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K R A S K I N, L E S S E & C O S S O N, L L P
ATTORNEYS AT LAW
TELECOMMUNICATIONS MANAGEMENT CONSULTANTS

2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Telephone (202) 296-8890
Telecopier (202) 296-8893

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Re: Western Wireless Corp. Petition for Designation as an Eligible
Telecommunications Carrier and for Related Waivers to Provide
Universal Service to the Crow Reservation in Montana, DA 99-
1847, CC Doc. No. 96-45

Western Wireless Corporation Petition for Designation as an
Eligible Telecommunications Carrier for the Pine Ridge
Reservation in South Dakota, DA 01-278, CC Doc. No. 96-45

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 Do. No. 00-239

Dear Ms. Salas:

On behalf of Fort Randall Telephone Company, Golden West Telephone Cooperative, Great
Plains Communications, Project Telephone Company and Range Telephone Cooperative ("ILECs"),
this letter responds to the July 24, 2001 letter to you from David Sieradzki, counsel for Western
Wireless Corporation regarding the proceedings listed above. We regret burdening the record with
yet another discussion of issues that have been addressed many times, but believe this further
communication is necessary to correct various misstatements of law and fact in the Western Wireless
presentation. We address each of the points in the July 24 letter in turn.

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1. Alleged Uniqueness of These Applications

Western Wireless asserts that the Commission should not be concerned that preemption of state authority in the Crow or Pine Ridge cases would have any effects beyond their particular facts because the service offerings for which designation is requested are unique to the reservations.¹ The unique features are alleged to be that the service is offered only on the reservations, and is offered pursuant to contractual agreements with the respective tribal governments.² Western Wireless has invented this “unique offering” legal theory out of whole cloth. The “unique offering” theory is apparently an attempt to distinguish these applications in which it insists that tribal sovereignty preempts state commission authority to act on ETC applications, from those states in which it has accepted state commission designation for service areas which include reservations and will receive universal service support.³ Western Wireless apparently invented this theory subsequent to its initial applications to the commissions in Montana and South Dakota for ETC designation for service areas which included the reservations in question.⁴

Western Wireless cites no authority, and none exists to our knowledge, for the proposition that a non-Indian carrier’s service on a reservation is subject to state regulation if the carrier also offers the service off the reservation, but state regulation is preempted over a service offering of a non-Indian carrier offered only on a reservation.⁵ *Cheyenne River Sioux Tribe*, cited in our June 29, 2001 *ex parte*, does not provide authority for the on/off dichotomy claimed by Western Wireless. In that case the South Dakota Supreme Court found the state commission had authority to deny US West permission to transfer on-reservation exchanges to the telephone authority of a tribe from a

¹ Project and Range provided detailed reasons why “targeting” to a reservation does not result in preemption of state authority to act on ETC applications in their October 2, 2000 opposition to Western Wireless’ Petition for Reconsideration of the 12th Report and Order in which it proposed the Commission adopt its targeting rule.

² Any carrier locating facilities on a reservation must have some form of agreement with the tribal government.

³ In Minnesota, for fourth quarter 2001, Western Wireless will receive \$13, 343 per month for 721 “loops” or \$18.50 per month per loop. USAC Forth Quarter Projections, App. HC1, p. 16.

⁴ Both states have granted ETC designation to the incumbent LECs serving all the reservations in the respective states.

⁵ As a non-Indian entity, Western Wireless is not similarly situated to the tribal telephone companies operating on their own reservation for which the Commission found it had jurisdiction to grant ETC designation under Section 214(e)(6).

different reservation. Nothing in that decision ties the commission's jurisdiction over US West to its on and off reservation operations.

Nor does Western Wireless cite any authority for the proposition that a non-Indian entity can remove itself from state jurisdiction by entering into an agreement with a tribal government. As discussed under Issue 2, below, there is nothing in *Montana*, to suggest such a dichotomy. In any event, this Commission has already upheld the South Dakota PUC's ETC designation of the Cheyenne River Sioux Tribe Telephone Authority ("CRST"), a tribally owned company.⁶ CRST's service is as "targeted" to its reservation as a service could be. A finding that states have no jurisdiction to grant ETC status to carriers serving only on a reservation would require the Commission to reverse its prior holding and invalidate the designation of CRST by the South Dakota PUC. Such a result could have disastrous consequences for CRST's subscribers.

