

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

JAN 19 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
WESTERN WIRELESS CORPORATION)	
)	
Petition For Designation as an)	
Eligible Telecommunications Carrier for the)	
Pine Ridge Reservation in South Dakota)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	

**PETITION FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER**

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TABLE OF CONTENTS

	<u>Page</u>
I. WESTERN WIRELESS HAS ENTERED INTO AN AGREEMENT WITH THE OGLALA SIOUX TRIBE TO SERVE THE BASIC TELECOMMUNICATIONS NEEDS OF THE PINE RIDGE RESERVATION.....	2
II. THE FCC HAS JURISDICTION TO DESIGNATE WESTERN WIRELESS AS AN ETC FOR THE PINE RIDGE RESERVATION	7
A. The Commission Must Use a Balancing Test for Jurisdictional Analyses of ETC Petitions by Non-Tribally Owned Carriers Seeking to Serve Tribal Lands	8
B. The Characteristics of the Pine Ridge Reservation Community and Western Wireless' Universal Service Offering Weigh in Favor of FCC Jurisdiction Under Section 214(e)(6)	10
1. The Characteristics and Legal Status of the Pine Ridge Reservation Support FCC Jurisdiction Over This ETC Petition	11
2. Western Wireless' Tate Woglaka Offering Targeted to Pine Ridge is Unique.....	13
3. South Dakota Lacks a Legitimate Interest in Regulating Universal Service Targeted to the Pine Ridge Reservation.....	15
C. Western Wireless' Application for ETC Status in South Dakota Does Not Preclude its Petition for ETC Status on the Pine Ridge Reservation.....	17
III. WESTERN WIRELESS SATISFIES ALL THE STATUTORY AND REGULATORY PREREQUISITES FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.....	19
A. Western Wireless Offers All of the Services Supported by the Federal High-Cost Universal Service Program	19
B. Western Wireless Provides the Supported Services Using Its Own Facilities	24

C. Western Wireless Will Advertise Its Universal Service Offering.....24

D. Designating Western Wireless as an ETC in Service Areas Served By Rural Telephone Companies Will Advance the Public Interest.....25

IV. ANTI-DRUG ABUSE CERTIFICATION30

V. CONCLUSION30

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Western Wireless Corporation and its wholly-owned subsidiary, WWC License, LLC (together, “Western Wireless”), hereby seek designation as an eligible telecommunications carrier (“ETC”) for the provision of universal service on the Pine Ridge Reservation (“Reservation”) in South Dakota, pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (“Act”). ^{1/} The FCC should grant Western Wireless ETC status for the Reservation because, as shown below, (i) the South Dakota Public Utilities Commission (“South Dakota PUC”) lacks jurisdiction over Western Wireless’ provision of universal service on the Reservation pursuant to the Tate Woglaka Agreement, (ii) Western Wireless meets

^{1/} 47 U.S.C. § 214(e)(6). See Public Notice, *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 12 FCC Rcd 22497 (1997); *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, 15 FCC Rcd 12208, 12261-62, ¶¶ 106-08, 115-27 (2000) (“*Twelfth Report and Order*”) (establishing process for seeking ETC status for tribal areas).

all the statutory and regulatory prerequisites to be an ETC on the Reservation, and (iii) designating Western Wireless as an ETC for the Reservation will advance the public interest.

I. WESTERN WIRELESS HAS ENTERED INTO AN AGREEMENT WITH THE OGLALA SIOUX TRIBE TO SERVE THE BASIC TELECOMMUNICATIONS NEEDS OF THE PINE RIDGE RESERVATION

Western Wireless is a leading competitive carrier seeking to provide universal service to high-cost and rural areas, including Indian reservations. ^{2/} By submitting this Petition for Designation, Western Wireless seeks to serve the basic telecommunications needs of the Oglala Sioux Tribe on the Pine Ridge Reservation. Western Wireless' wireless universal service offering is aimed at serving unserved and underserved residents of the Reservation.

^{2/} Western Wireless has been designated as an ETC in eleven states – California, Iowa, Kansas, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, Texas, Utah, and Wyoming. *See, e.g., 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 (CCB, rel. Dec. 26, 2000) (“*Wyoming Designation Order*”). Western Wireless also has ETC applications pending in Colorado and New Mexico, and at the FCC for the Crow Reservation in Montana. *See* Public Notice, CC Docket No. 96-45, 15 FCC Rcd 6817 (CCB 1999) (“*Crow ETC Petition*”). The South Dakota Sixth Judicial Circuit Court reversed the South Dakota PUC's decision denying Western Wireless' ETC petition. *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000). That decision is currently stayed pending the PUC's appeal to the South Dakota Supreme Court. *Cf. Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168, 15169, ¶ 3 (released Aug. 10, 2000) (“*ETC Declaratory Ruling*”); *see infra* Section II.C.

