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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE
SOUTH DAKOTA INDEPENDENT TELEPHONE COALITION

SOUTH DAKOTA INDEPENDENT
TELEPHONE COALITION

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Summary

The South Dakota Independent Telephone Coalition ("SDITC") requests that the Commission reconsider its Declaratory Ruling concerning the standards by which state regulatory commissions may designate an "eligible telecommunications carrier" for universal service purposes under Section 214(e) of the Communications Act of 1934 ("Communications Act").

First, the Declaratory Ruling contains several serious procedural deficiencies that warrant its reconsideration. The Declaratory Ruling effectively adjudicates the merits of an issue that the Commission denies is before it – namely, a decision by the South Dakota Public Utilities Commission ("South Dakota PUC"), which denied ETC status to Western Wireless. In doing this, the Commission has only selectively engaged the record developed in the South Dakota proceeding, and the Declaratory Ruling lacks the undisputed factual basis in the record which the Commission must have before it issues such a declaratory ruling. In addition, the Declaratory Ruling may constitute an abuse of administrative discretion in that key elements of the "uncertainty" it addresses are currently pending on appeal before the South Dakota Supreme Court. Even if this flaw does not rise to the level of reversible error, the SDITC strongly believes that the facts of the South Dakota PUC's highly-developed record, the lack of any developed, corresponding record before the Commission, and the ongoing judicial review process each make it improper for the Commission to issue a ruling at this time, on this basis.

Second, SDITC believes that the Declaratory Ruling misinterprets the plain language of section 214(e) of the Communications Act, which requires carriers to "shall . . . offer" the services supported by the federal universal service support mechanisms throughout its service area. Although the statutory term "shall" is plainly written in the present tense, the Declaratory

Ruling substitutes a policy judgement that ETC status should be given to carriers based on their future intent to offer the services. The statutory justification for this decision is extremely weak: indeed, the authority the Declaratory Ruling cites from the Telecommunications Act of 1996 does not support the question of ETC status in any way. And once again, the overlooked record of the South Dakota ruling shows strong practical reasons why granting ETC status to carriers before they initiate service is bad policy, and inconsistent with the mandates of section 214(e).

In the alternative, SDITC requests that the Commission clarify the Declaratory Ruling and require that carriers designated as ETCs must provide the supported services within some reasonable period of time – such as 30 days – after they receive this designation. Such a clarification would comply with past Commission precedent, and would discourage speculative, poorly supported ETC requests by carriers that would not have the capability to provide the supported services once they were granted eligibility.

Third, the Declaratory Ruling's interpretation of section 253(a) of the Communications Act departs from the Commission's own past precedent. In previous decisions interpreting the statute, the Commission has required that parties requesting preemption under section 253(a) must present a full, factual record demonstrating that the challenged actions by state regulators do, in fact, have the effect of prohibiting competitive entry. In sharp contrast, by its own claim the Declaratory Ruling is not based upon a factual record, and would be of limited applicability because of the narrow factual situation presumed by the Commission. Moreover, the Declaratory Ruling also fails to address the impact of section 253(f)'s specific savings clause concerning state ETC decisions that affect rural telephone companies, which preserve such actions from challenge under section 253(a).

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Public Utilities Commission	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE SOUTH DAKOTA INDEPENDENT TELEPHONE COALITION

The South Dakota Independent Telephone Coalition ("SDITC") hereby requests that the Federal Communications Commission ("FCC") reconsider its Declaratory Ruling[1] concerning the showing that state regulatory commissions may require of carriers seeking designation as an eligible telecommunications carrier ("ETC") under the provisions of section 214(e) of the Communications Act of 1934, as amended ("the Act"). SDITC specifically requests that the Commission reconsider the Declaratory Ruling as unnecessary, given the Commission's threshold determination that an adjudication of the controversy giving rise to the "uncertainty" -- to be dispelled by the Declaratory Ruling -- is itself unnecessary. As a related mater, SDITC submits that issuance of the Declaratory Ruling constitutes an abuse of discretion, given the fact that the central issue addressed therein is currently before the South Dakota Supreme Court on a more extensively developed record.

