

FCC MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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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/

IVED

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2001

Released: October 5, 2001

By the Commission: Commissioner Martin dissenting and issuing a statement.

I. INTRODUCTION

1. Section 214(e) of the Communications Act (Act) sets forth the requirements for telecommunications carriers to be eligible for federal universal service support and provides for state and federal authority to determine whether carriers meet these eligibility requirements. In this Order, we undertake a jurisdictional analysis to determine whether the FCC or the South Dakota Public Utilities Commission (South Dakota PUC) should decide whether Western Wireless is eligible to receive federal universal service support for providing telephone service to residents of the Pine Ridge Reservation (Reservation) in South Dakota. After reviewing federal Indian law and the specific facts in this case, we conclude that the FCC should make the eligible telecommunications carrier (ETC) determination for Western Wireless' provision of service to members of the Oglala Sioux Tribe on the Reservation, and the South Dakota PUC should do so for provision of service to non-tribal members on the Reservation. In a separate companion order, we designate Western Wireless to be an ETC to serve the tribal population on the Pine Ridge Reservation.

II. BACKGROUND

A. The Communications Act

2. Section 254(e) of the Act states, in relevant part, that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."¹ Section 214(e)(1) sets forth the requirements for ETC designation. Section 214(e)(2) provides for state commission designation of ETC carriers:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [section 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State

¹ 47 U.S.C. § 254(e).

commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [section 214(e)(1)].²

3. When Congress first enacted section 214(e) in 1996, the statute contained no provision for designation of carriers that were not subject to the jurisdiction of a state commission. As a result, such carriers, “most notably, some carriers owned or controlled by native Americans,” had no access to a forum in which they could obtain a determination whether they met the requirements of section 214(e)(1).³ As a result, these carriers would have become ineligible for universal service support as of January 1, 1998, when the eligibility requirements of the Act became effective. In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this “oversight.”⁴ Section 214(e)(6) states that:

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the [FCC] shall upon request designate such a common carrier that meets the requirements of [section 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the [FCC] consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the [FCC] may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under [section 214(e)(6)], so long as each additional requesting carrier meets the requirements of [section 214(e)(1)].⁵

B. The *Universal Service Twelfth Report and Order*

4. As set forth above, the Act requires the FCC to determine a carrier’s eligibility to receive universal service funds when a state lacks jurisdiction. The Act does not provide any guidance, however, on how to determine whether a state commission lacks jurisdiction, who makes the determination, or what to do if two entities (*e.g.*, a state and a tribe) both assert jurisdiction over the same telecommunications carrier. In order to fill this gap in the statute, the FCC set forth a procedure in the *Universal Service Twelfth Report and Order*, which permits carriers serving tribal lands to petition the FCC for a determination on the jurisdictional question -- *i.e.*, whether the state or the FCC will determine the carrier’s eligibility for universal service funds.⁶

5. Once a carrier files with the FCC a petition seeking ETC designation for service provided on tribal lands, we undertake a two-step analysis: first, we determine whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission or whether it is subject to a tribal authority given the tribal interests involved. Second, if the carrier is not subject to the jurisdiction of a

² 47 U.S.C. § 214(e)(2).

³ 143 Cong. Rec. H10807 (daily ed. Nov. 13, 1997) (statement of Rep. Bliley).

⁴ 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

⁵ 47 U.S.C. § 214(e)(6).

⁶ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas; Smith Bagley, Inc.; Cheyenne River Sioux Tribe Telephone Authority; Western Wireless Corporation, Wyoming; Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc.; Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service*; CC Docket No. 96-45; Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking; 15 FCC Rcd 12208, 12265, paras. 115-27 (2000) (*Twelfth Report and Order*).

state commission, the FCC considers the merits of the carrier's request to be designated as an ETC. This two-step process is intended to "avoid any costs and delays associated with resolving the threshold jurisdictional determination in a state designation proceeding and possible court appeal" of the state's decision, yet "preserv[e] the state commissions' jurisdiction consistent with federal, tribal, and state law."⁷ During the first stage of the two-step process (which we conduct in this Order), the petitioning carrier bears a strict burden of proving that it is not subject to the state commission's jurisdiction. The petitioning carrier must set forth in detail the basis for its assertion, including any relevant statements by the tribal authority.⁸

