

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

In the Matter of

Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling That the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service

WT Docket No. 00-239

**REPLY COMMENTS OF UNITED STATES CELLULAR CORPORATION**

United States Cellular Corporation (“USCC”) submits the following reply comments to the 16 comments filed in response to the Petition for Declaratory Ruling (“Petition”) filed by the State Independent Alliance and the Independent Telecommunications Group (“Independents”).<sup>1</sup> USCC opposes the Petition. The Petition, and the 11 comments<sup>2</sup> submitted in support of it are meritless for the following reasons.

**I. INTRODUCTION**

The Petition really asks this Commission to issue a ruling which would discourage wireless carriers from participating in universal service mechanisms. Only through such

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<sup>1</sup> See Public Notice, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless’ Basic Universal Service in Kansas is Subject to Regulation as a Local Exchange Service, WT Docket No. 00-239, DA 00-2622 (rel. November 21, 2000).

<sup>2</sup> These comments were submitted in support of the Petition by the following: Rural Utilities Services (“RUS”); John Staurulakis, Inc. (“JSI”); Warinner, Gesinger & Associates, LLC (“WGA”); Fred Williamson & Associates, Inc. (“FWA”); Beacon Telecommunications Advisors, LLC (“Beacon”); The Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTC”); Minnesota Independent Coalition (“MIC”); National Telephone Cooperative Association (“NTCA”); The Rural Iowa Independent Telephone Association (“RIITA”); Nebraska Rural Independent Companies (“NRIC”); South Dakota Independent Telephone Coalition on Rural Task Force Recommendation (“SDITC”).

The Kansas Corporation Commission (“KCC”) merely supports clarification from the FCC on the issue raised by the Petition.

Four others filed oppositions: Sprint Corporation (“Sprint”); Western Wireless Corporation (“Western Wireless”); Dobson Cellular Systems, Inc. (“Dobson”) and the Rural Telecommunications Group (“RTG”). USCC endorses the opening comments filed in opposition to the Petition.

participation can wireless carriers effectively compete and offer customers a competitive choice in the rural landline markets controlled by the Independents and their supporters.

This petition is not really about the proper classification of the Western Wireless Basic Universal Service (“BUS”) offering in WT Docket No. 96-6. It is a request for this Commission to find that wireless services, which could be viewed as substitute for landline services, should be subject to landline state regulations when these wireless services are eligible for federal universal service funding (“USF”). USCC offers such a service, different in character than the BUS of Western Wireless at issue here because USCC’s USF offering has no “fixed” component.<sup>3</sup> However, the USCC USF service can and does substitute for landline service. USCC opposes subjecting its USF service, or similar service offerings of any other wireless provider, such as the BUS, to state regulatory jurisdiction. By granting the Petition, the Commission will set a troubling precedent which will strongly discourage wireless participation in universal service programs. Wireless carriers should not be subject to the state rate and entry regulation which could result from granting the Petition, under 47 U.S.C. § 332(c)(3).

Granting the Petition would not be in the public interest because it would indirectly deprive carriers of the opportunity to participate in federal universal service programs, which the Commission has encouraged. In turn, this would suppress competition in rural areas and

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<sup>3</sup> Like Western Wireless, USCC has obtained eligible telecommunications carrier (“ETC”) status from a state commission. In Washington State USCC was first granted eligible telecommunications carrier (“ETC”) status by the Washington Utilities and Transportation Commission (“WUTC”) for ten non-rural exchanges on December 23, 1997. See Order Designating Eligible Telecommunications Carriers, In The Matter of the Petitions of Yelm Telephone Company et al., Docket Nos. UT-970333-354 (December 23, 1997). USCC received ETC status for 72 additional local company exchanges on December 29, 1999. See Second Supplemental Order Granting Petition for Designation as Eligible Telecommunications Carrier (December 29, 1999), Third Supplemental Order Granting Petition for Designation as an Eligible Telecommunications Carrier, Docket No. UT-970345 (January 25, 2000). Sixty of these 72 local telephone company exchanges are currently classified as exchanges of rural telephone companies.

deprive customers of meaningful, competitive choices for telecommunications service. Nothing contained in the Petition or supporting comments justifies the relief requested.

## II. ARGUMENT

### A. The FCC Has Found That Fixed Wireless Is a CMRS Service.

On December 26, 2000, this Commission issued an Order<sup>4</sup> in which it granted the petition of Western Wireless for ETC status in Wyoming. While the Wyoming ETC Order did not discuss the BUS specifically, the Western Wireless universal service offering was examined and at the heart of the Order, and the Commission found that the Western Wireless offering—whether fixed or wireless—was eligible for universal service support. It said:

Thus, a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria.