The Pine Ridge Reservation, second in size only to the Navajo Reservation, consists of nearly 3,000 square miles, has a population that is approximately 91.5% Native American, and an unemployment rate of nearly 84%. The telephone penetration rate on the Reservation is abysmal, standing at less than 50 percent. ^{3/} In light of this low penetration rate and the critical need for telecommunications service and economic development on the Reservation, the Oglala Sioux Tribe, which exercises sovereign authority on the Reservation, began negotiating with Western Wireless in November 1999 regarding the deployment of a wireless universal service offering on the Reservation.

On August 16, 2000, Western Wireless and the Oglala Sioux Tribe signed the Tate Woglaka Service Agreement (“Service Agreement”), which sets forth the parties’ joint undertaking regarding the provision of a unique universal service offering that will improve telephone service on the Pine Ridge Reservation. ^{4/} Western Wireless began providing this universal service offering on the Reservation, referred to herein as the “Tate Woglaka Offering,” on November 7,

^{3/} See Resolution of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe, August 16, 2000, at 1 (“more than 50% of the residents of the Pine Ridge Reservation have either no telephone service or are unable to afford telephone service.”) (“Oglala Sioux Tribal Council Resolution”). The Oglala Sioux Tribal Council Resolution is attached as Appendix A.

^{4/} “Tate Woglaka” means “talking wind” in the Lakota Sioux language. See Appendix B for a summary of the terms and conditions of the Service Agreement. On December 13, 2000, the Oglala Sioux Tribe and Western Wireless commemorated the signing of the Service Agreement with a ceremony at the U.S. Senate. During that ceremony, the parties signed a Commemorative Proclamation that was witnessed and signed by FCC Chairman William Kennard and Commissioners Susan Ness and Michael Powell. That document is included in Appendix C.

2000. Since then, more than 1,000 customers, representing almost 1/4 of the households on the Reservation, have signed up for the service. Of these customers, 42% did not have *any* telephone service prior to their subscribing to the Tate Woglaka Offering.

The Reservation's residents and businesses thus are already benefiting substantially from the Tate Woglaka Offering. The Resolution of the Oglala Sioux Tribal Council approving the Service Agreement evidences the clear interest of the Tribe to exercise authority over telephone service on the Reservation. ^{5/} The Resolution also sets forth the parties' goal of providing the Reservation with 100% telephone penetration rate capability.

Pursuant to the Service Agreement, Western Wireless and the Oglala Sioux Tribe have developed a universal service offering targeted to the Pine Ridge Reservation that is separate and distinct from any universal service offering that Western Wireless provides elsewhere. The Tribe has entered into the Service Agreement in its capacity as a sovereign political entity in order to improve the state of telecommunications on the Reservation, and Western Wireless has agreed to grant the Tribe a substantial role in the scope, planning, design and provision of universal service targeted to the Pine Ridge Reservation.

Specifically, the Service Agreement provides for the implementation of a Telecommunications Services Plan ("TSP") for the basic and enhanced services set forth in the Service Agreement. The Tribe is contributing to the development of the

^{5/} See Appendix A, Oglala Sioux Tribal Council Resolution.

TSP and is providing advice and assistance to Western Wireless for the deployment of cellular infrastructure on the Reservation. The Tribe also has a role under the TSP in establishing the rates for the basic universal service offering, and the Tribe's employees are distributing and installing as necessary all WLL CPE and on-site equipment Western Wireless uses to provide universal service on the Reservation. The Tribe is receiving fees generated from Western Wireless' universal service offering targeted to Pine Ridge. 6/

The Service Agreement also provides for the Tribe's involvement in day-to-day operations of Western Wireless' universal service offering on the Reservation. Specifically, Western Wireless has established a training program for tribal personnel involved in installation and maintenance activities related to the provision of universal service on the Reservation, and Tribal members so trained are responsible for diagnosing and repairing service problems. Tribal members also receive preference in hiring decisions. 7/ The Tribe has assumed responsibility for interfacing with Western Wireless' universal service customers on the Reservation regarding a number of issues, including marketing universal service on the Reservation and billing and collection.