C. The Western Wireless Petition for the Pine Ridge Reservation

6. In November 1999, the Oglala Sioux Tribe began negotiating with Western Wireless regarding the deployment of a wireless universal service offering on the Pine Ridge Reservation in South Dakota. On August 16, 2000, Western Wireless and the Oglala Sioux Tribe signed the Tate Woglaka Service Agreement (Service Agreement).⁹ Pursuant to the service agreement, Western Wireless represents that it has expressly consented to the Tribe's regulatory authority¹⁰ and the Tribe has rights to participate extensively in and administer Western Wireless' service plan for the Reservation.¹¹ Furthermore, the service agreement is to be governed by tribal and federal law, and resolution of any disputes arising under the agreement will be through an arbitration process where judgments will be enforceable by the tribal court.¹²

7. In accordance with the *Twelfth Report and Order*, Western Wireless filed a petition with the FCC on January 19, 2001, requesting ETC designation for its provision of service to the Pine Ridge Reservation.¹³ On February 13, 2001, we sought public comment on the Western Wireless Petition. Nine

⁷ *Twelfth Report and Order*, 15 FCC Rcd at 12265, para. 115.

⁸ *Twelfth Report and Order*, 15 FCC Rcd at 12266-67, paras. 120-22.

⁹ Western Wireless Petition.

¹⁰ Western Wireless Petition at 15.

¹¹ Western Wireless Petition at 4-5.

¹² Western Wireless Petition at 6.

¹³ Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota (filed Jan. 19, 2001) (Western Wireless Petition). Western Wireless filed a petition for ETC designation with the South Dakota PUC for the entire state on August 25, 1998. *See GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 623 N.W.2d 474 (S.D. 2001). The South Dakota PUC concluded that Western Wireless failed to meet the ETC requirements in section 214(e)(1) of the Act and denied Western Wireless' petition. On appeal, the South Dakota Supreme Court reversed and held that Western Wireless met the ETC requirements statewide, but remanded to the South Dakota PUC the public interest determination required under section 214(e)(2) for areas served by a rural telephone company. *Id.* These areas encompass the Pine Ridge Reservation.

Subsequent to the South Dakota Supreme Court's remand, Western Wireless removed from the South Dakota PUC's consideration those study areas that encompass nearly all of the Reservation. *See* Letter from David L. Sieradzki, Hogan & Hartson, L.L.P., Counsel for Western Wireless Corp., to Magalie Roman Salas, Secretary, FCC, dated June 5, 2001 (Western Wireless June 5, 2001 *Ex Parte* Letter); Letter from Richard J. Johnson, Moss & Barnett, Counsel for Fort Randall Telephone Company, to Magalie Roman Salas, Secretary, FCC, dated June 27, 2001. Western Wireless took this action to eliminate any claim that it was violating the *Twelfth Report and Order's* restriction on simultaneously pending ETC requests before the state PUC and FCC. Western Wireless June 5, 2001 *Ex Parte* Letter.

parties filed comments, three parties filed replies, and numerous parties made additional filings.¹⁴ The Oglala Sioux Tribe supports FCC ETC jurisdiction and designation of Western Wireless in this case.¹⁵

8. In its Petition, Western Wireless argues that the FCC should make the ETC determination because the South Dakota Commission lacks jurisdiction over its provision of service on the Reservation. Western Wireless requests that we designate the entire geographic area of the Reservation as its "service area."¹⁶ Currently Western Wireless provides service only to tribal members which, according to Western Wireless, comprise nearly 91 percent of the Reservation's population.¹⁷ If Western Wireless is designated as an ETC, Western Wireless intends to provide supported service to both tribal and non-tribal members living on the Reservation.¹⁸

9. The South Dakota Commission opposes FCC action on Western Wireless' petition. The PUC asserts that Western Wireless is subject to its general regulatory authority under State law,¹⁹ and that its regulations applicable to Western Wireless at this time encompass the areas of service quality, complaint adjudication, and prohibitions on unjust and unreasonable discrimination in rates and terms of service.²⁰ The South Dakota PUC also asserts a specific interest in making ETC determinations, citing off-reservation effects on maintaining quality and uniformity in telecommunications service for the existing ETC carrier and preventing unjust and unreasonable discrimination in telecommunications statewide.²¹ SDITC further argues that the State is better able to make the public interest determination whether to permit an additional ETC carrier for the area currently served by the incumbent rural telephone company, because the State is more familiar with its local history and circumstances.²² Furthermore, the South Dakota PUC maintains that the State has a strong interest in continuing to regulate all carriers

¹⁴ Commenters are the Cellular Telecommunications & Internet Association (CTIA), Fort Randall/Mt. Rushmore Telephone Co., Golden West Telecommunications Cooperative Inc. (Golden West), Great Plains Communications Inc. (Great Plains), National Telephone Cooperative Association (NTCA), Oglala Sioux Tribe, South Dakota Independent Telephone Coalition (SDITC), South Dakota Public Utilities Commission (South Dakota PUC), and Western Wireless. Reply commenters are Fort Randall/Mt. Rushmore Telephone Co., Oglala Sioux Tribe, and SDITC.

