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

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In the Matter of)
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Federal-State Joint Board on)
Universal Service)
)
Western Wireless Corporation)
Petition For Designation as an)
Eligible Telecommunications Carrier)
And For Related Waivers To)
Provide Universal Service To)
The Crow Reservation in Montana)

CC Docket No. 96-45

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

REPLY TO COMMENTS ON JURISDICTIONAL SUPPLEMENT

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EXECUTIVE SUMMARY

The Commission clearly has jurisdiction to grant the Western Wireless petition for ETC designation for the Crow Reservation in Montana, contrary to the arguments of opposing parties that would effectively prevent the Crow Tribe from realizing the benefits of a competitive universal service offering. Those arguments fail to refute the clear analysis of applicable federal Indian law submitted by Western Wireless, showing that a balancing test must be applied to determine whether the state or the FCC has jurisdiction here. Under that balancing test, it is highly significant that Western Wireless has proposed a novel universal service offering targeted specifically to the residents of the Crow Reservation, of whom 74% are Native Americans, and that the Crow Tribe has exercised its sovereign authority to enter an arrangement with Western Wireless. These and other factors compel the conclusion that the Commission has jurisdiction under Section 214(e)(6) of the Act. The Commission should expeditiously reach that conclusion and grant Western Wireless' petition.

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REPLY TO COMMENTS ON JURISDICTIONAL SUPPLEMENT

Western Wireless Corporation (“Western Wireless”) submits this Reply to the comments on its Jurisdictional Supplement filed in response to the *Twelfth Report and Order*. ^{1/}

Western Wireless demonstrated in the Jurisdictional Supplement that the Commission has jurisdiction under 47 U.S.C. § 214(e)(6) to designate Western Wireless as an eligible telecommunications carrier (“ETC”) that may receive federal support for providing universal service to the Crow Reservation. Western Wireless’

^{1/} *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12273-74, ¶ 140 (2000) (“*Twelfth Report and Order*”) (citing *Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Services Eligible for Universal Service Support to the Crow*

Jurisdictional Supplement, supported by the expert opinion of a leading Indian law scholar, 2/ established that determining whether a state commission lacks jurisdiction over a non-tribally-owned carrier serving an Indian reservation requires the balancing of federal, state and tribal interests. The Supplement also demonstrated that, in the case of Western Wireless' universal service on the Crow Reservation, the balancing of interests favors FCC jurisdiction. The Commission should therefore assume jurisdiction over Western Wireless' Crow ETC Petition and dismiss the arguments that would effectively prevent the Crow people from realizing the benefits of a competitive universal service offering.

I. WESTERN WIRELESS' UNIVERSAL SERVICE PROPOSED IN THE CROW ETC PETITION DIFFERS IN A JURISDICTIONALLY SIGNIFICANT WAY FROM THAT PROVIDED ELSEWHERE

This Reply demonstrates that the FCC should reject the opposing commenters' arguments in favor of subjecting the Crow ETC Petition to the Montana Public Service Commission's ("Montana PSC") jurisdiction, and should instead determine that Section 214(e)(6) accords the Commission jurisdiction over the Petition. In opposing FCC jurisdiction, the commenters misapply Section 214(e)(6), proffer baseless and unworkable theories of jurisdiction, and misunderstand the relevant federal Indian law. The commenters also incorrectly

Reservation, Montana, CC Docket No. 96-45, Public Notice, 15 FCC Rcd. 6817 (CCB 1999) ("Crow ETC Petition").

2/ See Jurisdictional Supplement, Appendix (Opinion Letter from Professor Richard B. Collins, University of Colorado School of Law, to Gene DeJordy, Vice

assert that a finding of FCC jurisdiction over the Crow ETC Petition would upset existing ETC designations and/or Commission precedent. The Commission should reject these assertions, as well as the commenters' other misguided claims, and instead hold that the FCC has jurisdiction over the Crow ETC Petition.

The comments filed on the Jurisdictional Supplement underscore the extent to which the Petition raises a matter of first impression different from the many ETC designations that came before. Unlike most ETCs serving tribal lands only incidentally (including Western Wireless in other states), Western Wireless proposes universal service targeted exclusively to the Crow Reservation. Unlike other ETC service areas, the service area contemplated by the Crow ETC Petition is predominantly populated and held by the Crow Tribe and its members. 3/ This is a key factor in deciding whether the state or the Tribe has jurisdiction over the service proposed, and it is thus a key factor in deciding whether the Montana PSC or the FCC has jurisdiction over the Petition. 4/ In addition, unlike other ETCs that serve an Indian reservation simply because it falls within their service territory, Western Wireless has entered into a special arrangement with the Crow Tribe to

President of Regulatory Affairs for Western Wireless (September 29, 2000) (the "Opinion Letter").