Further, preemption of the authority of the Montana and South Dakota commissions' authority to act on Western Wireless's applications for either the Pine Ridge or Crow Reservations will raise questions as to the validity of all ETC designations of non-Indians with respect to service on reservations throughout the country.

2. Indian Law and FCC Jurisdiction

Apparently on the theory that repetition makes it so, Western Wireless continues to claim that the exception to the general rule of *Montana*, which recognizes tribal jurisdiction to regulate non-Indians which enter into contractual agreements with tribes, necessarily preempts state jurisdiction. The exceptions to *Montana* have never been interpreted to support preemption in the context of preexisting, historically exercised, state regulatory authority which Congress expected would continue to be exercised. As we have previously stated: tribal sovereignty is not an independent basis for preemption of state law, but a "backdrop against which the applicable treaties and federal statutes must be read."⁷ This statement is particularly true where there is no tradition of tribal regulation of telephone service, but there is a tradition of state regulation.⁸

⁶ *Twelfth Report and Order*, para. 149, "We find no reason before us to disturb the South Dakota Commission's designation of the Cheyenne Telephone Authority as an eligible telecommunications carrier."

⁷ *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

⁸ Pine Ridge Comments of South Dakota Public Utilities Commission 12-17, Mar. 12, 2001. Montana Public Service Commission Supplemental Comments on Threshold Question of Jurisdiction, Nov. 24, 2000 at 3, "...the Montana PSC has long exercised jurisdiction over telecommunications carriers...in all areas of Montana, including on the Crow Reservation and other

Nor does *Montana* or any subsequent Supreme Court decision suggest that if a state rather than the FCC exercises jurisdiction over ETC applications, there are serious negative implications for a tribe's health, welfare and/or economic security. There is no factual basis for such a conclusion, because it must be presumed that the applications will be resolved on the merits in either forum. Nor is there basis to conclude that whether the state commissions or the FCC acts on the applications will in any way implicate the rights of the tribes "to make their own laws and be governed by them."⁹ In either forum the tribes are free to participate fully in the application process.¹⁰ Western Wireless has never directly responded to the point that the only decisions preempting states are those which involved conflict with a federal plan designed to benefit Indians, or where state action was inherently inconsistent with the exercise of tribal sovereignty.¹¹ Since the federal plan at issue here contemplates state action, there is no conflict with a federal plan. If the state is preempted, jurisdiction shifts to the FCC, not to the tribe so there can be no issue of exercise of tribal sovereignty.

Western Wireless at least acknowledges that "checkerboard" designation would make no sense, but contends that existence of fee lands and non-member inhabitants within the boundaries of the reservations can be ignored. The case law is to the contrary; in fact, *Montana*, was specifically about the question of regulation of non-Indians on fee lands by the Crow tribe. That decision also makes clear that the proportion of trust land and tribal members within the boundaries of the Crow Reservation cannot be described as a "vast preponderance" or "overwhelming majority." Therefore there is no justification to ignore the population and land within the boundaries of the Reservation that is not even arguably subject to tribal jurisdiction.

3. Duplicate Application and Study Area Boundary Issues

At the present time, Western Wireless has ETC applications before this Commission for the Pine Ridge Reservation and before the South Dakota PUC for a service area which includes the portion of the Pine Ridge Reservation in the Fort Randall study area. Western Wireless asserts it is not really violating the prohibition on duplicate applications in the *Twelfth Report and Order* because

reservations in Montana, without known jurisdictional objection or dispute of any kind."

⁹ See *Williams v. Lee*, 358 U.S. 217, 220 (1959).

¹⁰ Both states conduct their proceedings as on the record hearings, which arguably provides the tribes with a greater influence over the outcome in that they can engage in discovery, call witnesses and cross examine other parties.

¹¹ *White Mountain Apache v. Bracker*, 448 U.S. 136, 146-47 (1980); *New Mexico v. Mescalero Apache Tribe*, 462, U.S. 324, 327-28 (1983).

only a *de minimis* portion of Fort Randall's study area is located on the Pine Ridge Reservation. Western Wireless also asserts its service offerings are different on the Reservation from those in other parts of South Dakota. The Commission's order does not exempt from its non-duplication requirement applications for separate portions of a single study area in a single state, and says nothing about an exception for *de minimis* overlaps. (Para 126). To adopt such an exemption would, in effect, reverse the non-duplication requirement in most instances and encourage the sort of forum shopping that the requirement is designed to prevent and that Western Wireless is clearly attempting in South Dakota. Nor is any exception made for different offerings, and such an exception would not make sense because the issue in an ETC proceeding is whether the specific services enumerated in the Commission's rules are offered. Embellishments beyond those requirements would not minimize the burden of determining either jurisdiction or compliance with the minimum service requirements.¹²