¹⁵ Letter from John Yellow Bird Steele, President, Oglala Sioux Tribe, to Michael Powell, Chairman, FCC, dated March 12, 2001; Letter from John Steele, Tribal Chairman, Frank Means, Economic and Business Development Committee Chairman, and Gary Janis, Economic and Business Development Committee Vice-Chairman, Oglala Sioux Tribe, to Magalie Roman Salas, Secretary, FCC, dated June 12, 2001.

¹⁶ Western Wireless Petition at 7.

¹⁷ See Western Wireless Petition at 3, 9, 10-11, ("[a]bout 91.5% of the residents of the Pine Ridge Reservation are Native Americans"), 25 ("[tribal] members . . . comprise 91.5% of the Reservation's population"); South Dakota Comments at 19 (referring to the "failure of Western Wireless to identify the actual number of members of the Oglala Sioux Tribe"); Western Wireless Reply at 13, n.28 ("virtually all" of the Native American population on the Pine Ridge Reservation "are likely Oglala Sioux, and the SDPUC provides no evidence supporting a different conclusion").

¹⁸ Western Wireless Petition at 9.

¹⁹ The South Dakota PUC asserts that the services Western Wireless offers on the Reservation fall within the definition of a "telecommunications service" under South Dakota state law SDCL 49-31-1(27) and, as such, Western Wireless is a "telecommunications company" subject to the "general panoply of state regulatory authority." See also SDITC Comments at 12, n.13 (South Dakota state law SDCL 49-31-78 expressly provides for South Dakota PUC action on ETC designation petitions).

²⁰ South Dakota PUC Comments at 12-17; see Golden West Comments at 6.

²¹ South Dakota PUC Comments at 15-16; see Golden West Comments at 6; Fort Randall Reply at 3-4.

²² South Dakota Independent Telephone Coalition, Inc. Comments at 16-17; see Fort Randall Reply at 3.

servicing the area constituting the Reservation, which include three wireline carriers currently servicing approximately 73 percent of the households on the Pine Ridge Reservation.²³ Shortly after the Act was passed, the South Dakota PUC designated all incumbent wireline carriers as ETC carriers throughout their service territories (some of which include parts of the Pine Ridge Reservation) without conducting a particularized inquiry.²⁴

III. DISCUSSION

10. We conclude below that, under relevant Supreme Court precedent, the Tribe has jurisdiction with respect to Western Wireless' service provided to tribal members on the Reservation -- who comprise the vast majority of the Reservation's population -- and the State has jurisdiction with respect to any service provided to the remaining non-tribal residents on the Reservation. We further conclude under section 214(e) that the relevant service area for Western Wireless's ETC designation is defined as service to tribal members living within the boundary of the Pine Ridge Reservation. The service area does not include service to non-tribal members.

A. Analysis Under Federal Indian Law

11. In assessing "the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation," the Supreme Court in *White Mountain Apache Tribe v. Bracker* has established that the question calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake."²⁵ By balancing these interests, we are then able to resolve the ultimate question of whether the South Dakota PUC has jurisdiction over Western Wireless' service on the Pine Ridge Reservation. We therefore undertake that inquiry, examining in turn the relevant federal, state and tribal interests, consistent with the principles set out by the courts.

1. Federal Interests

12. As to federal interests, we agree with the parties that this is not an instance in which state regulatory authority is preempted based on federal policies reflected in the Communications Act.²⁶ Section 214(e)(2) gives the states primary responsibility to determine whether a carrier meets the ETC

²³ See Letter from Benjamin H. Dickens, Jr., Blooston, Mordkofsky, Dickens, Duffy & Prendergast, Counsel for Golden West Telecommunications Cooperative, to Susan H. Steiman, Office of General Counsel, FCC, dated July 11, 2001; Golden West Comments at 18; Great Plains Comments at 2; Letter from Bruce Hanson, Treasurer, Mt. Rushmore Telephone Company, to Magalie Roman Salas, Secretary, FCC, dated July 5, 2001; *but see* Western Wireless Petition at 3, App. A (according to Tribe resolution, telephone penetration rate on Reservation is less than 50 percent); NTCA Comments at 4-5 (according to 1999 NTCA staff report, Golden West reported telephone penetration rate of 86 percent for portion of Reservation it served).