3/ Crow ETC Petition at 14 & Exhibit D; Jurisdictional Supplement at 4.

4/ Jurisdictional Supplement at 4, 6.

bring competitive universal service (and its related benefits) to the Crow Reservation. 5/ This, too, is jurisdictionally significant in applying Section 214(e)(6).

Moreover, the comments help illustrate the importance of the Crow Tribe's support and initiative as a sovereign seeking to bring competitive universal service to the Crow Reservation. Project Telephone Company and Range Telephone Cooperative ("Project/Range") argue that telephone penetration rates on the Crow Reservation are not as low as the Crow ETC Petition avers. 6/ Though Western Wireless stands by its claim that the penetration rate is unacceptably low, factual disputes regarding telephone penetration among the Crow are not relevant to the jurisdictional analysis. 7/ However, it is significant for jurisdictional purposes that the Crow Tribe entered an arrangement with Western Wireless to provide additional universal service in order to increase telephone penetration rates, and that Western Wireless has declared its willingness to subject itself to tribal jurisdiction to do so. This emphasizes not only that improving Reservation telephone service is critically tied to tribal political, social and economic interests, but also the involve-

5/ Crow ETC Petition at 2 & Exhibit A.

6/ Project/Range at 7-8.

7/ Even if the penetration rate on the Crow Reservation was atypically consistent with the average nationwide penetration rate, jurisdiction over the ETC Petition would still turn on the Indian or non-Indian status of the population and service area Western Wireless proposes to serve, and the extent to which it proposes to do so in a manner targeted to tribal lands rather than as part of a larger universal service offering. *See infra*.

ment and jurisdiction of the Crow Tribe here. Both of these are central to the jurisdictional analysis under Section 214(e)(6).

II. THE FCC HAS JURISDICTION OVER THE CROW ETC PETITION UNDER APPLICABLE INDIAN LAW AND FCC PRECEDENT

Nothing in the opposing comments undermines the Jurisdictional Supplement's showing that a balancing test must be used to make jurisdictional determinations regarding non-Indian entities providing on-reservation services to both Indians and non-Indians, or its conclusion that applying the balancing test to the Crow ETC Petition weighs in favor of FCC jurisdiction. The alternative interpretations of Section 214(e)(6) offered by the opposing commenters are inconsistent with the *Twelfth Report and Order*, and arguments that the balance of federal, tribal and state interests favors Montana PSC jurisdiction do not comport with applicable Indian law. We demonstrate below that the Jurisdictional Supplement's framework and conclusions are correct.

A. The Jurisdictional Supplement Sets Forth the Proper Approach to Section 214(e)(6) Jurisdiction for Non-Tribal Carriers Serving Indian Reservations

The balancing test in the Jurisdictional Supplement is the proper tool for determining Section 214(e)(6) jurisdiction for non-tribally-owned carriers serving tribal lands. ^{8/} The Supplement demonstrates that jurisdictional determinations

^{8/} The Commission has already determined, and no commenter here disputes, that tribally owned carriers providing universal service on reservations are subject to tribal rather than state jurisdiction – and therefore must be designated as ETCs under Section 214(e)(6) by the FCC – even though they may serve reservation residents who are not Indians. *See Twelfth Report and Order*, 15 FCC Rcd at 12261,

under federal Indian law turn on the Indian or non-Indian status of the parties to a transaction. Thus, a balancing test is required because Western Wireless, a non-Indian carrier, seeks to provide on-reservation universal service to both Indians and non-Indians. In so doing, the Opinion Letter and the framework in the rest of the Supplement adhere to established legal precedents, which is not the approach offered by opposing parties.

