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

In the Matter of	**)**	
	)	
Wireless Telecommunications Bureau	**)**	**WT-00-239**
Seeks Comment on Petition for Declaratory	**)**	
Ruling that Western Wireless' Basic	**)**	**DA-00-2622**
Universal Service in Kansas is Subject to	**)**	
Regulation as Local Exchange Service	**)**	

To: The Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch

REPLY COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"), by its attorneys, respectfully submits these reply comments in response to the comments filed in this proceeding.[1] The Federal Communications Commission ("FCC" or "Commission") seeks comments regarding a Petition for Declaratory Ruling ("Petition") filed by a group of rural incumbent, independent local exchange carriers ("LECs") in Kansas ("Independents") requesting that the FCC determine that the basic universal service ("BUS") offering of Western Wireless is not a commercial mobile radio service ("CMRS") and that Western Wireless should, therefore, be subject to state regulation as a local exchange carrier. RTG opposes the Petition and, in its comments, demonstrated that the law and FCC precedent governing the provision of fixed wireless services prohibit the regulation of Western Wireless' BUS service as a local exchange carrier ("LEC").

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[1] *In re Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless' Basic Universal Service in Kansas Is Subject to Regulation as Local Exchange Service*, WT-00-239, Public Notice, DA-00-2622, (rel. November 21, 2000). ("*Public Notice*").

The comments were divided between rural telephone company-affiliated commenters supporting their brethren in Kansas[2] and CMRS carriers opposing the precedent of an additional layer of regulation on competitive CMRS operations. Of all the comments, it is the Kansas Corporation Commission's ("KCC") comments that stand out in this proceeding and should serve as the Commission's guide to put an end to the Independent's legally unsupported and unsound request. The KCC and other commenters note that Western Wireless' BUS, while a substitute for landline service, does not serve a substantial portion of Kansas. Also, as the CMRS commenters explain, the BUS service is an incidental and ancillary part of Western Wireless' overall CMRS network.

I. Western Wireless' BUS Does Not Come Close to Serving a Substantial Portion of the State

In its comments, the KCC determines that "Western Wireless' BUS offering does not appear, at this time, to constitute 'a substantial portion of the communications within the state' based on the Western Wireless application filed in Kansas."[3] Under Section 332(c)(3) of the Communications Act of 1934, as amended ("Communications Act"), the KCC can only regulate the rates and entry of Western Wireless "where such services are a substitute for land line telephone exchange service for a *substantial portion* of the communications within" Kansas.[4] Western Wireless has 386 BUS customers in Kansas.[5] According to U.S. Census Bureau data, Kansas has an estimated 1,044,000 households.[6] Western Wireless' 386 BUS customers represent less than one half of one percent of Kansas households. RTG submits that less than one half of one percent of households in a state fails to

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[2] The Comments of RTG, a group of rural telephone companies with wireless interests, were the notable exception and should be accorded considerable weight in this proceeding.
[3] KCC Comments at 4.
[4] 47 U.S.C. § 332(c)(3) (emphasis added).
[5] Western Wireless Comments at 3.

constitute a "substantial portion" of the households in Kansas. The FCC should defer to the KCC's determination that Western Wireless' BUS has yet to serve a "substantial portion" of the state.

The National Telephone Cooperative Association (NTCA) supports the Independents request that Western Wireless be regulated as a LEC by arguing that "Western Wireless' BUS offering is a fixed service that is a substitute for local exchange carrier service."[7] Be that as it may, Section 332(c)(3) dictates that Kansas can only regulate the rates and entry of Western Wireless "where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state."[8] NTCA cannot and does not claim that Western Wireless' 386 BUS customers are "a substantial portion of the communications within such state."

NTCA's further claim that the U.S. Court of Appeals for the Fifth Circuit has found that a state has the authority to apply additional standards to eligible telecommunications carriers ("ETCs") for the purpose of promoting universal service[9] only weakens the need for another layer of regulation. In other words, the KCC, without regulating Western Wireless as a LEC, has the authority to oversee Western Wireless' provision of universal service according to the Fifth Circuit decision NTCA cites.[10] If the KCC wants to apply additional universal service obligations on Western Wireless as a CMRS carrier, it has the legal authority to do so, and the FCC need not instruct the KCC to regulate Western Wireless as a LEC in order to promote universal service in the state of Kansas.[11]

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[6] *See* (http://www.census.gov/population/estimates/housing/sthuhh2.txt).
[7] NTCA Comments at 1.
[8] 47 U.S.C. § 332(c)(3).
[9] NTCA Comments at 4.
[10] *Texas Office of Public Utility Counsel*, 183 F. 3d at 418 (1999).
[11] *See Texas Office of Public Utility Counsel*, 183 F. 3d at 418 (1999) where the court concluded that the FCC "erred in prohibiting the states from imposing additional eligibility requirements" under 47 U.S.C. § 214(e)(2).