²⁴ See, e.g., SDITC Comments, Appendix B (South Dakota PUC orders designating Golden West and Fort Randall telephone companies as ETC carriers.)

²⁵ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

²⁶ Western Wireless Petition at 8-9 (referencing Western Wireless Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers To Provide Universal Service to the Crow Reservation in Montana, Jurisdictional Supplement, Appendix (Letter from Richard B. Collins, Professor, University of Colorado at Boulder School of Law, to Gene DeJordy, Vice President of Regulatory Affairs, Western Wireless Corporation, (dated Sep. 29, 2000) (Collins Sep. 29, 2000 *Ex Parte* Letter) at 2)); Golden West Comments at 6; Great Plains Comments at 6; South Dakota PUC Comments at 10-11; Letter from Benjamin H. Dickens, Mary J. Sisak, Blooston, Mordkofsky, Dickens, Duffy and Prendergast, Counsel for Golden West Telephone Cooperative, Inc., and David Cosson, Kraskin, Lesse & Cosson, L.L.P., Counsel for Great Plains Telecommunications, Project Telephone Company and Range Telephone Cooperative, to Magalie Roman Salas, Secretary, FCC (dated June 29, 2001) (Golden West/Great Plains June 29, 2000 *Ex Parte* Letter).

criteria. At the same time, section 214(e)(6) requires the FCC to make the ETC determination when the state lacks jurisdiction to do so. But the Act is silent on the issue of the circumstances in which a state commission lacks jurisdiction.²⁷ In enacting section 214(e)(6), Congress acknowledged pending jurisdictional disputes between states and tribes and made clear that the adoption of section 214(e)(6) was not “intended to impact litigation regarding jurisdiction between State and federally-recognized tribal entities.”²⁸ Therefore, given Congress’ recognition of possible tribal jurisdiction over carriers requesting ETC determinations, our task at this stage in the process is to determine whether the state or the tribe has jurisdiction, by examining the state and tribal interests in accordance with the relevant factors articulated by the Supreme Court and lower court decisions.²⁹

2. Tribal Interests

13. **Background.** This case presents the issue of the extent of tribal authority over a non-tribally owned carrier that intends to serve both tribal members and others on the reservation. More specifically, the population of the Pine Ridge Reservation, like that of most reservations, consists of both tribal and non-tribal members. The record indicates that 91 percent of the population is comprised of Indians, most of whom also are tribal members, and about 9 percent of the population is comprised of non-Indians.³⁰ In addition, about 85 percent of the land on the Reservation is owned by or held in trust for the Tribe, whereas about 15 percent of the land within the Reservation boundaries is non-Indian fee land that is not owned by or held in trust for the Tribe and its members.³¹ This non-Indian fee land, mostly occupied by non-tribal members, is scattered randomly in a checkerboard fashion throughout the Reservation.

14. The Supreme Court has long held that tribal sovereignty interests are strongest with regard to on-reservation conduct of tribal members. In such cases, state law is generally inapplicable³² but for “exceptional circumstances.”³³ The Supreme Court’s decision in *Montana v. United States*³⁴ sets out the guiding principle that Indian tribes generally lack jurisdiction to regulate non-members on the reservation,³⁵ but it recognized two exceptions to that rule. Under the first *Montana* exception, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or

²⁷ 47 U.S.C. § 214(e)(2), (e)(6); see Collins Sep. 29, 2000 *Ex Parte* Letter at 2.

²⁸ 143 Cong. Rec. H10808-09 (daily ed. Nov. 13, 1997) (Colloquy between Representatives Thune and Bliley); see also 143 Cong. Rec. S12568-01 (daily ed. Nov. 13, 1997) (Colloquy between Senators Daschle and McCain).

²⁹ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 n.16 (1983) (the exercise of State authority may be barred if “it unlawfully infringes ‘on the right of reservation Indians to make their own laws and be ruled by them.’” quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) and *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

³⁰ See *supra* note 15.

³¹ Letter from David L. Sieradzki, Counsel for Western Wireless Corp., Hogan & Hartson L.L.P., to Magalie Roman Salas, Secretary, Federal Communications Commission, dated June 5, 2001, at 3 (“[eighty-five]% of the Reservation’s land . . . is owned by or held in trust for the tribe and its members,” referencing year 2000 statistics from the Bureau of Indian Affairs).

³² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

³³ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983)).

³⁴ *Montana v. United States*, 450 U.S. 544 (1981).