6/ This includes rental revenue for antenna sites on the Reservation, service fees for installation and maintenance of on-site CPE installation performed by employees of the Tribe, and a share of customer monthly charges for telecommunications service.

7/ This program also provides trainees with transferable skills that they can use to secure positions with other telecommunications providers on and off the Pine Ridge Reservation.

Western Wireless' provision of universal service targeted to the Reservation differs from its universal service offerings elsewhere in another critical manner – it is subject to the Tribe's jurisdiction. More precisely, the Tribe and Western Wireless have agreed that the Service Agreement is to be governed by Tribal and federal law, and the resolution of any disputes arising thereunder will be through an arbitration process where judgments will be enforceable by the Tribal Court on the Pine Ridge Reservation. This jurisdictional structure is unique to Western Wireless' provision of universal service targeted to the Pine Ridge Reservation and it, along with the features of the service discussed above, make the service separate and distinct from Western Wireless' provision of universal service anywhere else in South Dakota and the rest of the country.

Western Wireless currently provides on the Pine Ridge Reservation all the services and functionalities supported by the federal universal service program as required by the FCC. ^{8/} It does so using the cellular network facilities and spectrum it uses throughout its service territory to serve its conventional mobile cellular service customers, including the antennas, cell sites, towers, and trunking, mobile switching, and interconnection facilities.

Western Wireless is currently providing its universal service customers on the Pine Ridge Reservation with wireless local loop customer premises equipment (“WLL CPE”) that serves as the customer interface to the cellular

^{8/} See 47 C.F.R. § 54.101(a).

network in the same manner as a handheld cellular phone unit. 9/ To maximize its universal service signal coverage and service availability, Western Wireless is in the process of deploying additional cell sites and channels on the Reservation. 10/

II. THE FCC HAS JURISDICTION TO DESIGNATE WESTERN WIRELESS AS AN ETC FOR THE PINE RIDGE RESERVATION

Western Wireless' provision of universal service on the Pine Ridge Reservation is not subject to the jurisdiction of a state commission, so it falls to the FCC under Section 214(e)(6) to designate Western Wireless as an ETC for the Pine Ridge Reservation. Western Wireless requests that the Commission designate Western Wireless' "service area," for purposes of its universal service targeted to the Pine Ridge Reservation, to be identical to the geographic area of the

9/ The WLL CPE simulates many of the attributes of local exchange telephone service provided by incumbent local exchange carriers ("ILECs"), and enables consumers to use existing telephones, computers, facsimile equipment and other standard telecommunications devices. The WLL CPE uses commercial A/C power or a battery much like a handheld phone, and can use a high-gain antenna or a small antenna attached to the unit. The technical and operational characteristics of the WLL CPE are described in detail in Appendix D. Western Wireless may use other types of CPE for its universal services offering as necessitated by customer needs and technological developments.

10/ On October 31, 2000, Western Wireless filed an application with the FCC to serve a portion of the Reservation with a newly-constructed cell site in Oglala, a community on the Reservation. Western Wireless also filed a request for Special Temporary Authority ("STA") to construct and operate the Oglala site prior to FCC action on the underlying unserved area application. The STA was granted on November 6, 2000. Western Wireless has since filed unserved area applications for the construction of two more cell sites on the Pine Ridge Reservation, which are currently pending. See FCC File Nos. 0000250083 (Oglala Phase 2 Application), 0000250080 (Oglala STA Request), 0000279836 (Rocky Ford Application), and 0000285347 (Potato Creek Application).

Reservation. 11/ The Commission has determined that it will decide whether a carrier is subject to the jurisdiction of a state commission for ETC designation on tribal lands on a case-by-case basis. 12/ We provide below the necessary factual support to demonstrate that Western Wireless is not subject to South Dakota PUC jurisdiction for its provision of universal service targeted to the Pine Ridge Reservation, and we demonstrate that the ETC petition Western Wireless filed with the South Dakota PUC for its overall service area in South Dakota does not preclude FCC consideration and grant of the instant Petition for the Pine Ridge Reservation.

