

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

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)

**COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
IN SUPPORT OF THE
PETITION FOR RECONSIDERATION AND CLARIFICATION FILED BY
THE SOUTH DAKOTA INDEPENDENT TELEPHONE COALITION AND
THE PETITION FOR RECONSIDERATION FILED BY
PROJECT TELEPHONE COMPANY AND RANGE TELEPHONE COMPANY**

The National Telephone Cooperative Association (NTCA)¹ supports the petition for reconsideration filed by the South Dakota Independent Telephone Coalition and the petition for reconsideration and clarification filed by Project Telephone Company and Range Telephone Cooperative concerning the Federal Communications Commission's (FCC's or Commission's) declaratory ruling in the above-captioned matter.² The petitions object to the FCC's ruling that a state's interpretation of section 214(e) which

¹ NTCA is a national association of over 500 local exchange carriers that provide service primarily in rural areas. All NTCA members are small carriers that are defined as "rural telephone companies" in the Telecommunications Act of 1996 (Act). *47 U.S.C. § 153(37)*. Approximately half of NTCA's members are organized as cooperatives.

² In the Matter of Federal-State joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order by the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45 (Released August 10, 2000).

requires a carrier to provide service throughout a designated service area prior to an eligible telecommunications carrier (ETC) designation “prohibits or has the effect of prohibiting the ability of competing carriers to provide telecommunications service in violation of section 253(a) of the [Communications Act of 1934].”³ The FCC’s ruling is inappropriate and should be withdrawn. It disregards the Commission’s own precedent concerning declaratory rulings and attempts to resolve a controversy where the facts and the law are clearly in dispute before the South Dakota Supreme Court.⁴

³ Petition for Reconsideration and Clarification of the South Dakota Independent Telephone Coalition, CC Docket 96-45 (September 11, 2000); Petition for Reconsideration of Project Telephone Company and Range Telephone Cooperative, CC Docket 96-45 (September 11, 2000).

⁴ Fifth Report and Order and Notice of Proposed Rulemaking, CC Docket No. 96-262, 14 FCC 14221, 14317 (1999).

The FCC has specifically stated “a declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed.”⁵ Significant dispute exists between parties before the South Dakota Supreme Court as to both the facts and the law concerning the specific issue addressed in the FCC’s ruling. The declaratory ruling is part of the Commission’s decision to place Western Wireless’ (WW’s) petition for preemption in abeyance pending the South Dakota Supreme Court’s review of the South Dakota Public Utilities Commission’s (SDPUC’s) order denying WW ETC designation throughout the state. Because these factual and legal issues are currently under litigation before the South Dakota Supreme Court, the Commission’s declaratory ruling is premature, inappropriate and inconsistent with its own precedent.⁶

The FCC’s ruling also ignores the record evidence that was presented before the SDPUC. Based on that record, WW had not deployed the universal service capable network it proposed to even a single customer in South Dakota,⁷ and therefore it is not surprising that the SDPUC could not evaluate the quality or sufficiency of its proposed fixed wireless network on the basis of WW’s wireless network. This decision, however, did not create a barrier to entry to new carriers because it does not prevent carriers who are capable of offering service from applying for ETC designation or WW

⁵ Memorandum Opinion and Order, American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges, 4 FCC Rcd 550, 551 (1989).

⁶ Fifth Report and Order and Notice of Proposed Rulemaking, CC Docket No. 96-262, 14 FCC 14221, 14317 (1999).

⁷ SDPUC Decision ¶ 19.

from reapplying for ETC designation in the future when it is capable of offering service. Moreover, the Commission's ruling ignores the SDPUC's finding that even if WW was not required to offer service prior to ETC designation, WW's ETC application was so lacking in substance and detail that the SDPUC could not accept WW's statement of intent as credible or reliable.⁸

⁸ SDPUC Decision p. 4.

The FCC's preemption analysis under section 253 is also improper. Section 253 directs the Commission to preempt state statutes, regulations and legal requirements that prohibits entry only to the extent necessary to correct a violation or inconsistency with section 253(a) and (b). The SDPUC decision is neither a statute, regulation, nor legal requirement, but rather an order on appeal. As the Commission has previously stated, section 253 preemption is appropriate only if the state requirement is so burdensome that it effectively precludes a provider from providing service.⁹ Given that a state requirement precluding a carrier from providing fixed wireless service does not exist, nothing prohibits WW from offering fixed wireless service in South Dakota.

Finally, the Commission's decision not to act on WW's petition for preemption until the South Dakota Supreme Court has ruled on the SDPUC's ETC decision is proper under section 214(e), which grants South Dakota with the authority to determine WW's ETC designation in that state. The final ruling on the state ETC determination will come from the South Dakota Supreme Court. Once this decision is released, the FCC can then utilize its authority to determine, based on the record, whether preemption is necessary. Until that time, the Commission should withdraw its declaratory ruling as inappropriate and its preemption analysis as unripe.

Respectfully submitted,

National Telephone Cooperative Assn.

By: /s/ L. Marie Guillory

⁹ The Petition of the State of Minnesota for Declaratory Ruling Requiring the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum and Opinion and Order, CC Docket No. 98-1, ¶ 32 (rel. Dec. 23, 1999).

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November 1, 2000

Certificate of Service

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in CC Docket No. 96-45, FCC00-248 was served on this 1st day of November 2000 by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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