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Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: CC Docket No. 96-45/DA 99-1356  
Western Wireless Corporation Petition for Preemption of an  
Order of the South Dakota Public Utilities Commission

Dear Chairman Kennard:

I would like to stress the urgent nature of Western Wireless Corporation's pending Petition for Preemption of the South Dakota Public Utilities Commission's ("SD PUC") order denying the Company's application for designation as an eligible telecommunications carrier ("ETC") in South Dakota. Western Wireless has been on the forefront of furthering the twin goals of the Telecommunications Act of 1996 ("Act") - competition and advancing and preserving universal service - but has experienced certain barriers to its efforts to introduce a competitive universal service offering in rural America. Western Wireless strongly believes that the basis for the SD PUC's denial of ETC status to Western Wireless warrants, and in fact requires, Commission preemption.

In a significant development late last week, the Sixth Judicial Circuit Court in South Dakota overturned the SD PUC's decision denying ETC status to Western Wireless. The state court properly concluded that the SD PUC erred in its finding that a carrier must already be providing universal service ubiquitously throughout its service area before receiving ETC designation, and remanded the case back to the SD PUC. While the state court decision is helpful, Commission preemption remains critically important to resolve the larger issues raised by the SD PUC decision.

First, FCC guidance is critical not only for the SD PUC but for the many other state commissions who are being presented with similar issues and who need FCC guidance as to the national policy for implementing the Act. As you may be

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aware, Western Wireless has applied for ETC designation in numerous states, has applications for ETC designation pending before the state commissions in Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, Texas, and Utah, and plans to file applications in several other states over the next few months. 1/ Other carriers have pending ETC applications, or are considering whether to file them and will make decisions in large part based on how the FCC handles this matter. The issues raised by the SD PUC's order are not unique to that state, but are present everywhere that Western Wireless and other carriers face contested proceedings regarding ETC designation. 2/ A Commission decision would do much to lay the groundwork for future FCC decisions, as well as to provide the clarity and guidance for which many state commissions are apparently still waiting.

In addition, the court's order is not yet final, and may yet be appealed to the South Dakota Supreme Court. Moreover, the SD PUC may try to exploit additional opportunities for delay and for thwarting Western Wireless' ETC aspirations in addressing the issues that the court remanded to it. 3/ Given that Western Wireless applied for ETC status in South Dakota over a year and a half ago, the Commission should issue an order definitively resolving the issues that

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1/ Western Wireless also has applications pending before the FCC for Wyoming (where the state commission held it lacked jurisdiction to consider Western Wireless' application) and on the Crow reservation in Montana.

2/ A good example of this may be found in the recommendation of an Oklahoma administrative law judge ("ALJ"), which has recommended that Western Wireless' ETC application be denied for the same reason that the SD PUC denied its ETC application. In essentially every ETC proceeding, the incumbent local exchange carriers have submitted the SD PUC decision as a model for ruling on Western Wireless' pending ETC applications. Commission preemption of the SD PUC decision is therefore necessary to implement the Act's statutory commands and establish clear national policy on universal service.

3/ For example, the court's order directs the SD PUC to determine whether the public interest would be served by designating Western Wireless as an additional ETC in the rural telephone company service areas within the state, a matter as to which the FCC has thus far provided little guidance. The Commission should therefore take this opportunity to provide such guidance on how state commissions must make this critical determination. Specifically, the public interest inquiry for additional ETCs in rural telephone company service areas should focus on the consumer, with the issue being *not* the impact on the rural telephone company or competitive carrier, but rather whether the designation of an additional ETC is in the best interests of the rural consumers.

have already caused significant delay to the advent of competitive universal service in South Dakota. Such a decision would also likely be quite useful to the state Supreme Court should it be called upon to take up this matter.

Finally, it is clearly within the Commission's power to provide the requested guidance, notwithstanding the state court decision. As an administrative agency, the FCC is not bound by the "case or controversy" requirements that restrict Article III courts. <sup>4/</sup> To the contrary, both the Administrative Procedure Act and the Commission's rules empower the agency to "remove uncertainty" regarding matters within the agency's jurisdiction. <sup>5/</sup> As the Commission noted:

As an administrative agency, we are vested by statute with broad and discretionary powers to devise and use procedures, such as the issuance of declaratory judgments, as may be reasonably appropriate to discharge our statutory responsibilities with respect to effective regulation of interstate and foreign communication[.] <sup>6/</sup>

This power clearly exists in the context of the Commission's preemption authority under Section 253 of the Act. As the Commission held in *Silver Star Telephone Company, Inc.*, <sup>7/</sup> "[w]e may preempt under Section 253(d) [even] in the absence of a directly aggrieved party or even a petition seeking preemption. \* \* \* \* Thus we have discretion to [take action] to terminate [ ] controversy and remove uncertainty." <sup>8/</sup> Notably, even in Section 253 preemption cases where the Commission has opted not to issue a ruling to provide guidance or remove

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<sup>4/</sup> *Telerent Leasing Corp.*, 45 FCC.2d 204, ¶ 21 (1974), *aff'd sub nom.*, *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787, 790.

<sup>5/</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

<sup>6/</sup> *Telerent Leasing Corp.*, 45 FCC.2d at ¶ 21.

