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April 11, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: Western Wireless Corp. Petition for Preemption of an
Order of the South Dakota Public Utilities Commission;
CC Docket No. 96-45**

Dear Ms. Salas:

I am writing to inform you that representatives of Western Wireless Corp. made *ex parte* presentations today regarding the proceeding referred to above to Kyle Dixon, Legal Advisor to Commissioner Powell, and Lee Carosi, Legal Intern to Commissioner Powell; and to Katherine Schroder, Deputy Chief, Accounting Policy Division, Common Carrier Bureau, and Gene Fullano of the Accounting Policy Division staff. Participants in these presentations included Gene DeJordy, Vice President, Regulatory Affairs, Western Wireless (participating by telephone); Suzie Rao of Western Wireless; and Michele Farquhar and the undersigned, counsel for Western Wireless. The presentations focused on the issues summarized in the attached handout and in other written materials that Western Wireless has previously filed in this docket.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosures

cc: Kyle Dixon
Lee Carosi
Katherine Schroder
Gene Fullano

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WESTERN WIRELESS PETITION FOR PREEMPTION OF SOUTH DAKOTA PUC DENIAL OF ETC STATUS

- **Because ETC designations are critical for competitive carriers seeking to provide universal service to rural and high-cost areas, the South Dakota PUC's decision constituted a barrier to entry.**
 - Incumbents continue to enjoy implicit and explicit subsidies.
 - New entrants have no hope of competing unless they have equal access, at least, to the explicit subsidies available for providing universal service (and the FCC should continue to work toward making all implicit subsidies explicit and fully portable as required by the Act).
 - New entrants cannot receive universal service support unless they are designated as ETCs.
 - Therefore, unlawful or improper denials of ETC status by state commissions prohibit or have the effect of prohibiting entry in rural and high-cost areas by carriers seeking to provide universal service in violation of Section 253(a).
 - As discussed below, the South Dakota PUC improperly denied Western Wireless' ETC petition by misapplying the requirements of Section 214(e)(1), thereby effectively prohibiting Western Wireless from providing universal service in South Dakota, so the FCC must preempt under Section 253(d).

- **The South Dakota PUC misapplied the requirements of Section 214(e)(1) by holding that non-incumbent ETC applicants must already be providing a ubiquitous universal service offering *prior to* being designated as an ETC.**
 - This South Dakota PUC's error of law is contrary to the statutory language of Section 214(e), the FCC's rules and directives, and common sense.
 - A correct reading of the statute is that ETC applicants need only demonstrate a capability and commitment to meet the obligations imposed by Section 214(e) – the obligation to actually offer and advertise a universal service offering flows from the designation as an ETC, and is not a prerequisite to obtaining the designation.
 - The plain language of Section 214(e)(1) confirms that an ETC's obligations to “offer” and “advertise” a universal service offering are subsequent to the designation given the past tense language of Section 214(e)(1) (directing common carriers “*designated* as ETCs” to offer and advertise the services).

- No carrier can be expected to compete effectively in subsidized markets or provide a universal service package without being eligible to receive the necessary, intended universal service subsidies to underwrite a portion of the costs.
- The FCC (1st R&O, Saddleback, Ft. Mojave) and other state commissions (North Dakota, Minnesota, Kansas, California, Maryland, Arkansas, Wisconsin) have all taken this approach. The Minnesota and Washington state public service commissions have both filed comments supporting Western Wireless' petition on this issue.
- Western Wireless' eligibility to be designated should not depend on whether it offers universal service to fixed, hybrid fixed/mobile or mobile terminals.
 - Section 214(e) requires only an analysis of whether the applicant can provide the FCC's mandated services, not an analysis of the various ways it might choose to do so, and Western Wireless currently provides the supported services over its existing cellular network.
 - Western Wireless' ETC designation should not turn on the type of terminals its universal service customers use to receive Western Wireless' offering.
- **Expeditious FCC action is crucial because:**
 - Although one of the FCC's highest priorities is to close the "digital divide" between those that have access to advanced telecommunications services and those who lack such access, there are many people – particularly in rural, high-cost, and underserved areas, as well as in low-income households – that lack access to competitive *basic* services. The first step in bridging this gap is to open the universal service marketplace to competition, and unblocking the ETC process would jump-start the process of competitive entry.
 - Confusion and lack of certainty regarding the ground rules for designating competitive ETCs impede competitive entry – a few state commissions have designated prospective entrants as ETCs, but others have rejected ETC applications, limited ETC designations to areas where no universal service funding is available, or delayed action on competitive entrants' applications. These practices function as barriers to entry, especially given that almost all of the ILECs received ETC status through expedited processes that took no more than a few months.
 - The FCC should move rapidly on the South Dakota petition and similar proceedings (Wyoming, Crow, other carrier petitions) to set an example for the states regarding expeditious processing of ETC applications.