A. The Commission Must Use a Balancing Test for Jurisdictional Analyses of ETC Petitions by Non-Tribally Owned Carriers Seeking to Serve Tribal Lands

For carriers proposing universal service targeted to Indian reservations, the Commission's jurisdictional determination under Section 214(e)(6) requires the use of a balancing test under well-settled statutory and Supreme Court law. Western Wireless submitted an analysis of the Indian law relevant to ETC designations under Section 214(e)(6) with the Jurisdictional Supplement to its ETC petition for the Crow Reservation. 13/ That analysis, based on the expert opinion of

11/ This area is shown on the map attached hereto as Appendix E.

12/ *Twelfth Report and Order*, 15 FCC Rcd at 12267, ¶ 122. The Commission has already concluded that its jurisdiction under Section 214(e)(6) is not limited to tribally-owned carriers serving tribal lands. *Id.* at 12261, ¶ 106.

13/ See Western Wireless Jurisdictional Supplement, *Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Crow Reservation in Montana*, CC Docket No. 96-45 (filed October 2, 2000). The Opinion Letter from Professor Richard Collins, University of Colorado School of Law, to Gene DeJordy,

Professor Richard Collins of the University of Colorado School of Law, applies with equal force here as it did to Western Wireless' provision of universal service on the Crow Reservation.

Pursuant to prevailing Indian law, tribal authorities generally have jurisdiction over Indians on reservations – including their transactions with non-Indian parties that voluntarily subject themselves to tribal authority to sell services to Indians – but states generally have jurisdiction over transactions among non-Indians on or off reservations. ^{14/} Thus, tribal jurisdiction governs transactions between an Indian and either another Indian or a party that subjects itself to tribal authority.

Carriers designated as ETCs are required to serve everyone in a designated service area, including Indians and non-Indians. ^{15/} For this reason, a balancing test must be used to weigh the respective interests of the tribal, federal, and state governments in the context of universal service targeted to a reservation under Section 214(e)(6). This balancing test weighs a number of factors:

- whether the non-Indian carrier has consented to tribal jurisdiction;
- the ratio of Indian to non-Indian residents and land on the reservation;
- whether treaties or other legal documents affect tribal sovereignty;

Vice President of Regulatory Affairs for Western Wireless (“Collins Opinion”), and Professor Collins’ *curriculum vitae*, are attached to this Petition as Appendix F.

^{14/} Collins Opinion at 2 (citing *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164 (1973); *Montana v. United States*, 450 U.S. 544, 557-67 (1981)).

^{15/} 47 U.S.C. § 214(e)(1).

- the extent to which the activity under consideration is limited to the reservation or extends beyond its boundaries; and
- a comparison of the respective interests of the tribe and the state in the activity under review. 16/

We demonstrate below that applying this balancing test to Western Wireless' provision of universal service targeted to the Pine Ridge Reservation under the Service Agreement compels a conclusion that the FCC has jurisdiction over this Petition.

B. The Characteristics of the Pine Ridge Reservation Community and Western Wireless' Universal Service Offering Weigh in Favor of FCC Jurisdiction Under Section 214(e)(6)

In light of the relevant Indian law, the FCC clearly has jurisdiction over the Western Wireless universal service offering that Western Wireless and the Tribe have jointly devised to meet the needs of the Pine Ridge Reservation. First, the population of the Reservation is overwhelmingly Native American, the land there is mostly owned by the Tribe and its members, and Western Wireless has agreed to subject its universal service offering targeted to the Reservation to the Tribe's jurisdiction. Second, Western Wireless' provision of universal service on the Pine Ridge Reservation was specially designed using input from the Tribe to reflect the Tribe's needs, and the result is a universal service offering unique to the Pine Ridge Reservation. Finally, given these facts, the State of South Dakota lacks a legitimate interest in regulating Western Wireless' provision of universal service on

16/ Collins Opinion at 1-4 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)).

the Pine Ridge Reservation. Thus, the Commission clearly has jurisdiction to grant this ETC Petition.

1. The Characteristics and Legal Status of the Pine Ridge Reservation Support FCC Jurisdiction Over This ETC Petition

About 91.5% of the residents of the Pine Ridge Reservation are Native Americans. 17/ The vast majority of the land on the reservation is either owned by, or held by the federal government in trust for, the Tribe and its members.

Moreover, Western Wireless has consented to the Oglala Sioux Tribe's legal jurisdiction for its universal service on the Reservation. There is no treaty or other legal document in which the Oglala Sioux Tribe consented to state jurisdiction. 18/

The 1868 Treaty of Fort Laramie between the United States and the Sioux tribes established the Reservations in South Dakota, including the area now known as Pine Ridge. 19/ Subsequently, the State of South Dakota's admission to

17/ Population is based on data available at <http://factfinder.census.gov>. The relevant chart created using the Census Bureau Factfinder is attached as Appendix G. While the Tribe believes that the total population of the Reservation has been significantly undercounted by census efforts, it believes that the percentage of Indians in the total Reservation population is essentially accurate.