The United States Telecom Association ("USTA"), like NTCA, agrees with the Independents "that the Western Wireless fixed wireless local loop BUS is a *substitute* for local exchange carrier service."[12] USTA then erroneously claims that because the BUS is a substitute service, "Western Wireless cannot legitimately seek refuge from appropriate common carrier regulation."[13] This claim demonstrates an almost willful ignorance of the Section 332(c)(3) prohibition on state regulation unless such a substitute service is in a "substantial portion of the communications within such state."[14] USTA is aware of the provisions of Section 332(c)(3) and is selectively choosing those portions of the statute it believes may advance its case. USTA states correctly that it is up to the state to petition the FCC to regulate the rates of a CMRS carrier when that service becomes a replacement for landline telephone exchange service.[15] However, USTA fails to note that Kansas did not petition the FCC. Until the KCC files a Section 332 petition, the FCC cannot instruct the state to get involved in the regulation of the entry or rates of Western Wireless, regardless of the service offered.

II. Western Wireless' BUS Offering Is Incidental to its Mobile Service Offering and by Law Is Subject to Regulation as CMRS

The commenters who support the Independents take an extremely narrow view of law and FCC precedent governing the provision of services by CMRS carriers. The Rural Utilities Service ("RUS") comments rely in their entirety on the unsubstantiated claim that a "split-level playing field" will "devolve" universal service.[16] Notably, RUS provides no support for its doomsday universal service scenario, yet admits that "[c]ellular radio facilities can be used to provide a 'wireless local loop' as an ancillary

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[12] USTA Comments at 4 (emphasis added).
[13] USTA Comments at 4.
[14] 47 U.S.C. § 332(c)(3).
[15] *See* USTA Comments at 4 and 47 U.S.C. § 332(c)(3)(A).
[16] RUS Comments at 3.

service" and that Western Wireless "offer[s] such a service in Kansas."[17] RUS obviously refers to an FCC determination that fixed service offerings that are provided on an ancillary, auxiliary, or incidental basis fall within the ambit of CMRS and are to be regulated as CMRS.[18] Western Wireless' BUS offering accounts for 0.857 percent of its cellular customer base in Kansas.[19] RTG agrees with RUS that such a small percentage is indeed "ancillary" to Western Wireless' cellular service in Kansas. RTG submits that the FCC need only rely on its rules, rather than RUS' speculation about unsubstantiated universal service harm.

The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") offers an overly narrow, LEC-centric view of Section 332(c)(3). OPASTCO concentrates solely on Western Wireless' BUS offering and its ability to move without considering Western Wireless' network as a whole.[20] The CMRS network designed and engineered by Western Wireless to provide its mobile service is the same network utilized by Western Wireless to provide its fixed wireless service. As Western Wireless confirms, "any analysis of BUS as a distinct offering should reach the conclusion that it is 'incidental,' 'ancillary,' or 'auxiliary' to Western Wireless' conventional cellular service."[21] While RTG disagrees with OPASTCO's narrow interpretation of flexible service

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[17] RUS Comments at 3.

[18] *See In re Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1424, ¶ 36 (1994), *recon dismissed in part and denied in part*, 15 FCC Rcd. 5231 (2000). ("*CMRS Second Report and Order*"). *See also*, 47 C.F.R. § 22.323.

[19] Western Wireless Comments at 3.

[20] OPASTCO Comments at 3.

[21] Western Wireless Comments at 6.

offerings by CMRS providers, RTG wholeheartedly agrees with OPASTCO's conclusion that competition should lead to a reduction in regulation for all carriers.[22]

Beacon Telecommunications Advisors, LLC ("Beacon") takes an overly narrow view as well. Beacon argues that "[t]he requirement of a fixed electrical source to power [the BUS] device is prima facie evidence that BUS [is] not mobile, and therefore is not a CMRS service."[23] This analysis, unsupported by any regulations or laws, begs the question as to whether a mobile handheld phone changes regulatory regimes from CMRS to LEC whenever the customer plugs the phone into an electrical outlet to charge the batteries. Under Beacon's analysis, all handheld mobile phones should be regulated by a state when they are plugged into an electrical source. As Dobson Cellular Systems, Inc. ("Dobson") explains, such an analysis is based on a "snapshot" view of how often customer premises equipment ["CPE"] is moved or how difficult it is to move.[24] RTG agrees with Dobson that the Commission should refrain from making a determination on what is "mobile" in a vacuum and "instead consider other relevant factors, such as the architecture of the CMRS provider's network, and the customer's ability to move the CPE between locations without prior Commission approval and carrier coordination."[25]

III. Conclusion

The outcome of this proceeding will most likely set precedent for all CMRS carriers providing fixed services in conjunction with their mobile services. Many of RTG's members provide fixed wireless services in addition to their mobile service offerings and would rather see

[22] OPASTCO Comments at 5.
[23] Beacon Comments at 2.
[24] Dobson Comments at 5.
[25] Dobson Comments at 5.

less regulation for all carriers once competition is present, even if one of those carriers is Western Wireless – one of their competitors.

For the forgoing reasons, the Commission should dismiss or deny the Kansas Independents' Petition for Declaratory Ruling.

RURAL TELECOMMUNICATIONS GROUP

_____/s/_____

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CERTIFICATE OF SERVICE

I, Fatmata Dean, hereby certify that a true and correct copy of the foregoing document has been served via first class, postage pre-paid mail on the following, this 8th day of January 2001:

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