Wyoming ETC Order, ¶ 11. (Emphasis supplied.)

Implicit in the Commission ruling was a finding that the Western Wireless USF service offering fell under the CMRS umbrella. This conclusion is consistent with the Commission's recent decisions which have found that fixed wireless services qualify as CMRS services. Much of the Petition (pp. 6-16) and supporting comments<sup>5</sup> argue why the BUS should not be considered a "mobile" service and should be considered "fixed" and, therefore, not categorized as a CMRS service. Western Wireless in its opposition has rebutted effectively these definitional arguments. USCC does not have sufficient information about the BUS service to contribute much to the definitional debate. However, resolution of this debate will not determine the issues raised by the Petition. This Commission has already found that a fixed mobile service can qualify as a CMRS service. Therefore, whether the BUS service is

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<sup>4</sup> In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, DA 00-2896; 2000 FCC LEXIS 6745 (rel. December 26, 2000) ("Wyoming ETC Order").

<sup>5</sup> See, *i.e.*, Comments of JSI (pp. 4-6); Beacon (pp. 1-3); NTC (pp. 1-3); NRIT (pp. 2-4).

considered “fixed” or “mobile” is not really the question. The Kansas Corporation Commission (“KCC”) in its comments acknowledged that whether the BUS offering is “fixed” will not resolve the applicability of 47 U.S.C. § 332(c) (p. 2). The KCC, however, determined that it viewed the BUS as exempt from state regulation under that statute. Thus, the question really is whether there is any reason to remove the BUS service from CMRS classification. Neither the Petition, nor its supporting comments, provide such reason.

Every recent FCC order to date which has dealt with the issue of using CMRS spectrum to provide fixed services has concluded that it is proper to regulate them as CMRS services in order to promote innovation in the development of mobile services and greater customer choice. For instance, in the CMRS Second Report and Order, the Commission found that all auxiliary services provided by mobile services licensees would fall within the definition of mobile services, including ancillary fixed communications offered by PCS providers.<sup>6</sup>

In 1996 in WT Docket No. 96-6, the Commission stated:

[We] do not want to discourage the development of such integrated networks by subjecting carriers to multiple layers of regulation. We, therefore, propose to treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider, so long as the carrier otherwise offers interconnected, for profit mobile service to the public on licensed CMRS spectrum as provided by the Communications Act.<sup>7</sup>

In the CMRS Regulatory First Report and Order, the Commission concluded that CMRS licensees should be given maximum flexibility in their uses of CMRS spectrum.<sup>8</sup> They should be allowed to offer all types of fixed, mobile and hybrid services in order to better respond to

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<sup>6</sup> *Implementation of Sections 3(n) and 332 of the communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1424-25, ¶¶ 36, 38 (1994) (“*CMRS Second Report and Order*”).

<sup>7</sup> Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Notice of Proposed Rule Making*, WT Docket No. 96-6, 11 FCC Rcd 2445, ¶ 20 (1996) (“*NPRM*”).

<sup>8</sup> Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, ¶ 22 (1996) (“*CMRS Regulatory Flexibility First Report and Order*”).

market demand and increase competition in the provision of telecommunications services. While not concluding that all fixed services fall within the category of CMRS, this order established a rebuttable presumption that fixed wireless services would constitute CMRS services.<sup>9</sup>

When the Commission issued the Second Report and Order in WT Docket No. 96-6 on July 20, 2000, it did not adopt the rebuttable presumption proposed in the CMRS Regulatory First Report and Order because it concluded it was too difficult to adopt a “bright-line” test to separate CMRS services from non-CMRS services, given the evolving nature of wireless services. While it did not state unequivocally that all fixed wireless services fall under the CMRS umbrella, the direction the Commission took in the Second Report and Order favored, if anything, further expansion and inclusion within the CMRS category of innovative fixed wireless services, such as BUS. To find otherwise would contradict the Commission’s expressed intent to not “limit or discourage the development of these services.”<sup>10</sup> The Second Report and Order recognized that many services which have been traditionally associated with fixed service, such as data transmission, Internet access and facsimile transmission can now be offered by CMRS providers using a combination of fixed and mobile functionality, and therefore could be appropriate fixed uses of the CMRS spectrum.<sup>11</sup> Because the provision of BUS offers a service traditionally associated with fixed service (local service) which results from a combination of fixed and mobile functionality, BUS should also be recognized as appropriate as CMRS, according to the rationale of the Second Report and Order.

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<sup>9</sup> *Id.* at ¶ 53, 54.

<sup>10</sup> *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, Second Report and Order, FCC 00-246; ¶¶ 7,8 (rel. July 20, 2000) (“*Second Report and Order*”).