18/ See *Twelfth Report and Order*, 15 FCC Rcd at 12262, ¶ 108 (“whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission . . . usually consider[s] whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and *whether the tribe has consented to state jurisdiction, either in treaties or otherwise*”) (emphasis added).

19/ Indian Affairs, Laws and Treaties, 1008-11, Government Printing Office (Charles J. Kappler, LL.M., ed., 1904). The original Great Sioux Reservation included most of the western half of South Dakota. Its territory was subsequently greatly reduced, and divided into separate reservations for distinct Sioux tribal groupings.

the union in 1889 was explicitly made subject to the federal government's preexisting commitments to the Territory's Indian tribes. Specifically, the Congressional statute adopted in 1889 admitted South Dakota and other states into the Union provided that those states "forever disclaim all right and title to . . . [lands] owned or held by any Indian or Indian tribes; and that . . . all Indian lands shall remain *under the absolute jurisdiction and control of the Congress of the United States.*" 20/ Consistent with this requirement, the South Dakota Constitution specifically provides that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 21/

Furthermore, while Public Law 280, enacted in 1953, granted states the option of assuming full civil and criminal jurisdiction on tribal lands, in 1968 that law was amended to allow for states to impose their jurisdiction only upon obtaining consent from the affected tribe. 22/ The Eighth Circuit has held that a 1961 South Dakota enactment did not effectively establish state jurisdiction over the activities of the tribes and their members on the reservations, and that the Oglala and other Sioux tribes did not consent to state jurisdiction after the 1968 amendment requiring such consent. 23/ The South Dakota Supreme Court has also

20/ Act of February 22, 1889, chap. 180, 25 Stat. 676 (1889) (emphasis added).

21/ S.D. Const. art. XXVI, § 18.

22/ See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *codified in part at* 18 U.S.C. § 1162.

23/ *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1165, 1169-74 (8th Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); see also *U.S. v. High Elk*, 902 F.2d 660, 661

acknowledged that “South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations.” ^{24/}

In sum, FCC jurisdiction is clearly warranted here, because (i) the overwhelming majority of potential customers are Native Americans, (ii) the state does not have authority over Western Wireless’ proposed service area, *i.e.*, the Pine Ridge Reservation; and (iii) the requirement in Section 214(e) that ETCs serve all customers in a given geographic area makes it impossible for Western Wireless’ Tate Woglaka Offering to be subject to tribal jurisdiction when offered to some customers (Indians), but subject to state jurisdiction when offered to others (non-Indians). Western Wireless has acknowledged the Tribe’s jurisdiction over its universal service offering, which forecloses the state from exerting jurisdiction and vests jurisdiction in the FCC for purposes of ETC designation.

2. Western Wireless’ Tate Woglaka Offering Targeted to Pine Ridge is Unique

Western Wireless’ provision of universal service to the Pine Ridge Reservation differs substantially from its offerings elsewhere. Western Wireless’ Tate Woglaka Offering has been designed at the Tribe’s behest and with its input, and is targeted to the needs of the Reservation. Unlike Western Wireless’ other offerings in South Dakota and elsewhere, the Tate Woglaka Offering is marked by

n.4 (8th Cir. 1990) (“South Dakota has not obtained Public Law 280 jurisdiction over Indians within the state”).

^{24/} *South Dakota v. Spotted Horse*, 462 N.W.2d 463, 467 (S.D. 1990) (citing *Rosebud Sioux Tribe*, 900 F.2d at 1174).

substantial involvement, oversight and participation by the Tribe. In addition, while Western Wireless' non-reservation services are subject only to individual contracts with each customer, its Tate Woglaka Offering is subject to the Service Agreement with the Tribe as well. All of these factors militate strongly in favor of a conclusion that Western Wireless' universal service targeted to the Pine Ridge Reservation is "not subject to the jurisdiction of a state commission" for purposes of Section 214(e)(6).