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[1] Declaratory Ruling, CC Docket No. 96-45, FCC 00-248 (released Aug. 10, 2000).

As further grounds for reconsideration, SDITC respectfully submits that the Declaratory Ruling has misinterpreted the plain language of section 214(e) of the Act, which requires would-be ETCs to actually "offer" the services supported by the universal service mechanism, when ETC status is sought. And, although SDITC believes that the statute is clear on this point, SDITC requests the Commission to alternatively clarify that state commissions can require that the supported services must be offered immediately after ETC designation, if they are not offered beforehand.

Finally, SDITC shows that the Declaratory Ruling's preemption analysis was flawed and that no preemption of state authority to designate ETCs should occur as a result of this decision.

The Declaratory Ruling Is Unnecessary And Improperly Relies on Disputed Facts

The Declaratory Ruling purports to provide "guidance" as to the proper interpretation of section 214(e)(1) of the Act regarding whether a carrier may be required to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier ("ETC") under the Act. The Commission cites section 1.2 of its Rules (47 C.F.R. § 1.2) as a source of authority to issue the declaratory ruling, apparently acting on its own motion.[2] The Declaratory Ruling points to proceedings before the South Dakota Public Utilities Commission and the South Dakota courts as the source of alleged uncertainty regarding the proper interpretation of section 214(e).[3] It proceeds to find that requiring the provision of service throughout a service area prior to ETC designation contravenes federal purposes under section

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[2] Id. at ¶1 and n.1.

[3] Id. at n.2.

253(d) of the Act and under traditional principles of federal preemption.[4] The Declaratory Ruling acknowledges that Western Wireless has raised similar issues in seeking preemption of the South Dakota PUC's Order on the issue, but denies that it is acting on the Western Wireless petition.[5] It then proceeds to engage in a preemption analysis, making several factual assumptions along the way. For instance, the Commission finds that the requirement that a carrier "provide" the supported services prior to ETC designation has the effect of prohibiting entry by prospective competitors.[6] It further finds that a competitor could not be expected to enter a high cost market without knowing whether it was eligible to receive high cost support.[7]

Against this background, SDITC respectfully submits that the Commission erred by issuing the Declaratory Ruling in the first instance. The Commission has before it a developed record on the very issue addressed by the Declaratory Ruling, *i.e.*, the question of whether the South Dakota Public Utility Commission properly interpreted section 214(e) of the Act. Instead of dealing with the question based on the record, however, the Declaratory Ruling puts the real controversy on ice, finding resolution "unnecessary" at this time.[8] This disposition having been made, the Commission turns around and uses the same controversy, found to be unworthy of resolution, as the basis of "substantial uncertainty" regarding the interpretation of section 214(e), and hence as the basis of issuing its Declaratory Ruling.

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4 Id. at ¶2.

5 Id. at ¶3.

6 Id. at ¶12.

7 Id. at ¶13.

8 Id. at ¶3.

This course has left the Commission with a fatally flawed decision. For instance, the Declaratory Ruling selectively uses the record developed on Western Wireless' petition for a factual underpinning. Western Wireless' petition is the sole source of the Commission's finding that no competitor can be expected to enter a high cost market without knowing whether it is eligible to receive support.[9] However, as was made clear in the August 27, 1999 Comments filed in this proceeding by the South Dakota Public Utilities Commission,[10] Western Wireless' shortcomings went far beyond simply not knowing whether it would be eligible for universal service support:

- It did not have a financial or pricing plan;
- Its current infrastructure did not serve the entire state (for which it had sought ETC status) and it had no firm plans for how it would extend service to the public;
- Western Wireless offered contradictory testimony as to whether it would offer universal service supported services through cellular or fixed services;
- The fixed wireless solution advocated by Western Wireless failed to meet ETC requirements, for instance, by failing to offer free local usage;
- The wrong corporate applicant was before the Commission;
- Substantial portions of the State of South Dakota were without coverage by Western Wireless.