³⁵ *Nevada v. Hicks*, 2001 WL 703914, 4, 121 S.Ct. 2304 (2001).

other arrangements.”³⁶ Under the second *Montana* exception, “[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”³⁷ In its most recent decisions, the Supreme Court continues to follow closely the principles of *Montana v. United States*, which it has referred to as “the pathmarking case” on Indian tribes’ regulatory authority over non-members.³⁸ We have therefore resolved this case in light of *Montana*’s guidance.

15. Discussion. After carefully examining the service agreement between the Oglala Sioux Tribe and Western Wireless, we are persuaded that, because of the carrier’s consensual relationship with the Tribe, the first *Montana* exception is satisfied with respect to the carrier’s service to tribal members. Pursuant to the service agreement, Western Wireless represents that it has expressly consented to the Tribe’s regulatory authority,³⁹ and the Tribe has rights to participate extensively in and administer the service plan.⁴⁰ The Tribe, for example, assists Western Wireless in developing the service plan, deploying infrastructure, and establishing basic service rates.⁴¹ In addition, the agreement requires Western Wireless to give financial proceeds directly to the Tribe and give hiring preferences and training to tribal members.⁴² Furthermore, it allows the Tribe to interface with customers on the Reservation concerning such issues as marketing and billing and collection.⁴³ The service agreement is to be governed by tribal and federal law, and resolution of any disputes arising under the agreement will be through an arbitration process where judgments will be enforceable by the tribal court.⁴⁴ In this regard, Western Wireless states that its transactions with tribal members (with Western Wireless’ consent) “are subject to the Tribe’s jurisdiction.”⁴⁵ Similarly, the Oglala Sioux Tribe states that, in order to establish affordable telecommunications services for its residents, it has established a Utilities Commission “which has full rate and regulatory authority over all purveyors,” and that Western Wireless “has agreed . . . to abide by the Oglala Sioux Tribe Utilities Commission authority.”⁴⁶

16. These features, we believe, set the agreement apart from a normal carrier-customer relationship and are directly related to the Tribe’s sovereignty interests, including the regulation of transactions between the carrier and tribal members and substantial authority over the provision of

³⁶ *Montana v. United States*, 450 U.S. 544, 565 (1981).

³⁷ *Montana v. United States*, 450 U.S. 544, 566 (1981).

³⁸ *Nevada v. Hicks*, 2001 WL 703914, 3, 121 S.Ct. 2304 (2001) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)).

³⁹ Western Wireless Petition at 15; see *Nevada v. Hicks*, 2001 WL 703914, 11 (first *Montana* exception refers “to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into”).

⁴⁰ Western Wireless Petition at 4-5.

⁴¹ Western Wireless Petition at 4-5.

⁴² Western Wireless Petition at 5.

⁴³ Western Wireless Petition at 5.

⁴⁴ Western Wireless Petition at 6.

⁴⁵ Western Wireless Petition at 15.

⁴⁶ Letter from John Yellow Bird Steele, President, Oglala Sioux Tribe, to Michael Powell, Chairman, FCC, dated March 12, 2001, Attachment at 2 (Letter from Wilbur Between Lodges, Vice Chairman, Oglala Sioux Tribe and G. Wayne Tapio, Chairman, Oglala Sioux Tribe Economic & Business Development Committee, to William Kennard, Chairman, FCC, dated May 31, 2000).

communications services to the Tribe that affect the welfare of the Tribe.⁴⁷ Consistent with the relevant Supreme Court decisions, these are areas in which tribal sovereignty interests are at their zenith. By the same token, given that the areas of state regulatory authority currently are limited to matters that primarily involve issues of service quality and complaint adjudication, we believe that the State's interests in resolving such disputes solely between tribal members and Western Wireless are minimal.

3. State Interests

17. Service to Tribal Members. As explained above, we are persuaded that, under well-established Supreme Court precedent, the tribal sovereignty interests in Western Wireless' service to tribal members outweigh the State's regulatory interests. We acknowledge the state interests in regulation of telecommunications services throughout the State of South Dakota, as well as the possibility that designating an additional ETC carrier for service to the Reservation could have off-reservation effects on the incumbent carrier's service throughout its service area. Indeed, because Congress generally gave the states the authority to make ETC designations in section 214(e)(2), the statute establishes Congress' own recognition of the important state interests at stake.⁴⁸

18. Nevertheless, we do not agree that the interests asserted by the State under these circumstances outweigh the tribe's interests in regulating a carrier that has entered into a service agreement with the tribe and that provides service to its tribal members. Although we are sympathetic to state concerns about maintaining uniformity and preventing unjust and unreasonable discrimination in telecommunications statewide, we are persuaded that the tribe's interests in regulating service quality and determining the procedures by which to resolve complaints between Western Wireless and its tribal members are more compelling. Also, although we agree that, in general, states are more familiar with local history and circumstances, here we have been presented with a full record detailing the Oglala Sioux Tribe's sovereignty interests and its desire to regulate the relationship between the carrier and its own tribal members.