Second, Western Wireless argues that the Section 214(e)(5) requirement that the service area of a second ETC include all of a rural telephone company's study area really does not prevent designation of a service area that includes only portions of such study areas. In support of this Orwellian argument, Western Wireless cites as precedents the Commission's order designating it for portions of rural telephone company study areas in Wyoming and the orders of various state commissions designating existing ILECs in 1997 in order to implement the 1996 Act pursuant to the time schedule established by the Commission.

As to the Wyoming order, the pending petitions for reconsideration demonstrate that it was simply decided incorrectly. As to the state decisions, the net effect of them was that all portions of the study areas of the ILECs were designated, and there was no reason for the decisions to be simultaneous, so long as they were all concluded by the effective date. A comparable procedure could be used in the case of second ETCs with service areas covering multi-state, or state/FCC rural telephone company service areas. The applicant would simply file in all relevant jurisdictions with the request that each issue its order conditioned upon the action by the other jurisdiction(s).

Finally, Western Wireless suggests that the Commission could forebear from enforcing Section 214(e)(5) as regards to its obligation to serve an entire study area. Assuming, *arguendo*, the Commission has jurisdiction over the application and authority to forebear, Western Wireless has made no showing on the present record to support a finding that the requirements of Section 10 have been met.¹³

¹² The fact that the Commission has found Western Wireless meets the ETC requirements in Wyoming does not prove that it also meets those requirements in South Dakota or Montana.

¹³ 47 U.S.C. 160. It is not clear that even if it made the necessary findings, the Commission could lawfully forebear from enforcing the Section 214(e)(5) requirement, because such

4. “Extraneous” Matters

Western Wireless complains that other parties have raised “extraneous” matters not relevant to jurisdiction and ETC issues. Specifically in this category Western Wireless claims are penetration rates on the reservations, Western Wireless’ CMRS status, its service quality, and the question of a second ETC receiving support based upon the incumbent’s cost. All of these allegedly extraneous issues are directly relevant to the public interest findings which must be made before designating a second ETC in the area of a rural telephone company.

The penetration rate issue is relevant because in both applications it was raised in the first instance by Western Wireless in the form of highly exaggerated claims as to the unavailability of telephone service on the reservations.¹⁴ These unfounded claims are clearly intended to create the false impression at the Commission that it must do something because the incumbent LECs and the state commissions have failed to ensure the availability of service.¹⁵

The availability of service to virtually every household on both reservations is demonstrated by extensive data on the record provided by the ILECs, much of it at the direct request of the Commission’s staff. Western Wireless nevertheless attempts to continue perpetuating a myth to the contrary.¹⁶ The differences between Western Wireless’ unsupported claims and the hard data,

action would assign to the Commission more powers in ETC proceedings than state commissions, even though the Commission’s authority under Section 214(e)(6) was added to the act only to deal with the few situations in which states have no jurisdiction to act on the applications.

¹⁴ Crow Application at 2: “...**only 45.1 percent of the households on the reservation have access to basic telephone service.**” (Internal citation omitted, emphasis in the original). In truth, virtually all households on the Crow Reservation have access to telephone service and more than 80% subscribe. Pine Ridge Application at 3: “The telephone penetration rate on the Reservation is abysmal, standing at less than 50 %.” The truth, however, for the three ILECs serving Pine Ridge, is that service is available to virtually all households and the subscription rate is between 70 and 86%.

¹⁵ Accepting, *arguendo*, Western Wireless’ theory that having the FCC rather than a state commission decide its ETC application is important to the welfare of the tribe, then penetration rates might be relevant to show that the tribe had a concern which state commissions had ignored.

¹⁶ Western Wireless has even gone so far as to state in its filing with the SEC that many of its customers on the Pine Ridge Reservation previously had no access to telephone service. Western Wireless Corporation Form 10K for fiscal year ended December 31, 2000, Mar. 30, 2001,

backed up by explanations of source and methodology which the ILECs have supplied are not, as Western Wireless claims, largely due to any undercounting of population by the census bureau. The ILECs have not relied on census data, but on physical counts of dwelling units, electric meters, billing records, GPS-based surveys and other tangible evidence, none of which has been directly challenged by Western Wireless.