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9 Id. at ¶13 and n.23.

10 See, *e.g.*, Comments of South Dakota Public Utilities Commission to Petition For Preemption by Western Wireless, pp. 10-12 citing, In Matter of the Filing By GCC License Corporation For Designation As an Eligible Telecommunications Carrier; Findings of Fact And Conclusions of Law; Notice of Entry of Order TC98-146, dated May 19, 1999, passim.

In short, an undisputed factual basis does not exist in the record of this proceeding, although Commission precedent requires it prior to the issuance of a declaratory ruling.[11]

These procedural shortcomings alone warrant reconsideration. A substantial case can be made, however, that the Commission's insistence on issuing its Declaratory Ruling, while the section 214(e) issue is squarely before the South Dakota judiciary, constitutes an abuse of administrative discretion. A close parallel can be found in the federal courts' refusal to grant declaratory judgments where the issues raised are likely to be fully adjudicated in another court.[12] Here, the section 214(e) issue was fully litigated in a trial-type proceeding before the South Dakota Public Utilities Commission; it was duly reviewed by the state Circuit Court having jurisdiction; and the briefing cycle is substantially complete before the South Dakota Supreme Court which has jurisdiction under state law. The FCC should be extremely deferential under these circumstances where it: a) has only had a paper "hearing" process; b) disavows the necessity of ruling on the controversy yet where one of the key issues before the South Dakota Supreme Court is addressed in the Declaratory Ruling and; c) where the issues and evidence at the state level have been filtered through a trial-type hearing process and two levels of appellate review.

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[11] See American Telephone and Telegraph Co. (1985 Annual Access Tariffs), 65 RR.2d 153, 156 (Com. Car. Bur. 1985); Competitive Telecommunications Association, 66 RR.2d 1344, 1347 (Com Car. Bur. 1989); Aeronautical Radio, Inc., 67 RR.2d 1004, 1007 (Com. Car. Bur. 1990).

[12] See Navajo Nation v. District Court for Utah County, 624 F. Supp. 130, 134-135 (D. Utah, 1985) (refusing to issue declaratory relief where parties had full and complete opportunity to be heard in state court proceedings); Consolidated Rail Corporation v. Grand Trunk Western Railroad Co., 592 F. Sup. 562, 568-569 (E.D. Pa. 1984) (dismissing claims where similar claims pending in another district court); Nationwide Ins. v. Zavalis, 52 F.3d 689 (7th Cir. 1995) (dismissing portion of federal suit seeking declaratory judgment where related state action was pending); Brillhart v. Excess Ins. Co. of America, 316 U.S. 1173, 1176 (1942).

SDITC thus respectfully submits that the Declaratory Ruling's procedural flaws alone warrant reconsideration. And, even if such flaws did not rise to the level of reversible error, the highly developed record of the South Dakota Public Utility Commission (and absence of a comparable record at the FCC), coupled with a judicial review process substantially underway by the State's highest Court, warrant that this Commission stay its hand. The piecemeal approach of the Declaratory Ruling is hardly a logical manner in which to proceed.

The Declaratory Ruling Has Improperly Construed the Plain Meaning of Section 214(e)

Section 214(e) of the Act requires ETCs to "offer" services supported by the federal support mechanisms and to advertise the availability of such services in media of general distribution. The Declaratory Ruling spends two paragraphs explaining its conclusion that the term "offer" does not mean that ETCs should provide services as a prerequisite to ETC designation by the States.[13]

Support for this decision is threadbare, however, other than the Commission's belief that it is not reasonable to expect a carrier to enter a high-cost market before it is receiving universal service support, and that such a requirement would conflict directly with Congress' intent to promote competition in high cost markets. This latter point is grounded only upon citation to the first page of the Joint Explanatory Statement of the Telecommunications Act of 1996.[14] Close examination reveals that the cited material does not address in any way the precise question that is before the Commission.

