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July 24, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota
Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers To Provide Universal Service To Crow Reservation, Montana;
CC Docket No. 96-45

Dear Ms. Salas:

On behalf of Western Wireless Corp. ("Western Wireless"), this letter provides additional detail regarding points Western Wireless presented during two *ex parte* meetings on July 13, 2001 (disclosed in our letter of July 16, 2001). This letter also responds to a number of recent filings by opposing parties. In brief, we make the following points:

- An FCC decision that it has jurisdiction to designate Western Wireless as an ETC under unique circumstances on two reservations would not have far-reaching implications.
- FCC jurisdiction under Section 214(e)(6) is clear where, as in this case, a non-Indian carrier operates on reservations under consensual relationships with the tribes and with an overwhelming majority of consumers who are members of the tribes. The presence of a small minority of non-

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Indians on the reservations does not give rise to a sufficient state interest to overcome tribal interests and preclude finding that the FCC has authority under § 214(e)(6).

- The fact that certain ILEC study areas extend beyond the boundaries of the reservations does not preclude the FCC from exercising its full authority out to the geographic limits of that authority – in this case, the boundaries of the reservations.
- The Commission should reject irrelevant arguments raised by opposing carriers over issues such as telephone penetration rates on the reservations, the CMRS status of Western Wireless' universal service offerings, comparisons between the service quality offered by ILECs and by Western Wireless, and the ILECs' fundamental disagreement with established FCC rules requiring funding portability.

1. Uniqueness of This Proceeding. An FCC decision that it has jurisdiction to designate Western Wireless as an ETC for the Pine Ridge and/or Crow Reservations under § 214(e)(6) would be limited to the facts presented in this proceeding, and would not have broad effects beyond this unique context. FCC jurisdiction here would not upset or otherwise affect any ETC designation already granted to other carriers serving tribal lands. As a non-Indian carrier providing universal service on these specific reservations, Western Wireless' targeted service offering is truly unique. Other carriers providing universal service on Indian reservations do so only as part of a broader service offering provided across a much wider geographic area that includes predominantly non-Indian areas and populations. For example, in the *Cheyenne River Sioux Tribe* case ^{1/} cited by Golden West and others in their *ex parte* letter filed on June 29, U S WEST (now Qwest) served areas throughout the state of South Dakota, and therefore the South Dakota Public Utilities Commission had authority to regulate its exchange sales. By contrast, the services at issue here are limited to the Pine Ridge and Crow Reservations, and are designed specifically for the needs of Indians pursuant to consensual relationships with the respective tribes. It likewise follows that FCC designation of Western

^{1/} *Cheyenne River Sioux Tribe Telecoms. Auth. v. South Dakota Pub. Util. Comm'n*, 595 N.W.2d 604 (S.D. 1999).

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Wireless would not affect the jurisdiction of state commissions over the rates, entry, exit and service quality of such carriers serving reservations incidental to their overall service in the state. In contrast, Western Wireless' targeted service offering on these reservations does not implicate the state commissions' general jurisdiction over telephone service.

2. Indian Law and the FCC's § 214(e)(6) Jurisdiction. The FCC has jurisdiction to designate Western Wireless under § 214(e)(6) for the services at issue here on the Pine Ridge and Crow Reservations. The Supreme Court held in *Montana v. United States* ^{2/} and successive cases that, on reservations, Indian tribes – not states – have regulatory authority over transactions between non-Indians and Indian tribes or their members, and over matters that critically implicate the tribe's health, welfare and/or economic security. The Supreme Court has reaffirmed this framework in subsequent decisions, continuing through its recent decisions in *Atkinson Trading Company* and *Nevada v. Hicks*. ^{3/} In the case of Pine Ridge, Western Wireless provides service pursuant to a contract with the Oglala Sioux Tribe in which Western Wireless consents to the Tribe's jurisdiction, more than 90% of the Pine Ridge Reservation's residents are Indians, and more than 85% of the Reservation's land is held by or on behalf of Indians. Similar, although not identical, factors are present on the Crow Reservation.

^{2/} 450 U.S. 544 (1981).

