for non-RTC service areas must be rejected as not only conflicting with the plain language of the statute, but as rendering the public interest requirement for rural service areas superfluous, contrary to long-accepted maxims of statutory interpretation. ^{7/} Section 5(b)(5) of the Arkansas Act must therefore be preempted.

Likewise, Section 5(d) of the Arkansas Act, which bars the Arkansas Commission from designating as ETCs carriers other than the incumbents in RTC service areas (absent consent of the affected RTC(s)), must also be preempted as inconsistent with federal law and as a barrier to entry. ^{8/} Section 214(e)(2) expressly contemplates that state commissions will designate multiple ETCs in RTC service

primary purpose to be served by [] state decision-making, *particularly in the case of non-rural areas since there is no public interest test and the states must designate an ETC*, is to determine whether the company seeking designation as an ETC is capable of offering the services" (emphasis added).

^{7/} See, e.g., *C.F. Comms. Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (reversing FCC action based on Act interpretation that "violates the familiar principle of statutory interpretation which requires construction 'so that no provision is rendered inoperative or superfluous, void or insignificant'" (quoting *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993))).

^{8/} See MCI Petition at 17-18. Moreover, in similar circumstances where a state telecommunications act attempted to insulate carriers from competition unless the carrier consented, the FCC preempted the offending provision. See *Silver Star Tel. Co. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Mem. Opinion and Order, 12 FCC Rcd 15639 (1997), *recon. denied*, 13 FCC Rcd 16356 (1998).

areas if such designations will serve the public interest. ^{9/} This public interest determination must be made not by legislative fiat as to a whole state, but rather by examination of individual RTC circumstances. ^{10/} As the Minnesota state commission concluded, designating multiple ETCs in RTC service areas serves the public interest because it spurs universal service competition to the benefit of consumers, it brings consumers new telecommunications services, and it promotes rapid development of new technologies in rural areas through new entrant deployment of advanced facilities, and the corresponding incentive for RTCs to improve their networks to stay competitive.

The Commission must also preempt the requirement in Section 5(b)(1) of the Arkansas Act that new entrant competitive ETCs must provide universal

^{9/} 47 U.S.C. § 214(e)(2) ("the State commission may, in the case of an area served by a rural telephone company . . . designate more than one common carrier . . . so long as each additional requesting carrier meets the requirements[but first] the State commission shall find that the designation is in the public interest").

^{10/} *Minnesota Cellular Corp. Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 at 16 (MN PUC Oct. 27, 1999) (holding that once an ETC applicant makes an initial showing that competition will not harm consumers in rural telephone company service areas, it is "incumbent upon the rural telephone companies to produce facts demonstrating that consumers *in individual areas served by individual companies* would be harmed by granting ETC status") (emphasis added). (The Minnesota commission went on to grant ETC status for the rural telephone company service areas applied for, based on the facts that consumer choice, innovation in services, development of new technologies, lower prices, higher quality, and greater efficiency would all result from granting ETC status, and that the rural telephone companies had rebutted this evidence solely with "general economic theory." *See id.* at 16-18.)

service for service areas identical to those of the incumbents. 11/ This obligation is neither required by Sections 214(e) or 254, consistent with competitive or technological neutrality, nor necessary to the advancement of federal universal service objectives. The requirement is particularly anti-competitive and inequitable as applied to wireless carriers, whose FCC-licensed service areas may not coincide with those of incumbent wireline carriers. 12/ It also places a substantial burden on competitive new entrants seeking to compete with incumbent local exchange carriers ("ILECs") having statewide or otherwise geographically sizable service areas. Thus, Section 5(b)(1) must also be preempted as a barrier to entry and as inconsistent with federal universal service rules and policies.

Finally, Section 5(a) of the Arkansas Act, which automatically designates all of the state's ILECs as ETCs, without so much as a state commission

11/ See MCI Petition at 15; e-spire Petition at 17.

12/ It is already well-settled that wireless providers are eligible to become ETCs. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8858-59, ¶ 145 (1997); *Federal-State Joint Board on Universal Service*, Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, 8082-83, 8085, 8113, ¶¶ 10, 15, 72 (1999). However, given that a wireless carrier may not be licensed to serve all of an ILEC's service area, the ILEC-service-area requirement described above, combined with the Arkansas Act's restriction in Section 5(b)(2) that ETCs recover only the costs of providing universal service using their own facilities, means that wireless carriers may have to provide universal service to portions of the ILEC service area through resale without being eligible for support for doing so. (Although, this facilities requirement, too, is inconsistent with federal law and subject to preemption in this proceeding. See MCI Petition at 16.)

determination that they meet the requirements of Section 214(e)(1) of the federal Act, is inconsistent with federal law and must be preempted. ^{13/} Section 214(e)(2) clearly requires that a determination must be made, as to *any* carrier designated as an ETC, that the carrier provides the required services and functionalities specified by the FCC, and that the determination be made by a state commission. ^{14/} Hence, no carrier can become an ETC for federal universal service purposes absent a state commission designating it as such, based on a finding that the carrier meets the requirements of Section 214(e)(1). ^{15/} It is also not competitively neutral for Arkansas law to create a procedure for designating ILECs as ETCs different from that for designating competitive carriers. If ILECs are able to essentially self-certify that they meet the statutory ETC criteria, competitive carriers should likewise be able to self-certify as well. Therefore, the Arkansas Act's attempt to make ETC designations exclusively to ILECs by way of a blanket legislative grant must be preempted.

^{13/} See MCI Petition at 15.

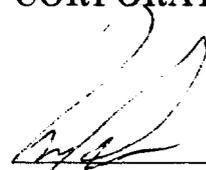
^{14/} 47 U.S.C. § 214(e)(2) ("A *State commission* shall . . . designate a common carrier that meets the requirements of paragraph (1) as an [ETC] for a service area designated *by the State commission.*") (emphases added).

^{15/} The only exception to this requirement is where a carrier is not subject to the jurisdiction of a state commission, in which case the FCC must designate it as an ETC. See 47 U.S.C. § 214(e)(6). In any event, however, no carrier can become an ETC without the appropriate agency determining that it meets the ETC criteria.

In sum, many of the universal service provisions of the Arkansas Act are inconsistent with federal law, and most of them are barriers to entry for carriers seeking to bring competition to high-cost and rural areas. As such, the Commission must preempt those provisions.

Respectfully submitted,

**WESTERN WIRELESS
CORPORATION**

By: 

Gene DeJordy
Vice President of
Regulatory Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave., S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Counsel for Western Wireless
Corporation

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