A balancing test is required because Western Wireless' service to Indians on the Crow Reservation is clearly subject to tribal jurisdiction, while its service to non-Indians there is potentially subject to state jurisdiction. ^{9/} Western Wireless' status as a common carrier – which it must be to claim ETC status ^{10/} – prevents separating its offering into Indian and non-Indian components. ^{11/} Likewise, Section 214(e)(1) requires an ETC to offer universal service throughout its service area without regard to the Indian or non-Indian status of its customers, so there is no way to separate Western Wireless' universal service into Indian and non-

[¶] 106; *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, 13 FCC Rcd 22433 (CCB 1998) (“*Saddleback*”); *Designation of Fort Mojave Telecommunications, Inc., et al, as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 13 FCC Rcd 4547 (CCB 1998) (“*Fort Mojave*”).

^{9/} Jurisdictional Supplement at 5 (citing *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Montana v. United States*, 450 U.S. 544, 557-67 (1981)).

^{10/} See 47 U.S.C. § 214(e)(1),(2),(6).

^{11/} See *id.*, § 153(10); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“indiscriminate offering of service on generally applicable terms [] is the traditional mark of common carrier service”).

Indian components. Because Section 214(e) requires that ETC designations for the whole of a service area be made by only one designating agency, jurisdiction to designate Western Wireless cannot be shared by or split between the FCC and the Montana PSC. 12/ A balancing test must therefore be used to determine which agency should designate Western Wireless as an ETC for the Crow Reservation.

The propriety of the balancing approach is underscored by the shortcomings of the other theories of jurisdiction offered in the comments. For example, the FCC has already rejected the theory offered by the commenters asserting that the Montana PSC has jurisdiction over the Crow ETC Petition because Section 214(e)(6) applies only to tribally owned carriers. 13/ The Commission should also reject the argument, supported by no legal analysis, that the Montana PSC should have jurisdiction over the Crow ETC Petition as a function of “custom, comity, and simple practicality.” 14/

12/ Other contexts might permit subjecting Western Wireless’ dealings with the Tribe and its members to FCC jurisdiction, and its dealings with non-Indians to the Montana PSC. For example, were Western Wireless selling individual goods, or providing services on an individual contract basis, different jurisdictional rules could apply to its dealings with Indians and non-Indians on the Crow Reservation. However, telecommunications service offered on a common carrier basis to a unified service area allows no such division of jurisdictional interests.

13/ *Twelfth Report and Order*, 15 FCC Rcd at 12261, ¶ 106; *contra*, Montana Telecommunications Association (“MTA”) at 2-4; National Telephone Cooperative Association (“NTCA”) at 3-5.

14/ Montana PSC at 3-4. There is absolutely no basis for the Montana PSC’s suggestion that the Jurisdictional Supplement is intended to create or suggest a jurisdictional dispute between the State and the Crow Tribe. *Id.*

The Commission should also reject the equally insupportable position that FCC jurisdiction attaches only where a state commission's enabling act fails to give it jurisdiction to designate a carrier as an ETC. 15/ This theory is undermined by Section 214(e)(6)'s legislative history, which shows intent to create FCC authority to designate carriers not subject to the jurisdiction of the state commission where the carrier operates, even if that commission designates other carriers as ETCs. 16/ The theory is also undercut by FCC precedent implementing Section 214(e)(6). 17/

Likewise, the Commission should reject NTCA's attempt to rewrite Section 214(e)(6) to argue in favor of Montana PSC jurisdiction over the Crow ETC Petition. To support its position, NTCA improperly inserts "any" into Section 214(e)(6)'s "not subject to the jurisdiction of a state commission" language to suggest that, because the Montana PSC would have jurisdiction over Western Wireless' business dealings with the small minority of non-Indian residents on the Crow Reservation, Western Wireless is subject to the Montana PSC's jurisdiction. 18/

15/ *Id.* at 6-8.

16/ *See, e.g.*, 143 Cong. Rec. S12568 (noting that "State commissions in a few States have no jurisdiction over *certain* carriers").

17/ *Compare Saddleback & Ft. Mojave, supra* note 8 (each designating tribally owned LECs as ETCs in Arizona), *with U S WEST Communications, Inc.*, Docket Nos. T-1051-97-637, T-1051-97-641, Decision No. 60513 (Arizona Corporation Commission Dec. 18, 1997); *GTE California Inc.*, Docket Nos. T-1846-97-570, T-1846-97-669, Decision No. 60553 (Arizona Corporation Commission Dec. 18, 1997); *Southwestern Tel. Co.*, Docket Nos. T-1072A-97-621, T-1072A-97-672, Decision No. 60555 (Arizona Corporation Commission December 18, 1997) (each designating an ETC).