The Oglala Sioux Tribe's influence and role in Western Wireless' Tate Woglaka Offering is extensive. Under the Service Agreement, the Tribe is receiving substantial benefits by participating in the deployment of the Tate Woglaka Offering on the Reservation. These benefits include direct financial proceeds as well as training and employment preference benefits for members of the Tribe. Moreover, unlike Western Wireless' service offerings elsewhere, on the Reservation the Tribe is providing advice and assistance in developing the Telecommunications Service Plan for the Reservation. Members of the Tribe are installing all on-site equipment and, to the extent necessary, CPE used as part of the Tate Woglaka Offering, diagnosing service problems, and assisting in billing and collection activities. These factors make the Tate Woglaka Offering unique, and distinguish it from Western Wireless' offerings outside the Pine Ridge Reservation.

In addition, the extent to which Western Wireless' universal service targeted to the Pine Ridge Reservation is expressly made subject to tribal authority by the Service Agreement makes it markedly different from Western Wireless' other service offerings. The Service Agreement specifies that the agreement is governed

by Tribal and federal law. The Agreement also provides that any disputes are to be resolved through arbitration yielding judgments enforceable by the Oglala Sioux Tribal Court. The Service Agreement gives the Tribe joint review power with Western Wireless regarding use of Western Wireless antenna towers by third parties, and provides that the Tribe will advise Western Wireless on whether to increase or decrease rates. The Service Agreement also provides for annual meetings between Western Wireless and the Tribe to review the Tribe's role in implementing the Tate Woglaka Offering and to evaluate options for increasing the Tribe's role. Western Wireless' Tate Woglaka Offering is geographically limited to the Reservation only. These factors make it clear that Section 214(e)(6) confers exclusive jurisdiction upon the FCC to designate Western Wireless as an ETC for the Pine Ridge Reservation.

3. South Dakota Lacks a Legitimate Interest in Regulating Universal Service Targeted to the Pine Ridge Reservation

Finally, the South Dakota PUC lacks any legitimate interest in regulating the Tate Woglaka Offering. First, as discussed above, the transactions Western Wireless enters into as an ETC will be with residents of the Pine Ridge Reservation, the vast majority of whom are Indians, and those transactions (with Western Wireless' consent) are subject to the Tribe's jurisdiction. Second, Western Wireless is bound by a contract with the sovereign government of the Oglala Sioux Tribe, and it is well established that a tribe has a significant interest in sovereign

independence from state authority over such contracts. 25/ Third, while Western Wireless' status as a CMRS provider does not alone confer Section 214(e)(6) jurisdiction on the FCC, 26/ the state's limited regulatory authority over wireless carriers pursuant to Section 332(c)(3) further shifts the balance of interests toward tribal and FCC jurisdiction. 27/

25/ See Collins Opinion at 3. This interest, together with the Tribe's important interest in improving telephone service to its members, see *Twelfth Report and Order*, 15 FCC Rcd at 12211-12, ¶ 2, and federal policy that generally supports tribal sovereignty over reservation Indians, see Collins Opinion at 3 (citing *id.*, ¶ 119; *White Mountain Apache*, *supra*), shift the balance even further in favor of tribal and federal jurisdiction.

26/ *Twelfth Report and Order*, ¶¶ 109-10 (construing 47 U.S.C. §§ 214(e)(6) and 332(c)(3)).

27/ Collins Opinion at 2 (citing *Twelfth Report and Order*, ¶¶ 109-10). The present case is distinguishable from the South Dakota Supreme Court's recent decision upholding the South Dakota PUC's authority to disapprove a contract between a non-Indian corporation, U S WEST, and a tribally-owned carrier, the Cheyenne River Sioux Tribe Telecommunications Authority, for the sale of three rural exchanges, including one that partially overlapped the boundaries of the Tribe's Reservation. *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W.2d 604 (S.D. 1999) ("*Cheyenne River*"). First, only about one-half of the territory of one of the three exchanges involved in the transaction at issue in the *Cheyenne River* case was located within the boundaries of the Reservation. *Id.* at 606-07 (n.2), 609-10 (¶ 23). By contrast, in the present case, 100% of the service area at issue is on the Reservation. Second, *Cheyenne River* concerned the PUC's jurisdiction over U S WEST – a carrier that is comprehensively regulated and subject to PUC rate, entry and exit jurisdiction – in a transaction that only partially took place within the reservation's boundaries. By contrast, under both federal and state law, the PUC does not have statutory authority to regulate Western Wireless' rates or entry. 47 U.S.C. § 332(c)(3). Third, in *Cheyenne River*, the court was construing the PUC's implementation of a state statute that specifically addressed the transaction at issue, in a context where the court found that there was no federal law explicitly granting authority to the Tribe or the FCC. 595 N.W.2d at 609 (¶¶ 21-22), 610 (¶ 28). By contrast, this case primarily concerns the application of Section 214(e)(6), a federal statute that explicitly creates an important role for the Commission, particularly in the context of tribal lands. See also *Twelfth Report and Order*; *Statement of Policy on*

In sum, the South Dakota PUC lacks an appreciable interest in the Tate Woglaka Offering, so the FCC should expeditiously recognize its jurisdiction over this Petition.