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[13] Id. at ¶¶28-29.

[14] Id. at ¶28 & n.62.

SDITC respectfully submits that the construction of section 214(e) in the Declaratory Ruling is simply wrong. The exact phrase that appears in section 214(e) states that an ETC "shall throughout the service area for which the designation is received . . . offer the services that are supported by the federal universal service support mechanisms . . ." (emphasis supplied). As is readily apparent, the highlighted verbs appear in the present tense, and certainly do not indicate that ETC status can be conferred based on future intent; yet that is precisely what the Declaratory Ruling envisions. Indeed, such logic leads the Commission to pluck from thin air -- no statutory underpinnings are identified as support -- what forms of proof the states may require to determine whether ETCs really will provide the supported services once they receive state ETC designation.[15]

The experience gained in the South Dakota Western Wireless proceeding demonstrates the fallacy of this approach. For instance, it is obvious from the South Dakota Public Utility Commission's decision that contradictions were uncovered in Western Wireless' presentation before the Public Utility Commission both as to its intentions and capabilities.[16] Clearly, since hearings before the South Dakota Commission are conducted under oath, the lodging of a sworn affidavit by an applicant ETC, as suggested in paragraph 24 of the Declaratory Ruling, would have obscured the fundamental inability of Western Wireless to provide the supported services were it able to obtain ETC designation after such a perfunctory showing.

SDITC respectfully suggests that such an illogical and unlawful result was avoided by the South Dakota Public Utilities Commission's interpretation of section 214(e), and can be avoided

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[15] Id. at ¶24.

[16] See Findings of Fact and Conclusions of Law; Notice of Entry of Order, TC98-146, at ¶¶7-13.

in future cases by requiring would-be ETCs to demonstrate that such offerings are current offerings. As SDITC has previously observed in this proceeding, such immediacy of service was clearly envisioned by Congress through the enactment of section 214(e)(4), which requires the states to permit the withdrawal of service by an existing ETC where another provides service.[17]

In earlier contexts, before the filing of the Western Wireless petition, the Commission has demonstrated its own understanding that section 214(e) requires an offering that is current, by its adoption of section 54.101(C). This section allows state commissions to grant otherwise eligible carriers an extension of time to provide certain supported services. In adopting this rule, the Commission stated in pertinent part as follows:

> Consistent with the Joint Board's recommendation, we conclude that eligible carriers must provide each of the designated services in order to receive universal service support. In three limited instances, however, we conclude that the public interest requires that we allow a reasonable period during which otherwise eligible carriers may complete network upgrades required for them to begin offering certain services that they are currently incapable of providing.[18]

Assuming for argument's sake that the Commission were to refuse reconsideration of its interpretation of section 214(e), a point that SDITC in no way concedes to be a correct result, it should nevertheless clarify that state commissions can require ETCs to actually offer the supported services within a reasonably soon period of time after state designation takes place. Such a clarification would comply with past Commission precedent, as this Commission

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[17] See, Comments of South Dakota Independent Telephone Coalition, Inc., filed August 31, 1999, at 25-26.

[18] See Federal State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, 8826 (1997) (emphasis supplied, citations omitted). Also see id. at 8852, n.318 (describing extension of time procedure as available to a carrier that ". . .currently is unable to provide single-party service, access to enhance 911 service or toll limitation services . . .").

previously refused to preempt Texas regulations requiring competitive LECs to provide service within thirty days.[19] It also would discourage speculation in the universal service fund mechanism and attempts, like that made by Western Wireless in South Dakota, to obtain ETC status based upon the barest of capabilities. SDITC respectfully submits that Congress intended the term "offer" to connote a sense of immediacy when it placed that term in section 214(e). If the Commission will not interpret the term to require a current offering by ETCs, as SDITC believes it should, the Commission should at least prevent the designation process from becoming an open-ended promise by providing the clarification requested here.