^{3/} Some of the opponents have misread the recent *Atkinson Trading* case, 121 S.Ct. 1825 (2001). See, e.g., Letter from David Cosson, et al., counsel for Great Plains, Golden West, Project Telephone and Range Telephone, to Magalie Roman Salas, FCC, June 29, 2001, at 2 ("Great Plains Letter"). The key factor defeating tribal jurisdiction in *Atkinson* was that neither the non-Indian business nor its non-Indian customers had consented to tribal authority. However, in the case of Tate Woglaka, for example, both Western Wireless and its Tate Woglaka customers, Indians and non-Indians alike, consent to tribal jurisdiction: Western by way of the Tate Woglaka Agreement with the Oglala Sioux Tribe, and its customers through service agreements that reference and recite the governance of the tribe's regulatory authority. This crucial difference should lead to a finding of tribal jurisdiction – and as a result, ETC authority for the FCC. This is consistent with *Nevada v. Hicks*, 121 S.Ct. 2304 (2001), decided by the Supreme Court last month, which breaks no new ground on tribal regulatory authority, but rather relies on the same Indian law framework giving rise to *Atkinson Trading*.

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The Commission should reject the opposing parties' contention that, because a tiny minority of the population of the Pine Ridge and Crow Reservations are non-Indians, the state commissions have authority over transactions between these individuals and Western Wireless (of which there will probably be very few), and therefore the FCC may not act here. ^{4/} If this argument were correct, then the FCC would *never* be able to designate a non-Indian carrier operating on tribal lands, because virtually every reservation has at least some non-Indian residents. But the Commission has already rejected "claims that the exercise of our authority under section 214(e)(6) is limited to designations of eligibility sought by tribally-owned carriers serving tribal lands." ^{5/} Moreover, the Commission designated ETCs on tribal lands in the *Ft. Mojave* and *Saddleback* cases without pausing to consider whether service would be provided to non-Indians. ^{6/}

To be sure, the general approach of *Montana v. United States* and other federal Indian law cases is to examine the identity of the individual parties to a transaction, while § 214(e)(6) contemplates designation of a carrier for a defined geographic "service area." Thus, it would be rather awkward, if not impossible, for the FCC (or a state commission) to designate a carrier for purposes of serving certain customers (*e.g.*, Indians, over whom the state clearly lacks jurisdiction) but not others (*e.g.*, non-Indians). This divergence between the Indian law framework, focusing on the identity of individual parties to a transaction, and the communications law framework, focusing on service to a geographic area as a whole, makes it necessary to engage in a balancing approach. Western Wireless has shown that the balance tips decisively toward tribal authority and FCC jurisdiction to designate where, as here, service is provided pursuant to a consensual relationship with the tribes, and where the overwhelming majority of the population are Indians and the vast preponderance of land is tribally controlled.

^{4/} See *id.* at 2-3.

^{5/} Federal State Joint Board on Universal Service, Twelfth Report and Order, 15 FCC Rcd 12208, 12261, ¶ 106 (2000) ("*Twelfth Report and Order*"); see also *id.* n.259 and legislative history cited therein.

^{6/} *Designation of Fort Mojave, et al.*, Memorandum Opinion and Order, 13 FCC Rcd 4547 (CCB 1998) ; *Petition of Saddleback Communications*, Memorandum Opinion and Order, CC Docket No. 96-45, 13 FCC Rcd 22433 (CCB 1998) .

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Finally, the *Cheyenne River Sioux Tribe v. SDPUC* case, relied upon by some of the opposing carriers, ^{7/} is easily distinguished from the present case. First, only half the territory of one of three exchanges in that case was located on the Cheyenne River Sioux Reservation, while here the entire service area at issue is located on the reservations. Second, that case involved state commission jurisdiction over U S WEST, a comprehensively regulated RBOC that operates throughout the state subject to state commission rate, entry and exit jurisdiction, while this case involves a lightly regulated CMRS carrier. Moreover, the court noted that among the initial reasons why the SDPUC denied a transfer of the exchanges was that the state commission believed it would lack authority to regulate the buyer and its services after the sale.

3. Study Area Boundary Issues. The fact that certain ILECs' study areas extend beyond the boundaries of the reservation does not preclude the FCC from exercising its full authority out to the geographic limits of that authority. First, Western Wireless has not run afoul of the *Twelfth Report and Order's* admonition against ETC applicants filing concurrent FCC and state commission petitions. Western Wireless has removed Golden West's and Great Plains' study areas from its pending South Dakota ETC petition. Even if a sliver of Fort Randall Telephone's study area overlaps into the Pine Ridge Reservation, the size of the area and number of households included in the alleged overlap are so *de minimis* as to make it clear that Western Wireless is not engaged in improper "forum shopping." Moreover, in effect there is *no* overlap, because Western Wireless' Tate Woglaka offering on the Pine Ridge Reservation is significantly different from its generic universal service offering proposed elsewhere in the state. The differences – particularly the active involvement of the Oglala Sioux Tribe – are significant from a jurisdictional point of view.