<sup>7/</sup> 13 FCC Rcd 16356 (1998).

<sup>8/</sup> *Id.* at ¶ 23 (citing, *inter alia*, *Telerent*, 45 FCC.2d 204; *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995) (holding that Article III limitations on federal judicial power are inapplicable to administrative agencies); *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976) ("The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the Constitution or the common law") (other citations omitted).

uncertainty, it has indicated that it was declining to act as a matter of discretion, not because it was barred from acting. 9/

The Commission has long recognized a firm statutory basis for its exercise of this discretionary power:

Unlike federal courts, we are not restricted to adjudications of matters that are 'cases and controversies' within the meaning of Article III of the Constitution. Rather, Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) . . . authorizes agencies to issue declaratory orders with the *sole objective of removing uncertainty*. 10/

In so doing, the Commission noted that "it is particularly appropriate to take action . . . in order to remove or alleviate [ ] uncertainty and confusion," and that "[w]e would be remiss in the discharge of our statutory responsibilities were we to remain passive in the face of [ ] policy and regulatory uncertainties." 11/ Significantly, in the *Graphnet* case, the Commission acted because it was faced with "sharply differing views" on the issues presented. 12/ As the record in the Western Wireless South Dakota preemption proceeding makes clear, as do those in the Wyoming and Crow proceedings, the Commission is also confronted with "sharply differing views" on the application of Section 214(e). 13/ Hopefully, the FCC's decision in the instant proceeding, informed by the South Dakota appellate court's correct decision, will serve as a starting point for further clarification and guidance regarding the application of Section 214(e).

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9/ See, e.g., *TCI Cablevision of Oakland Co., Inc.*, 12 FCC Rcd 21396, ¶¶ 99, 101-02 (1997) (declining, "in our discretion," to decide the validity of, or address challenges to, specific sections of a local ordinance under Section 253 (but nevertheless "tak[ing] this opportunity to address generally some issues related to Section 253")).

10/ *Request for Declaratory Ruling and Investigation by Graphnet Systems, Incorporated Concerning a Proposed Offering of Electronic Computer Originated Mail*, 73 FCC.2d 283, ¶ 11 (1979) ("*Graphnet*") (emphasis added).

11/ *Id.*

12/ *Id.* at ¶ 12.

13/ See *supra* note 2.

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As we have noted previously, the SD PUC must not be permitted to impede entry by competitive carriers, or to frustrate the advancement of the 1996 Act's universal service goals by applying unsupported and inappropriate standards in designating ETCs for participation in the federal universal service program. The Commission should act expeditiously and issue a ruling that can be read hand-in-hand with the South Dakota court's decision to provide guidance on the application of Section 214(e), both for the SD PUC on remand as it considers Western Wireless' ETC petition, and for other states faced with similar petitions from Western Wireless and other new entrants.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gene DeJordy", with a stylized flourish at the end.

Gene DeJordy  
Vice President, Regulatory Affairs  
Western Wireless Corporation

Enclosures

cc: Honorable Susan Ness, Commissioner  
Honorable Harold W. Furchgott-Roth, Commissioner  
Honorable Michael K. Powell, Commissioner  
Honorable Gloria Tristani, Commissioner  
Lawrence Strickling, Chief, Common Carrier Bureau

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The Honorable William Kennard  
Chairman, Federal Communications Commission  
445 12<sup>th</sup> St. SW, Ste. 8B201  
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Dear Chairman Kennard:

I am writing to strongly support the State of Washington's petition (CC Docket 96-45) pending before the FCC. This petition seeks to allow the independent colleges and universities to be connected to Washington's K-20 telecommunications network.

This network is designed to connect the state's educational institutions together to enhance the education of all students. Including the independent colleges in this venture is a key piece to this network.

For the past four years, the Whitworth College Education Department has worked collaboratively with our school to create a program that benefits students from both institutions. Beginning Education students have been placed in K-6 classrooms to observe experienced teachers and assist them with daily tasks and small group instruction etc. In exchange, these students are assigned a portion of their time in our HOSTS volunteer reading mentor program. Whitworth students tutor our students, one on one, using prescribed lesson plans and materials.

The Ridgeview HOSTS program has received exemplary status due in large part to the many volunteers who assist our students in attaining their reading goals. Whitworth College students account for many of these mentoring hours. Our students benefit from the academic assistance and the relationships that develop as a result of working with the wonderful college mentors. The Whitworth students gain; an appreciation of children's vast needs, a better understanding of the developmental stages at each level and a working knowledge of what it takes to be an accomplished teacher. Many of these college students find this experience to be so rewarding that they ask to come back to Ridgeview for subsequent education courses. Our HOSTS program would not be as successful without these college resources.

I know that the pre-service and inservice teacher preparation that could be provided by the K-20 communication network would serve to make our experiences with the private college students even richer. Additionally, the network could facilitate communications with classroom teachers, student teachers and administrators across the country who are working with similar programs and issues.

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Again, I strongly urge you to rule in favor of the petition and allow the independent colleges to be connected to the network. I think students from other institutions would gain valuable information from the experiences of Whitworth College students as well !

Sincerely,

*Kathy Williams*

Kathy Williams, Principal