18/ NTCA at 2-3 ("The only exception to [state ETC designation] is when a common carrier is 'not subject' to *any* state commission jurisdiction." * * * * [T]he

This fallacious argument ignores both the well-settled principles of federal Indian law cited in the Jurisdictional Supplement, and the indivisible nature of universal service provided by a common carrier. As discussed above, it is precisely the fact that both the state and the tribe have legitimate claims to jurisdiction over certain transactions on the Crow Reservation that necessitates the use of a balancing test.

In the final analysis, it is clear that the opponents' arguments do not withstand scrutiny and that the balancing test is the correct approach. The jurisdictional frameworks that have applied thus far are inapplicable. Western Wireless is not seeking ETC designation for a service area that just happens to include an Indian reservation – such designations clearly must be made by a state commission under Section 214(e)(2). ^{19/} The jurisdictional analysis that applies here – *i.e.*, the balancing test required by federal Indian law precedents – necessarily differs from approaches used in the past. Unlike past cases, this case involves a non-tribal carrier that has subjected itself to tribal jurisdiction to provide universal service to a geographically limited area consisting of the Crow Reservation. This unprecedented

State 'has jurisdiction over service' to the non-Indian residents [so] the Montana PSC has jurisdiction over 'service' on the Crow Reservation.") (quoting 47 U.S.C. § 214(e)(6) and Opinion Letter at 4) (emphases added, quotations in original).

^{19/} For that reason, when Western Wireless has sought ETC designation for providing universal service throughout its territory in a given state, the company has applied to the appropriate state commission. For this same reason that, as discussed *infra* at Section III, designating Western Wireless for the Crow Reservation pursuant to Section 214(e)(6) is not inconsistent with the ETC designations received under Section 214(e)(2) in states where Western Wireless serves reservations only as part of its widescale offering of universal service. *Contra*, Project/Range at 5-6.

case requires a new jurisdictional paradigm – the balancing test proposed by Western Wireless and Professor Collins in the Jurisdictional Supplement.

B. A Proper Balancing of the Federal, Tribal and State Interests Compels the Conclusion that the FCC has Jurisdiction Over the Crow ETC Petition

Application of the prevailing Indian law to the present case compels the conclusion that it is the FCC, not the Montana PSC, that has jurisdiction to designate Western Wireless as an ETC for the Crow Reservation. Nothing in the opposing comments negates this conclusion. The Supplement cited several factors that strongly favor tribal jurisdiction, including (i) the overwhelmingly Indian population and land ownership on the Crow Reservation; (ii) the lack of a treaty or other legal document by which the Tribe consented to state jurisdiction; (iii) the arrangement between the Tribe as a sovereign and Western Wireless to improve telephone penetration to advance the Tribe's political, economic and social interests; (iv) Western Wireless' status as a CMRS provider. 20/ No commenter offers anything that casts doubt on the weight of the interests strongly favoring tribal jurisdiction, or that bolsters the state side of the equation.

Only one comment, that of Project/Range, even attempts to argue the merits of the results of the balancing, but its arguments are not persuasive. The Project/Range comments cite two Indian law cases in hopes of minimizing the weight of the federal and tribal interests, and bolstering the Montana PSC interests, with respect to the universal service offering Western Wireless proposes

20/ Jurisdictional Supplement at 5-7.

for the Crow Reservation. 21/ Their argument notes that pervasive federal interests in *White Mountain Apache* and *Mescalero Apache* outweighed the state interests in the activities at hand, then argues that the opposite is true here because Section 214(e)(2) creates a state interest in designating ETCs. 22/ However, the interest conferred on state commissions by Section 214(e)(2) necessarily extends – and is only as weighty as – the state’s jurisdiction over the carrier or service to be designated. Where the state’s jurisdiction is marginal or nonexistent – such as in cases where service is targeted to tribal lands or a state commission enabling act limits the agency’s authority – the state’s interest is correspondingly low. Moreover, on the other side of the balancing equation, the federal role in the provision of universal service to tribal lands in order to improve telephone penetration is substantial. There is general federal policy supporting tribal sovereignty over reservation Indians, 23/ an express FCC policy of facilitating a tribal role in improving telephone service on reservations, 24/ and newly created special federal funding for universal service on Indian reservations. In all, Western

21/ Project/Range at 13-15 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 149 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 327-29, 334, 343-4 (1983)).

22/ *Id.*

23/ See Jurisdictional Supplement, Opinion Letter at 3.

