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FEDERAL COMMUNICATIONS COMMISSION
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October 16, 2001

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

Re: **Petition of the State Independent Alliance, et al.;**
WT Docket No. 00-239

Dear Ms. Salas:

Western Wireless Corp. made an *ex parte* presentation today to the Wireless Telecommunications Bureau ("WTB") regarding the proceeding referred to above. FCC participants in this meeting included Thomas Sugrue, Bureau Chief; James Schlichting, Deputy Bureau Chief; David Furth, Senior Legal Advisor to the Bureau Chief; Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division; and Rose Crellin of the Commercial Wireless Division. Western Wireless representatives included Gene DeJordy, Vice President-Regulatory Affairs (participating by telephone); Mark Rubin, Vice President-Federal Regulatory; and my colleague Michele Farquhar and me. The presentation covered matters summarized in the attached handout.

If you have any questions, please contact me.

Respectfully submitted,



David L. Sieradzki
Counsel for Western Wireless Corp.

Enclosures

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cc: Thomas Sugrue
James Schlichting
David Furth
Jeffrey Steinberg
Rose Crellin

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**Western Wireless Presentation
WT Docket No. 00-239**

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**Federal Communications Commission
Office of Secretary**

I. Introduction and Overview

II. Background and Context

- A. In the *CMRS Flex 2nd R&O*, the FCC decided to conduct a *Secretary* case analysis, rather than trying to adopt principles for all time regarding what would be defined as a “mobile service.” This proceeding *only* concerns specific facts in the record about this specific case – no need to address other possible future cases.
- B. Context: Incumbents attempting to saddle competitive entrant with unnecessary regulation. (Note that this is not a preemption case.)

III. Facts

- A. BUS is just one component of Western Wireless’ overall cellular service – uses same mobile wireless network and CMRS spectrum.
- B. BUS does not increase cost to other subscribers or degrade quality or growth of conventional mobile service. 47 C.F.R. § 22.323.
- C. The Telular units –
1. are “capable of being moved,” as all agree
 2. “ordinarily do move”:
 - a. It can operate while in motion, and functions as part of a network that is designed to support mobile operation
 - b. Customers often use it while in motion, as demonstrated by billing invoices and network data in the record in this proceeding
 - c. Western Wireless stresses mobility in marketing BUS

IV. Law: Statutory Construction, Legislative History, and FCC Precedents

A. Statute

1. Section 332(c)

- a. Intent of 1993 Budget Act amendment was to deregulate the competitive wireless industry and to achieve regulatory parity among mobile services
 - b. Legislation concerned with carriers, not customer units or individual offerings. Simply grafted new law onto pre-existing definitions of “mobile service” and “mobile station”
2. Section 3(28)
- a. Language unchanged since original 1934 Act
 - b. Source was 1927 International Radio Telegraph Convention, which defined a mobile station as one “capable of being moved which ordinarily does move”
 - i. Context in 1927: probably bulky radios installed on ships and airplanes
 - c. Limited case law interpreting this definition
 - i. *United States v. Betteridge*, 43 S. Supp. 53 (N.D. Ohio 1942) (radio transmitter mounted in a parked automobile constituted a “mobile station”)
 - ii. *Sprint Spectrum LLP v. Willoth*, 176 F.3d 630 (2d Cir. 1999) (in dictum, cited Sec. 3(27) as an example of “some of the definitions [in the Act that] are lacking in clarity and apparent usefulness” and stating that the definition is “best characterized as much ado about nothing”)

B. FCC Precedents

1. *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*
 - a. First Report and Order, 11 FCC Rcd 8695 (1996): fixed services are permissible, on a co-primary basis, on all spectrum allocated for CMRS
 - b. Second Report and Order, 15 FCC Rcd 14680 (2000): No “bright line” test to determine which service offerings are CMRS; use a case-by-case approach; eliminated prior notification requirement in § 22.323 (rule permitting cellular carriers to offer “incidental” services)

2. *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994)
 - a. All existing services authorized under Part 22, including auxiliary and ancillary services provided by mobile licensees, fall within definition of mobile service (¶ 36)
 - b. “Services provided through dual-use equipment . . . which are capable of transmitting while the platform is moving are included in the mobile services definition.” But “BETRS does not constitute mobile service” (¶ 38)
3. Pre-1993 Precedents
 - a. *Westcom Products, Inc.*, 102 FCC 2d 470, 472-73, ¶ 5 (1985): denied petition for rulemaking to specifically permit fixed operations by cellular licensees as unnecessary, because:

“Section 22.308 [now 22.323] allows licensees to offer as incidental, communication services not incompatible with their licensed mobile operations. We therefore see no need for a rulemaking procedure when ***fixed cellular service may be implemented under existing Rules***. So long as the requirements of Section 22.308 are met, cellular licensees may offer fixed cellular service, in rural areas or elsewhere.”

- b. Note that the FCC specifically excluded BETRS from the category of fixed services that may fall within the “incidental” definition. *Revision and Update of Part 22*, 95 FCC 2d 769, 819, ¶ 178 (1983); *Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033, 7041, ¶ 66 (1988), *recon.*, 5 FCC Rcd 1138, 1140 ¶ 12 & 1141 n.14 (1990).

V. Public Policy

- A. Granting the petition would cause serious harm
 1. Would impede competition
 2. Would disrupt carriers’ current business plans, relying on decades-old definition of “incidental” services
 3. Would chill future evolution of services
- B. Denying the petition merely preserves the status quo
 1. No states are clamoring to regulate CMRS carriers’ fixed offerings