Similarly, Western Wireless itself raised its CMRS status in its filings, claiming among other things that as a CMRS carrier, not subject to rate or entry regulation by states, the states have less of a basis to claim regulatory jurisdiction over ETC applications on reservations.¹⁷ The ILECs have both disputed the notion that Section 332 has any relevance to jurisdiction, and explained that the service offering of Western Wireless is, in any event, not a mobile offering because the “station” utilized does not “ordinarily” move. If the applicability of Section 332(c)(3) is now irrelevant, Western Wireless must be taken to have abandoned the arguments based on that section previously made in support of its applications.

Service quality and support calculations are also relevant to the public interest findings required. The record shows that Western Wireless’s service supports a data speed of only 9.6 kbs, clearly inadequate for satisfactory Internet connection, and that the service cannot be used in medical facilities. The record also indicates that it is likely that Western Wireless would receive a substantial windfall if it received USF support based on the ILEC’s costs.

While such support is provided in the Commission’s rules, the rules only make sense in situations involving competition between carriers of similar cost, and do not preclude a negative public interest finding in situations which produce a windfall to the competitor. Western Wireless claims that its sole incremental cost of providing universal service will be the installation of the Telular unit in the subscriber’s premises, a cost of a few hundred dollars. Wireline costs are a matter of public record and are many times that amount, the result being that Western Wireless will obtain support far in excess of its costs. The likely result of such a situation is that the ILECs will be unable to compete despite their generally superior service. In that event, the subscribers will be dependent on Western Wireless inferior service and no realistic hope of ever getting advanced services, such as high speed Internet connections.

p. 7.

¹⁷ Pine Ridge Application at 16: “...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.” Note 27: “... the PUC does not have authority to regulate Western Wireless’ rates or entry. 47 U.S.C. 332(c)(3).” Crow Jurisdictional Supplement at 7: “...the state’s limited interest in regulating wireless carriers is a significant factor shifting the balance of interests toward tribal and FCC jurisdiction.”

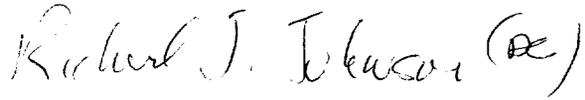
Conclusion:

The threshold issue before the Commission is not whether competitive telecommunications services should be available on Indian reservations, or whether such services should receive universal service support, but only whether the Commission can preempt the authority of the states of Montana and South Dakota to act on ETC designation applications. The threshold question is not about recognizing tribal sovereignty, because the Act grants no authority to the tribal governments to act on ETC applications, even if the state is found to have no jurisdiction. The Supreme Court's recent decision in *Nevada v. Hicks* stated unequivocally, " Tribal Assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them."¹⁸ The right to make their own laws "...does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.... Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State."¹⁹

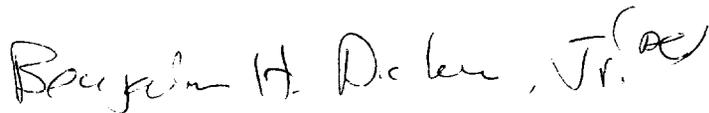
Questions regarding these issues may be directed to any of the undersigned.

Respectfully submitted,

Fort Randall Telephone Company

By  (ae)
Richard J. Johnson
Moss & Barnett

Golden West Telephone Cooperative

By  (ae)
Benjamin H Dickens, Jr.
Mary J. Sisak
Blooston, Mordkofsky, Dickens, Duffy and
Prendergast

¹⁸ 533 U.S. ____ (2001).

¹⁹ Id.

Magalie Roman Salas
August 31, 2001

Great Plains Telecommunications,
Project Telephone Co
Range Telephone Coop

By 
David Cosson
Kraskin, Lesse & Cosson, LLP

cc: Chairman Powell
Commissioner Tristani
Commissioner Abernathy
Commissioner Copps
Commissioner Martin

Kyle D. Dixon
Deena Shelter
Matthew Brill
Jordan Goldstein
Bryan Tramont
Sam Feder
Susan Steiman
Linda Kinney
Andrea Kearney
Carol Matthey
Jack Zinman
Katherine Schroder
Anita Cheng
Gene Fullano
Mark Nadel
Richard Smith

Martin Jacoboson
Rolayne Ailts Wiest