24/ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (rel. June 23, 2000).

Wireless' designation as an ETC for the Crow Reservation triggers substantial federal interests, but relatively little state interest.

Other attempts to bolster the state side of the equation, in order to avoid "preemption," as the Montana PSC and Project/Range refer to it, are likewise unavailing. The opponents cite only general Montana PSC interests in overseeing ETC designation and in assuring universal service throughout the state. ^{25/} These generalized interests are insufficient to overcome either the specific indicia of tribal jurisdiction noted above, or the Crow Tribe's interest in improving telephone service on its Reservation. Similarly, the FCC should reject arguments based on the Montana PSC's "familiarity" with telephone service throughout Montana that may incidentally include Indian reservations and/or the incumbent carriers that have been designated as ETCs. ^{26/} While such assertions may be germane to the ease with which the Montana PSC might make the ETC designation, they are irrelevant to the Montana PSC's *interest* in regulating universal service on the Crow Reservation. Moreover, they overlook the significant difference between service by carriers that serve Indian reservations only because they happen to fall within the designated service area, as compared to Western Wireless' proposal to offer universal service targeted specially to the Reservation.

The opponents also misunderstand and/or disregard the effects of Western Wireless' status as a CMRS provider on the jurisdictional balancing.

^{25/} Montana PSC at 3, 8-9; Project/Range at 17-18.

^{26/} *Id.*

Project/Range's argument that Western Wireless' CMRS status does not preempt the Montana PSC's jurisdiction to designate ETCs under Section 214(e)(2) 27/ misses the point. Section 332(c)(3)'s preemption of state rate and entry regulation does not *alone* displace the Montana PSC's jurisdiction, but it is a relevant factor that diminishes the state's interest in the overall balance. 28/

Finally, while the opponents concede – as they must – that no statute, treaty, intergovernment agreements or other source of legal rights resolves the jurisdictional question at hand, 29/ they proceed to leap to the facile and incorrect conclusion that the Montana PSC must have jurisdiction because states typically have jurisdiction over ETC designations and telephone service by local exchange

27/ Project/Range at 11; *see also* NTCA at 2. The argument by Project/Range that Western Wireless' provision of wireless local loop universal service is not CMRS, *id.* at 11-12, is completely irrelevant to this proceeding.

28/ *See* Jurisdictional Supplement at 7.

29/ Project/Range at 8; Montana PSC at 7-8; *see also* Jurisdictional Supplement at 4-5. The reference by Project/Range to the "Enabling Acts" which made Arizona, Montana, New Mexico and South Dakota states is unavailing. Project/Range at 9-10 (citing 25 Stat. 676, 677; 36 Stat. 557, 569; 36 Stat. 557, 599). The Jurisdictional Supplement cited the Enabling Act only to demonstrate that Crow Tribe has not ceded any of its inherent sovereignty to the State, and that the Act otherwise holds no answers in the jurisdictional question at hand. Thus, the fact that some state commissions have designated some ETCs serving tribal lands in South Dakota, Arizona and New Mexico likewise suggests no answer as to state/federal jurisdiction over non-tribally owned ETC applicants providing universal service exclusively to Indian reservations. *See supra*, note 17. This is particularly true given that the FCC has already determined that the universal service proposed in any ETC petition must be examined on its own merits under a very fact-specific inquiry. *Twelfth Report and Order*, 15 FCC Rcd at 12262, ¶ 108.

carriers. 30/ This approach, however, ignores the import of Section 214(e)(6). The better approach is the one offered by Western Wireless, drawing from federal Indian law to develop a practical, legally supported framework for resolving the jurisdictional issue. The Commission should apply that framework and conclude that the balance clearly favors finding FCC jurisdiction over the Crow ETC Petition.

III. FCC JURISDICTION OVER THE CROW ETC PETITION WILL NOT DISTURB EXISTING ETC DESIGNATIONS OR FCC PRECEDENT

The FCC should resist the suggestion that applying Section 214(e)(6) to the Crow ETC Petition will call into question existing ETC designations or FCC precedent. 31/ These arguments are red herrings that ignore significant facts. The opponents fail to recognize that the universal service proposed in the Crow ETC Petition is substantially different from that offered by existing ETCs and, as result this proceeding is a case of first impression. The FCC should not countenance such scare tactics offered in hopes of delaying Western Wireless' competitive entry.