19. Section 214(e)(6) provides that, where a state lacks jurisdiction, the FCC shall make the public interest determination whether to designate a carrier as an ETC. Here, in light of *Montana* and the specific facts presented, we conclude that Western Wireless's service to tribal members is not properly subject to the jurisdiction of the state. We further conclude, therefore, that section 214(e)(6) requires the FCC to make the ETC designation.

20. We note that our decision that the state lacks jurisdiction over Western Wireless's service to tribal members is not inconsistent with continued state regulation of wireline carriers serving the Reservation, all of which were automatically granted ETC status by the state shortly after the Act was passed.⁴⁹ States have far greater interests in regulating state-certificated rural or other wireline ETC

⁴⁷ See *Nevada v. Hicks*, 2000 WL 703914 (2001) ("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"); see also *Atkinson Trading Company, Inc. v. Shirley*, 121 S.Ct. 1825, 1833 (2001) ("*Montana's* consensual relationship exception requires that the ... regulation imposed by the Indian tribe have a nexus to the consensual relationship itself," citing *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997)); cf. *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W.2d 604, 609 (S.D. 1999) (contract for purchase of telephone exchange between Tribe and US WEST failed to displace state law requiring state PUC approval of all sales of telephone exchanges under first *Montana* exception because contract "was dependent upon approval of the sale, not upon the consensual agreement between US WEST and [Tribal carrier]" and thus State law did not impair tribal sovereignty interests.)

⁴⁸ See South Dakota Independent Telephone Coalition Comments at 16; Fort Randall Reply at 3-4; Golden West/Great Plains June 29, 2001 *Ex Parte* Letter at 2.

⁴⁹ See, e.g., SDITC Comments, Appendix B (South Dakota PUC orders designating Golden West and Fort Randall telephone companies as ETC carriers.)

carriers that provide service to and beyond the reservation area, often under comprehensive state regulatory schemes for wireline carriers of last resort. Here, the state does not regulate the rates that Western Wireless charges consumers,⁵⁰ nor is Western Wireless the carrier of last resort. Indeed, the need for the state to protect its consumers through regulation of a second carrier providing service on the Reservation is reduced because tribal customers have the option, as a fallback, to subscribe to a state-regulated carrier. Furthermore, Congress appears to have contemplated the situation with which we are presented here: where an additional carrier, not subject to state jurisdiction, wants to be designated as an ETC for an area already being served by a rural telephone company, which is presumably regulated by the state and has most likely been designated by the state as an ETC.⁵¹

21. Finally, and perhaps most importantly, the state-regulated wireline carriers, unlike Western Wireless, have not consented to tribal jurisdiction. Consent is a prerequisite under the first *Montana* exception, which provides that a tribe may regulate non-members who enter into a “consensual relationship” with the tribe. Thus, we conclude, as in other areas of federal Indian law, that the state continues to have jurisdiction over some entities for some purposes (*i.e.*, regulating the wireline carrier-of-last-resort) and the Tribe has jurisdiction over other entities for other purposes (*i.e.*, regulating a second carrier that has consented to tribal jurisdiction).

22. Service to Non-Tribal Members. Although we find that the tribe has jurisdiction over Western Wireless to the extent that it serves *tribal* members, we conclude that there is little support for tribal jurisdiction over Western Wireless' service to *non-tribal* members on the Reservation.⁵² As noted above, approximately 9 percent of the Reservation's population is comprised of non-Indians. The Supreme Court has indicated that tribal sovereignty interests generally do not apply to non-tribal members, particularly on non-Indian fee land.⁵³ While the carrier's agreement to submit to tribal jurisdiction when it serves the tribal members has a nexus to tribal sovereignty interests, we do not find any support in the cases that tribal sovereignty interests extend to the carrier's relationship with non-tribal members, even if the carrier were to agree to submit to tribal jurisdiction when serving those customers. Indeed, a non-tribal carrier serving non-tribal customers does not appear to have any relationship to the internal affairs of the tribe.⁵⁴

23. Similarly, we do not agree with Western Wireless' position that we should declare tribal jurisdiction over all of Western Wireless' service on the Reservation, whether to tribal members or to others, based on the second *Montana* exception. As noted above, that exception permits tribal jurisdiction

⁵⁰ The issue of whether state rate and entry regulation of Western Wireless' basic universal service offering is preempted under section 332(c)(3) of the Act is pending before the FCC. *See, e.g.*, South Dakota PUC Comments at 15, *citing* State Independent Telecommunications Group Petition for Declaratory Ruling that the Basic Universal Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service, WT Docket 00-239 (filed Nov. 3, 2000).