C. Western Wireless' Application for ETC Status in South Dakota Does Not Preclude its Petition for ETC Status on the Pine Ridge Reservation

Western Wireless submits that the FCC may consider and grant the instant Petition despite the Company's pending ETC petition filed at the South Dakota PUC, which was denied by the PUC but subsequently overturned in state court and is now pending in the South Dakota Supreme Court. ^{28/} Even though the Commission has determined that "a carrier may file an ETC petition [for tribal lands under Section 214(e)(6)] with the FCC only when it has not initiated a

Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, FCC 00-207 (rel. June 23, 2000) (committing the FCC to a policy of recognizing tribal sovereignty and promoting tribal self-sufficiency and economic development).

^{28/} In denying ETC status to Western Wireless, the PUC did not address the issue of whether the designation of Western Wireless as an additional ETC in areas served by rural telephone companies is in the public interest. By not addressing this issue, the PUC has left unresolved the issue raised here of whether the designation of Western Wireless as an additional ETC on the Pine Ridge Reservation, an area served by a rural telephone company, is in the public interest. See *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, TC98-146 (S.D. PUC May 19, 1999), *rev'd*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000), *appeal filed* (S.D. May 10, 2000); see also *ETC Declaratory Ruling*, 15 FCC Rcd at 15169, ¶ 3 (noting that the South Dakota PUC's decision denying Western Wireless' ETC petition was reversed by a state appellate court, but that the appellate court's order was automatically stayed pending the PUC's appeal to the South Dakota Supreme Court).

designation proceeding before the affected state commission,” 29/ the Commission possesses exclusive jurisdiction to address this Petition, for two reasons.

First, as discussed above, Western Wireless’ Tate Woglaka universal service offering targeted to the Reservation differs substantially from its proposed offering for the rest of South Dakota. The Tate Woglaka Offering proposed in this Petition for the Pine Ridge Reservation is completely distinct and separate from the offering at issue in the Petition filed with the South Dakota PUC. Western Wireless’ submission of separate ETC petitions for each of these offerings is therefore not inconsistent with the *Twelfth Report and Order*.

Second, Western Wireless’ filing of separate ETC petitions for its general universal service offering in South Dakota and for a targeted universal service offering to the Pine Ridge Reservation does not raise the concern that the Commission sought to protect against in the *Twelfth Report and Order*, i.e., “forum shopping.” 30/ Because the Tate Woglaka Offering differs so greatly from Western Wireless’ proposed general universal service offering, a new ETC petition is necessary to enable Western Wireless to provide a service targeted to the Oglala Sioux sovereign nation on the Pine Ridge Reservation. As demonstrated above, the FCC is the proper regulatory body to determine that the Tate Woglaka Offering meets the requirements of Section 214(e)(1). Western Wireless has not withdrawn its ETC petition for a general universal service offering in South Dakota, and the

29/ *Twelfth Report and Order*, 15 FCC Rcd at 12268-69, ¶ 126.

30/ *Id.*

instant Petition would be necessary regardless of the ultimate outcome of the South Dakota PUC proceeding. Thus, Western Wireless has not engaged in any “forum shopping” by filing the instant Petition with the FCC. This Commission therefore can consider, and should expeditiously approve, Western Wireless’ request for ETC designation for the Pine Ridge Reservation.

III. WESTERN WIRELESS SATISFIES ALL THE STATUTORY AND REGULATORY PREREQUISITES FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

Western Wireless, in addition to satisfying the jurisdictional prerequisite as set forth above, also satisfies each of the remaining elements for ETC status. ^{31/} The FCC’s Common Carrier Bureau recently granted ETC status to Western Wireless for its service in Wyoming. ^{32/} From a technical and functionality perspective, the Wyoming and Pine Ridge ETC applications are the same. The Commission should therefore reach the same conclusion that Western Wireless meets the prerequisites for ETC designation in this case.