<sup>11</sup> *Id.* at ¶ 7.

The fact that the BUS service is offered by a CMRS provider is significant. Congress and the FCC want to encourage innovation in the CMRS marketplace by CMRS providers. That is why Congress passed the Omnibus Reconciliation Act of 1993,<sup>12</sup> which created the CMRS regulatory classification and exemption from state regulation contained in 47 U.S.C. § 332(c)(3). “The broad goal of this legislation was to ensure that economic forces—not disparate regulatory requirements—shape the development of the CMRS marketplace.”<sup>13</sup> This goal was furthered in the FCC’s orders in WT Docket No. 96-6, which expanded the uses of the CMRS spectrum for fixed purposes. Thus, imposing disparate state regulatory requirements on a fixed service offered by a CMRS provider using its CMRS spectrum would offend this goal even if different policies might come into play if the service was offered by another type of provider (i.e., a LEC offering BETRS).<sup>14</sup>

In addition, adding new levels of regulation contradicts the mandate given to this Commission in the 1996 Telecommunications Act to “promote” competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.<sup>15</sup>

As discussed above, consistent with the deregulatory approach of the 1993 and 1996 legislation, the FCC in its orders in WT Docket No. 96-6 has sought to provide maximum flexibility in the uses of the CMRS spectrum, including fixed uses. There is no compelling reason, therefore, for the Commission to act contrary to these policy goals by granting the Petition.

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<sup>12</sup> Pub L. No. 103-66. Title VI, § 6002(b)(2)(A) and § 6002(b)(2)(B) 107 Stat. 312.

<sup>13</sup> NPRM, supra, ¶ 19.

<sup>14</sup> The “similar” service of BETRS can only be offered by a local exchange provider for a much different service—to reach customers whom they must serve, but can only do so via wireless means. USCC agrees with Sprint in its discussion (Opposition, pp. 11-12) as to why the BETRS service is not CMRS.

<sup>15</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (emphasis supplied).

B. Classifying the BUS Service as CMRS Would Not Violate Any Principles of “Regulatory Parity” or “Competitive Neutrality.”

1. The real agenda of the Petition and its Supporters is to drive wireless competitors from rural markets.

Many commenters, in support of the Petition, try to justify their position by claiming that regulatory parity requires the same regulation for the same service<sup>16</sup> which qualifies for USF funding. Rather than argue for a reduction in regulation for themselves, the Independents want to increase it for their ETC competitors. For instance, the JSI comments state “that it is sound public policy to require any carrier that is providing competitive local exchange service **and that is seeking ETC status** to be subject to the same level of state regulation as all other CLECs within the state” (p.3).

Advocating this “policy” is the crux of the Petition and other supporting comments. What the Independents and their supporters really want is for this Commission to impose an additional condition on ETC status which will deter entrance into rural local markets by wireless carriers, which are probably the only service providers willing and capable of offering competition at this time. Had Western Wireless not sought ETC status for offering BUS, it is doubtful that the Petition would have been bought. However, without access to USF subsidies, it is also doubtful that the BUS service could have been offered.

This challenge represents just another procedural attempt by rural independent companies to block access to the universal service subsidies by other providers. USCC faced such opposition in Washington State.<sup>17</sup> Similarly, Western Wireless has faced protracted litigation over obtaining ETC status in many of the states where it has sought this status.<sup>18</sup>

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<sup>16</sup> See, i.e., Comments of FWA (pp. 2, 4 and 5); RUS (pp. 3-4); Beacon (pp. 4-5); OPASTC (pp. 3-4); NRIT (p. 2).

<sup>17</sup> The independent telephone companies sued the WUTC over its order, granting USCC ETC status in rural areas, lost at the superior court level and have since appealed in Washington State.

<sup>18</sup> See Opposition of Western Wireless, pp. 11, 12 and Exhibits B and C.

The regulatory parity argument of the Petition and its supporters has been addressed, and rejected repeatedly by this Commission. The Commission has found that carriers do not have to offer landline substitutability to qualify for USF funds.

In its Universal Service Order, the Commission adopted the principle of competitive neutrality in the determination of eligibility to receive USF funds. In so doing, the Commission concluded that a policy of technological neutrality will foster competition by including providers, such as wireless providers, that may otherwise have been excluded from participation in the federal universal service mechanisms. We therefore reject the suggestion that service offered by CMRS providers are ineligible for universal service support due to alleged technological limitations of mobile service.