⁵¹ Section 214(e)(6) provides that the FCC may, “with respect to an area [already being] served by a rural telephone company... designate more than one common carrier as an eligible telecommunications carrier[.]”

⁵² *See* Collins at 3; *Nevada v. Hicks*, 2001 WL 703914 (2001) (characterizing sole Court decision upholding under *Montana* tribal regulatory authority over nonmembers on non-Indian land within reservation as “minor exception”); *Atkinson v. Shirley*, (tribe lacks jurisdiction under *Montana* to tax nonmember guests of hotel located on non-tribal land within reservation); *Strate v. A-1 Contractors*.

⁵³ *See Nevada v. Hicks*, 2001 WL 703914 (2001) (land ownership is only one factor to be considered in determining tribal jurisdiction, and land ownership alone is not enough to support tribal regulatory jurisdiction over non-tribal members.)

⁵⁴ *See Nevada v. Hicks*, 2001 WL 703914 (2001) (“Where nonmembers are concerned, the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes”) (Emphasis in original).

over non-tribal members because the conduct at issue “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁵⁵ In its decisions following *Montana*, the Supreme Court has made clear that the second exception is to be narrowly construed and does not extend beyond “what is necessary to protect tribal self-government or to control internal relations,”⁵⁶ and is “crucial to ‘the political integrity, the economic security, or the health or welfare’” of the tribe.⁵⁷ We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-tribal customers and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court’s exacting standard. Insofar as the State asserts authority to regulate Western Wireless’ provision of service to non-tribal members, therefore, we believe it may do so. We conclude, therefore, that under principles of federal Indian law, the Tribe has jurisdiction over aspects of Western Wireless’ service to tribal members living within the Reservation boundaries, but the State commission has authority over the carrier’s provision of service to non-tribal members.

24. Western Wireless also argues that we should utilize a balancing test based on the relative percentages of tribal and non-tribal residents and conclude that we may determine ETC designations for the entire Reservation. As explained above, however, we have discovered nothing in the relevant case law that provides for any *de minimis* exception to the boundaries of state jurisdiction that would permit the FCC to make the ETC determination for Western Wireless’ service to non-members on the Reservation. Nor do we believe that section 214(e) itself supports such a result. Defining Western Wireless’ service area as the entire Reservation in this case would exceed the boundaries of our authority under section 214(e)(6), which expressly provides that we may make ETC designations only when a carrier’s service is not subject to the jurisdiction of a state commission.⁵⁸

B. Analysis of Service Area under Section 214

25. Under section 214(e)(1), a carrier designated as an ETC is eligible to receive universal service support “throughout the service area for which the designation is received[.]”⁵⁹ Under the circumstances presented here, we conclude that the “service area” consists of the geographic area within the boundary of the Pine Ridge Reservation. We note, however, that section 214(e)(6) only permits the

⁵⁵ *Montana v. United States*, 450 U.S. 544, 566 (1981).

⁵⁶ *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1980)).

⁵⁷ *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

⁵⁸ We note that our decision here is distinguishable from cases such as *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280, 1288-1292 (D.C. Cir. 2000), in which the court concluded that Congress had expressly delegated authority to the tribes to regulate air quality on all nonmember fee lands located within reservations. In that case, the court relied on 1990 Amendments to the Clean Air Act providing that a tribe could exercise authority “within the exterior boundaries of the reservation” and not merely in areas “within a tribal government’s jurisdiction.” The *Arizona* court conceded that, had Congress used only more general language referring to the tribes’ authority in areas within tribal “jurisdiction,” the statute would have supported the petitioner’s position that tribes lacked authority over privately owned fee land within reservations. In contrast to *Arizona*, there is no similar statutory language here indicating express congressional intent to afford tribes jurisdiction over nonmember fee land within reservations; instead, the language of section 214(e)(6) refers only generally to the absence of state “jurisdiction.” Further, the legislative history of section 214(e)(6) affirmatively indicates the section was not intended to affect jurisdictional disputes between tribes and states. Also, given the high mobility of air pollutants and their serious areawide effects, the *Arizona* court agreed with the EPA that a “checkerboard” pattern of regulation of air quality would be “inconsistent with the purpose and provisions of the [Clean Air] Act.” 211 F.3d at 1288. We find no indication that our jurisdictional determination in this case, which hinges on whether particular customers receiving service from Western Wireless are tribal members, would result in a pattern of regulation that conflicts with the purposes or provisions of the Communications Act or section 214(e).