Second, the requirement in § 214(e)(5) that competitive ETCs serve all of each incumbent rural ILECs' study areas falling within the prospective ETC's service area does not preclude the FCC from designating Western Wireless. The FCC, acting in place of the Wyoming commission under § 214(e)(6) for Western Wireless' universal service in that state, designated Western Wireless for only the portions of the rural ILEC study areas contained within Wyoming. Likewise, state

^{7/} *E.g.*, Great Plains Letter at 3.

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commissions routinely designated rural ILECs as ETCs only to the extent of the state boundaries, even though many of those carriers' study areas cross state lines. Under these precedents, the FCC may designate Western Wireless as an ETC in rural ILEC study areas on the Crow and Pine Ridge Reservations to the extent of FCC authority, *i.e.*, the entirety of those study areas contained within the exterior boundaries of the Reservation. As an alternative, the Commission could exercise its § 10 authority to forbear from requiring Western Wireless to meet § 214(e)(5) for the rural ILECs serving reservation, and permit Western Wireless to serve just those portions falling within the Reservation. Neither the Wyoming approach nor the forbearance approach requires a redefinition of the "study areas" of the incumbent carriers.

4. *Extraneous Matters.* The Commission should reject opposing carrier efforts to hold up Western Wireless' ETC designations for Crow and Pine Ridge by raising issues that are irrelevant to the jurisdictional and ETC matters at hand. First, disputes between the parties about the penetration rate on the subject reservations are immaterial – no one disputes that the penetration rates on these reservations are significantly below the national average penetration rate. ^{8/} Moreover, competitive entry clearly serves the public interest in areas with medium and high penetration rates as well as in areas with low penetration rates. Second, whether Western Wireless' universal service offering qualifies as a commercial mobile radio service ("CMRS") is also irrelevant – that issue is presented in another, separate proceeding, and regardless of its outcome the FCC has already found that

^{8/} See, *e.g.*, Letter from Benjamin H. Dickens, Jr., counsel for Golden West, to Magalie Roman Salas, FCC, July 10, 2001, Attachment; Great Plains Letter at Attachment A (GPS map); Letter from David Cosson, counsel for Project Telephone, to Magalie Roman Salas, FCC, July 11, 2001, Attachment at 6-8 ("Project Letter"). Differences of opinion regarding the actual penetration rates are largely due to differences regarding the number of residents, or households, on the reservations (the denominator of the fraction). The tribes believe that the federal Census and other data-gathering efforts systematically undercount the Indian population on the reservations. For example, the Oglala Sioux Tribe informed Western Wireless that some of its members are particularly unwilling to supply personal information to those outside the Tribe, which is why Western Wireless reported the 50% penetration figure provided directly by the Tribe based on its own survey of its members.

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Western Wireless satisfies the ETC criteria. 9/ Third, ETC designation proceedings are not open forums for the FCC to weigh the asserted relative service quality of incumbent and new entrant offerings – that is an issue for consumers in a properly functioning market, not regulators or an incumbent carrier sheltered from competition. 10/ Fourth, an ETC designation proceeding is not the place for complaints that Western Wireless should not receive the same amount of universal service support as an incumbent wireline carrier. 11/ Such a claim is little more than an exceedingly tardy request for reconsideration of the FCC's 1997 decision requiring that all federal explicit universal service funding be portable to competitive ETCs. 12/

9/ 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 Local Exchange Service*, WT Docket No. 00-239, DA 00-2622 (rel. Nov. 21, 2000).; *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, Memorandum Opinion and Order, 15 FCC Rcd 48, ¶¶ 8-15, (CCB 2000) (Western Wireless satisfies enumerated ETC criteria).

10/ See Project Letter, Attachment at 13. Western Wireless strongly disagrees that its universal service offerings are of lower quality than the incumbents' service, and with the implication that wireless network traffic volumes and holding times are somehow insufficient to qualify as universal service. Western Wireless provides all the services and functionalities required of an ETC, and offers several features that the incumbents typically do not, such as expanded local calling areas and mobility. Moreover, while Western Wireless is rapidly deploying technology that will support high-speed Internet connections, we note that the data rate Western Wireless is capable of supporting is simply not relevant to ETC analyses, as the provision of advanced services is not among the enumerated ETC requirements.

11/ *Id.*, Attachment at 12.

12/ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8932-34, ¶¶ 286-90 (1997), *aff'd*, *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); see also *Alenco Comms., Inc. v. FCC*, 201 F.3d 608, 621-22 (5th Cir. 2000).

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In sum, there is no jurisdictional or other bar against the Commission expeditiously designating Western Wireless as an ETC on the Pine Ridge and Crow Reservations. Please contact me if you have any questions.

Respectfully submitted,



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Counsel for Western Wireless Corp.

Enclosure

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