In the Matter of Federal-State Joint Board on Universal Service; Cellco Partnership d/b/a Bell Atlantic Mobile for Petition for Designation as an eligible Telecommunications carrier. CC Docket No. 96-45, DA 00-2895, 2000 FCC LEXIS 6744. (rel. December 26, 2000). Thus, if different services are eligible for USF, there is no reason to impose the same regulation on all providers. The FCC has never said that it would do so in any universal service orders.

The proponents of the Petition are not truly seeking regulatory parity. They are misusing this principle in their arguments to achieve regulatory disparity—the denial of USF subsidies to wireless providers offering qualifying USF service. The Commission should not further this impermissible agenda by granting the Petition.

2. The criteria for ETC is uniform for all and does not impose submission to state regulation as a prerequisite.

The real issue of “regulatory parity” is not whether providers of USF offer the same service under the same regulation but whether the eligibility criteria for USF are the same. They are. The prerequisites for ETC status are set forth in 47 USC § 214(e)(1). So long as providers offer the defined “services”<sup>19</sup> supported by the federal funds throughout their service

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<sup>19</sup> Set forth in 47 C.F.R. § 54.101(a)(1)-(9)(c).

areas and advertise the same, they are eligible for ETC status. In the Wyoming ETC Order, the Commission found that satisfying this criteria was sufficient for ETC status, and that no additional criteria was necessary.<sup>20</sup> Because these criteria apply to all providers equally, there is no regulatory disparity between wireline and wireless providers.

This Petition is nothing but a collateral attempt to add a new universal service condition which would impose state regulation. The ETC criteria do not require a provider to submit to the jurisdiction of a state commission to obtain ETC status. The fact that a wireless service is used to meet ETC criteria does not change the nature of the service which remains wireless, even if the service could provide a substitute for wireline services. To find otherwise would subject many other services of CMRS providers to state regulation. Wireless providers offer many services all the time (non-USF and USF) which could function like wireline services. This does not mean they are anything but wireless services, no matter how they might be marketed or used to provide USF offerings.

3. The public interest does not require that wireless carriers offering USF services be subject to state service quality rules.

Several comments<sup>21</sup> claim that service quality concerns require the BUS to be subject to state service quality rules in order to receive USF funds. The Commission rejected this argument in the Wyoming ETC Order,<sup>22</sup> reasoning:

We find that these statutory provisions are sufficient to ensure that competitive carriers use universal service funds to make the supported services available to all requesting customers throughout the service area. We also believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. In order to do so, it is reasonable to assume that competitive ETCs must offer a service package

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<sup>20</sup> Wyoming ETC Order, supra, ¶ 12.

<sup>21</sup> See i.e., JSI (p. 4); RUS (p. 3).

<sup>22</sup> Wyoming ETC Order ¶ 12, 13. The WUTC in granting USCC ETC status also rejected this argument in its Order Designating Eligible Telecommunications Carrier at p. 14 discussed in footnote 3.

comparable in price and quality to the incumbent carrier. In addition, we emphasize that a carrier's ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.

Therefore, service quality concerns should not justify granting the Petition.

The true argument of the independents and their supporters is that competition is bad for consumers in rural markets because rural telephone company revenue streams will be hurt.

In the Wyoming ETC Order, the Commission rejected this claim:

We reject the general argument that rural areas are not capable of sustaining competition for universal service. We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless carriers.<sup>23</sup>

The Commission endorsed competition in rural markets and found it to be in the public interest in the Wyoming ETC Order. Therefore, the Commission should not grant this petition which would dampen competition in rural markets.

4. Wireless and wireline providers are subject to different regulations.

While state commissions traditionally regulate local exchange providers ("LEC") who offer intrastate services, wireless providers are not LECs. They are exempted from the definition of "local exchange carrier" in Section 3(26) of the Communications Act unless the Commission finds that a wireless service should be included within the definition. The Commission has specifically found that the CMRS provision of telephone exchange and exchange access services (i.e. substitutable for local exchange service) "did not require CMRS providers to be classified as LECs."<sup>24</sup> Therefore, the fact that the BUS service is substitutable for local exchange service does not make Western Wireless a LEC, subject to state regulation.

Service substitutability is not a proper test for imposing the type of dual regulation for wireless providers which Congress expressly rejected in 1993 in enacting 47 U.S.C. § 332. If it were, then any wireless service such as the AT&T Wireless' One Rate Plan, which could

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<sup>23</sup> Wyoming ETC Order, supra, ¶ 22.

<sup>24</sup> Cite, Par. 1004.

substitute easily for local exchange service, would subject the wireless carrier to state regulation. The service substitutability argument of the Petition and supporting comments is simplistic and confuses the regulatory distinctions established for different types of providers by Congress.