An FCC order accepting jurisdiction and designating Western Wireless as an ETC on the Crow Reservation would have no effect on the ETC status already conferred on incumbent carriers serving tribal lands (or competitive carriers like Western Wireless). Most non-tribally owned ETCs serving tribal lands have service areas consisting primarily of non-tribal lands. As a result, they provide service to

30/ Project/Range at 8; Montana PSC at 7-8.

31/ Project/Range at 18-20; MTA at 4 ("If the FCC were to claim the authority to designate WW as an ETC on the Crow Reservation, it would effectively overturn all state-designated ETCs serving Indian reservations.").

predominantly non-Indian populations and non-reservation lands. Because the extent to which a carrier serves Indian customers and/or tribal lands is a key factor in the jurisdictional balancing required under federal Indian law, 32/ it is clear that state jurisdiction applies to such offerings regardless of what the FCC does here. 33/ Thus, because the universal service that Western Wireless proposes in the Crow ETC Petition differs from that provided by other non-tribal ETCs that incidentally serve Indian reservations, the Commission's action here will have no effect on the incumbents' ETC status.

For the same reasons, the FCC's assumption of jurisdiction over the Crow ETC Petition will have no detrimental effect on Western Wireless' status in states where it has been designated as an ETC. Western Wireless has sought designation for its universal service provided in large portions of its license area in each of these states without regard for reservation boundaries. In these states, Western Wireless offers service as an ETC to a customer base that is overwhelmingly non-Indian, in a service area comprised almost entirely of non-tribal lands. Western Wireless has no special arrangements with any of the Indian tribes in those states, nor has it subjected itself to tribal jurisdiction for its general

32/ See *supra*, Section II.

33/ In addition, it is highly unlikely that carriers serving Indian reservations only fortuitously included in the carriers' service areas would have agreements or arrangements with the tribe(s) served. Nor is it likely that such carriers would consent to tribal jurisdiction over even the on-reservation portions of their service. The absence of both of these significant factors in the jurisdictional balancing make a clear case for state jurisdiction, notwithstanding the outcome of the jurisdictional issue at hand.

universal service offering. An FCC decision to accept jurisdiction over the Crow ETC Petition would in no way undermine – or be inconsistent with – Western Wireless’ existing ETC designations.

An assumption of jurisdiction by the FCC over the Crow ETC Petition also would not upset any FCC precedent. The only FCC ETC designations to date have been for tribally-owned carriers providing service predominantly to reservation Indians. 34/ Because the present case is factually distinct in that it concerns a non-tribally owned carrier, its outcome will have no bearing on the FCC’s prior cases under Section 214(e)(6). The present case will also require no rethinking or modification of the *Twelfth Report and Order*. In the *Twelfth Report and Order*, the FCC determined that each petition for ETC designation for tribal lands would be subject to a fact-specific inquiry that evaluates each set of circumstances on their merits. 35/ That is exactly the approach that has been taken thus far in this proceeding, and it is the approach advocated by the jurisdictional framework offered in the Jurisdictional Supplement and in this Reply.

Finally, there is no merit to the opposing parties’ suggestion that some ETCs could lose their pre-existing ETC designations by virtue of an FCC grant of Western Wireless’ petition here. 36/ Like other federal statutes, Section 214(e)(6)

34/ See *Saddleback & Ft. Mojave*, *supra* note 8.

35/ *Twelfth Report and Order*, 15 FCC Rcd 12262, ¶ 108.

36/ Project/Range at 18-20; MTA at 4.

would not be applied retroactively absent specific guidance from Congress. ^{37/}

There is no basis for suggesting that an FCC decision that Section 214(e)(6) gives it jurisdiction over the Crow ETC Petition would have negative consequences for existing ETCs.

IV. CONCLUSION

Western Wireless hereby respectfully submits that the analyses in the Jurisdictional Supplement and Professor Collins' opinion set forth the appropriate jurisdictional framework for the Commission to determine that the Crow ETC Petition falls within FCC jurisdiction under Section 214(e)(6). Western Wireless

^{37/} *Motion Picture Association of America, Inc. v. Oman*, 969 F.2d 1154, 1556-57 (D.C. Cir. 1992) (“statutes should not . . . have retroactive effect unless Congress expressly states otherwise”) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990)).

therefore respectfully requests that the Commission expeditiously accept jurisdiction and proceed to the merits of the present designation proceeding.

Respectfully submitted,

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