The Commission's Ruling Concerning
Section 253 Departs from Past Precedent

The Commission finds that a state commission action interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation is a violation of section 253(a) of the Act. According to the Commission, requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry "in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC."[20] Further, such a requirement would "deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition."[21] The Commission also states that "[w]hile a requirement that a carrier be providing service throughout

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[19] See Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, 13 FCC Rcd. 3460, 3507-08 (1997) ("Texas Preemption Order").

[20] See Declaratory Ruling at ¶12.

[21] Id.

the service area may not affect the provision of service in lower-cost areas, it is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas."[22]

As an initial matter, although the Commission states broadly that requiring a new entrant to provide service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of that entrant to provide intrastate or interstate telecommunications service, its rationale for this decision is based on the circumstance where the incumbent receives high cost universal service support. The Commission's own language, therefore, limits the applicability of its Declaratory Ruling to the specific circumstance where 1) universal service support is essential to the provision of affordable telecommunications service; and 2) high cost support is available to the incumbent. The Commission's ruling also appears to apply to the very limited circumstance where the only reason for the state commission's denial of ETC status was the non-provision of service. SDITC asks the Commission to clarify the limited applicability of its ruling as discussed herein.

In addition, the Commission's ruling departs from its past precedent on the interpretation of section 253(a). In prior cases, the Commission has required a party requesting preemption under section 253 to present a full factual record showing that the state commission action does, in fact, prohibit or have the effect of prohibiting entry. The Commission has not relied on mere allegations, as they are insufficient to satisfy the statutory requirement. As this Commission has previously explained:

> [p]arties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the

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[22] Id. at ¶16.

> requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records.[23]

In applying this standard, the Commission has considered not only the language of the challenged state action, but also how the state commission has interpreted that language. For example, in the Texas Preemption Order, the Commission did not preempt a rule specifying that carriers may purchase, for resale, certain services at the tariffed rate because the Texas commission argued that the provision did not preclude such carriers from negotiating for a different rate pursuant to section 251(c)(4) of the Act.[24] The Commission emphasized that its decision not to preempt was based on the Texas Commission's interpretation.[25]

The Declaratory Ruling, which is not based on a factual record, not only departs from past precedent, but, again, is of limited applicability since it is unlikely that a state commission action would be limited to the sparse facts presumed by the Commission in this case.

Finally, the Commission does not address the impact of Section 253(f) on its Declaratory Ruling. Section 253(f) states in pertinent part:

> It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service.

In the Texas Preemption Order, the Commission concluded that Section 253(f) is "a savings clause which preserves from preemption state or local requirements that may otherwise

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[23] TCI Cablevision of Oakland County, Inc.'s Petition for Declaratory Ruling, Preemption and Other Relief, Memorandum Opinion and Order, FCC 97-331, ¶101, released September 19, 1997.

[24] See Texas Preemption Order, 13 FCC Rcd. at 3535.

[25] Id.

violate Section 253(a)."[26] Accordingly, in an area served by a rural telephone company, what otherwise might be a violation of Section 253(f), would not be a violation. In view of Section 253(f), there is no justification for any claim that a state commission requirement that an ETC show an actual offering of service in a rural telephone company area violates section 253(a).

Thus, the Commission should reconsider its ruling that a state commission action interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation is a violation of section 253(a) of the Act. At a minimum, the Commission should clarify that its ruling is limited to cases that involve the same limited circumstances presumed in the Declaratory Ruling. The Commission also should clarify the effect of Section 253(f) on its Declaratory Ruling.

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[26] Id. at ¶3508.

CONCLUSION

Based on the foregoing, SDITC requests that the FCC reconsider and clarify the Declaratory Ruling as discussed herein.

Respectfully submitted,

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