The Communications Act establishes different regulation for different types of providers (i.e., cable, wireless, ILEC, CLEC, satellite). Under this scheme, wireless providers are regulated only at the federal level and must provide services through FCC-issued wireless licenses. The Communications Act contains many examples where carriers capable of offering substitutable services are subject to different regulatory requirements. For instance, rural LECs do not have the same interconnection obligations as non-rural LECs under 47 U.S.C. 251(f). Yet both provide the same services.

To subject a service offered by a wireless provider to state regulation is tantamount to making this provider subject to state regulation in violation of the federal legislative scheme. The wireless provider of the service would have to submit to state entry regulation requirements, and would have to comply with state tariff or price list rules. Such rate and entry regulation was expressly preempted by 47 USC § 332(c).

In sum, service substitutability does not equate with equal regulatory treatment for the providers when different services are involved. The factor of receipt of universal service support for a service does not impose new and additional regulatory requirements or change a wireless service into a wireline service. Congress and the Commission could have, but purposefully did not, impose a uniform regulatory requirement in setting the parameters of eligibility for USF funds.

5. Wireless providers should not be discouraged from participation in universal service programs by fear of new burdensome state regulatory requirements.

Wireless providers must contribute to the federal universal service fund and to certain state funds.<sup>25</sup> The Commission concluded that wireless providers should also be able to participate in universal service programs.<sup>26</sup> Neither Congress nor the Commission attached state regulatory strings to this participation. However, that is what the Independents and their supporters request.

USCC strongly advocates wireless participation in USF programs. The fact that it has sought and received ETC status in Washington as a starting point for its efforts, demonstrates that USCC views wireless as a viable means of providing a beneficial universal service solution, particularly to rural customers. USCC's choice of USF service offering differs from that of Western Wireless—yet USCC's service could also be deemed a substitute for landline service. If this Commission were to exempt the Western Wireless BUS offering from CMRS classification, the message would be that wireless participation in USF programs would come at a price wireless carriers do not want to pay—another layer of regulation at the state level.

Therefore, wireless carriers will forego the very type of innovation which has resulted in the two different approaches to USF taken by Western Wireless and USCC. Wireless carriers should be encouraged to design new USF programs unique to the carrier's network, rate plans and marketing strategies. They will not do so if they face an additional level of regulation.

The Commission should avoid setting a troubling precedent which denies competitors access to USF subsidies in rural areas, suppresses real competition and ultimately undermines the very universal service goals the Commission intends to promote.

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<sup>25</sup> See Cellular Telecommunications Industry Association, et al. v. FCC, 168 F.3d 1332 (D.C. Cir. 1999).

<sup>26</sup> In the Matter of Federal-State Joint Board on Universal Service, First Report and Order, Docket No. 96-48, 12 FCC Rcd. 8776, 8802 ¶ 48 (1997).

C. The Petitioners Lack of Standing to Bring this Petition

The Independents claim their request is based on “the Commission’s invitation in the Second Report and Order in WT Docket 96-6. FCC 00-246 (rel. July 20, 2000) for parties to seek declaratory rulings, on a case-by-case basis, to determine whether particular fixed wireless service offerings are CMRS.” Petition, p. iv.

The Petition does not explain why the Independents have “party” status to bring this petition. Western Wireless and the KCC are the only real parties at issue. Yet, neither party requested the relief sought in the Petition. The comments of the KCC may support “clarification” of whether the BUS offeror is a CMRS, but the KCC did not request reversal of its determination “that the 47 USC § 332(c)(3) and (8) exemptions appeared to apply to the BUS offering based on the evidence of record submitted in this proceeding.”<sup>27</sup>

The Independents do not have the standing to bring this challenge to the FCC under a misinterpretation of the Second Report and Order in Docket WT No. 96-6, which deals with use of the CMRS spectrum for “fixed “applications, not with issues of universal service. The Petition states no legal or factual basis for entitlement to question the regulatory classification of a competitor’s service. Surely the FCC did not intend to invite this anti-competitive tactic in the Second Report and Order.

III. CONCLUSION

No legal, factual or policy reason exists to grant the Petition. Comments in support of it advance nothing but the self-serving interests of rural telephone companies in preserving their markets. The BUS is a proper CMRS service. To find otherwise would expose any other wireless USF solution to the risks of state regulation. This result would deter wireless USF

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<sup>27</sup> KCC Comments, p-1.

solutions which could substitute for a landline service and would not further the universal service goals this Commission intends to achieve. The Petition should be denied.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of January, 2001.

WILLIAMS, KASTNER & GIBBS PLLC

By \_\_\_\_\_  
Judith A. Endejan  
WSBA #11016

Attorneys for USCC