A. Western Wireless Offers All of the Services Supported by the Federal High-Cost Universal Service Program

Western Wireless satisfies the requirement that an ETC “offer the services that are supported by Federal universal service support mechanisms . . .

^{31/} In every state where Western Wireless’ operations have been reviewed, it has been determined that the Company meets the ETC criteria. The only decision-maker to hold otherwise – the South Dakota PUC – has been reversed on appeal. *See supra* notes 2 & 28.

^{32/} *Wyoming Designation Order, supra* note 2.

using its own facilities or a combination of its own facilities and resale.” ^{33/} Western Wireless is already providing cellular service in South Dakota, including the Tate Woglaka Offering on the Pine Ridge Reservation. Thus, as described below, Western Wireless currently offers to consumers in the designated service area each of the supported services enumerated in Section 54.101(a).

1. Voice-Grade Access To The Public Switched Network. Voice-grade access means the ability to make and receive phone calls within a voice frequency range of between 300 and 3000 Hz, a bandwidth of approximately 2700 Hz. ^{34/} As an existing cellular service provider on the Reservation, Western Wireless provides voice-grade access to the public switched network, and through interconnection arrangements with incumbent local exchange carriers (“ILECs”), Western Wireless is able to originate and terminate telephone service to the public switched network.

2. Local Usage. Western Wireless currently offers several service options that include varying amounts of local usage in monthly service plans, as required by the Commission’s rules. ^{35/} Under the Service Agreement, Western Wireless’ universal service customers on the Pine Ridge Reservation receive unlimited local usage within the defined local calling area. Thus, even though the FCC has yet to adopt any specific quantity of minimum local usage that ETCs must

^{33/} 47 U.S.C § 214(e)(1).

^{34/} See *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5328-29, ¶ 16 (1997).

^{35/} 47 C.F.R. § 54.101(a)(2).

provide for designation, 36/ Western Wireless satisfies the existing (and any possible future) local usage criterion for ETC designation.

3. Functional Equivalent Of Touch-Tone (“DTMF”) Signaling. DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. 37/ The FCC has recognized that “wireless carriers use out-of-band digital signaling mechanisms [I]t is appropriate to support out-of-band signaling mechanisms as an alternative to DTMF signaling.” 38/ Western Wireless currently uses out-of-band digital signaling and in-band multi-frequency (“MF”) signaling that is functionally equivalent to DTMF signaling. Western Wireless thus meets the requirement to provide DTMF signaling or its functional equivalent. 39/

4. Single Party Service. “Single party service” means that only one party will be served by each subscriber loop or access line, in contrast to a multi-party line. The FCC has determined that a CMRS provider meets the requirement of offering single party service when it offers a dedicated message path for the length of a user’s particular transmission. 40/ Western Wireless meets the

36/ See *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21277-81, ¶¶ 46-53 (1998) (seeking comment on appropriate number of minutes of “free” local usage, if any, ETCs should be required to provide).

37/ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8814-15, ¶ 71 (May 8, 1997) (“*Universal Service Order*”).

38/ *Id.*

39/ *Id.*

40/ 47 C.F.R. § 54.101(a)(4).

requirement of single-party service by providing a dedicated message path for the length of all customer calls. 41/

5. Access To Emergency Service. Western Wireless currently offers access to 911 emergency service throughout the Pine Ridge Reservation. 42/ Enhanced 911 (“E911”), which includes the capability of providing both automatic numbering information (“ANI”) and automatic location information (“ALI”), is required only if a public emergency service provider makes arrangements for the delivery of such information. 43/ To date, no public emergency service provider on the Pine Ridge Reservation has made arrangements for the delivery of ANI or ALI from Western Wireless. The FCC has already held that wireless providers may be designated as ETCs despite the current unavailability of E911. 44/ By providing 911 service and being capable and ready to provide E911 service upon request, Western Wireless meets the requirement to provide access to emergency service.

6. Access To Operator Services. Access to operator services means any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call. 45/ Western Wireless offers its subscribers access to operator services throughout its designated service area.

41/ *Universal Service Order*, 12 FCC Rcd at 8810, ¶ 62.

42/ 47 C.F.R. § 54.101(a)(5).

43/ *Universal Service Order*, 12 FCC Rcd at 8826-27, ¶ 90.

44/ *Id.*

45/ 47 C.F.R. § 54.101(a)(6).