⁵⁹ 47 U.S.C. § 214(e)(1).

FCC to authorize federal universal service funding when the carrier providing telephone service “is not subject to the jurisdiction of a State commission.” As discussed above, we find that the state retains jurisdiction over Western Wireless to the extent that the carrier serves non-tribal members. Thus, we are barred by the statute from authorizing universal service funding for Western Wireless to the extent that it serves non-tribal members. Accordingly, Western Wireless need comply with the requirements of section 214(e)(1) -- including the requirement to offer supported services -- only insofar as it is providing service to tribal members on the Reservation.⁶⁰

26. We also note that, at the current time, Western Wireless is offering telephone service only to tribal members on the Reservation.⁶¹ Thus, our definition of the service area reflects Western Wireless’ current service offering for which they do not currently receive universal service support. From an administrative perspective, the carrier would merely be converting its current service offering into a supported service, which should enable the carrier to receive universal service support and to offer reduced rates to its tribal customers.

27. As to non-members, we encourage the South Dakota PUC to act expeditiously should Western Wireless request the PUC to designate Western Wireless as an ETC for service to non-tribal members living on the Reservation.⁶² In our companion order, we have determined that it serves the public interest for Western Wireless to be designated an ETC for its service to tribal members on the Reservation; however, we recognized in the *Twelfth Report and Order* that non-Indian, low-income households on tribal lands may face the same or similar economic and geographic barriers as those faced by low-income Indian households.⁶³ Further, as we stated in the *Twelfth Report and Order*, increasing the total number of individuals, both Indian and non-Indian, who are connected to the network within a tribal community, enhances the value of the network in the community and results in greater incentives for carriers to serve these areas.⁶⁴ Therefore, we encourage the South Dakota PUC to take action consistent with these policies.

⁶⁰ As we explain in our companion order, we reject the contention raised by some commenters that, under section 214(e)(5), the service area we define must be coextensive with the incumbent LEC’s study area. Reading sections 214(e)(5) and (e)(6) together, we conclude that we must designate the service area in these circumstances to include only those portions of the relevant study areas over which the Commission has jurisdiction to make the ETC designation under section 214(e)(6). *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 01-283 (rel. Oct. 5, 2001).

⁶¹ Letter from David L. Sieradzki, Hogan & Hartson, L.L.P., to Magalie Roman Salas, Secretary, FCC, dated June 13, 2001 (Western Wireless June 13, 2001 *Ex Parte* Letter), Att. at 2.

⁶² See *Twelfth Report and Order*, 15 FCC Rcd 12208, 12267, para. 121 (where the carrier fails to demonstrate that it is not subject to the state commission’s jurisdiction, the Commission will dismiss the carrier’s request for ETC designation and direct the carrier to seek designation from the appropriate state commission).

⁶³ *Twelfth Report and Order*, 15 FCC Rcd 12208, 12225, para. 29.

⁶⁴ *Twelfth Report and Order*, 15 FCC Rcd 12208, 12225, paras. 29-30.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 214, and 254, this Memorandum Opinion and Order IS ADOPTED.

29. IT IS FURTHER ORDERED that Western Wireless' Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota IS GRANTED IN PART and DENIED IN PART to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Memorandum Opinion and Order, CC Docket No. 96-45.

I dissent from the Commission's determination that the South Dakota Public Utilities Commission lacks jurisdiction to designate Western Wireless as an eligible telecommunications carrier (ETC) in its service to Indians on the Pine Ridge Reservation. Section 214(e)(6) states that the Commission may designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission." 47 U.S.C. § 214(e)(6). As the Commission acknowledges, Congress added this provision based on concerns that some Indian controlled carriers had been unable to obtain a forum in which to seek ETC status due to limitations on the jurisdiction of particular State commissions. *See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶ 98 (2000). Congress thus amended the statute to ensure that every carrier has some forum in which to obtain ETC status and thereby receive universal service support. *See Pine Ridge Jurisdiction Order* ¶ 3.

In my view, the Commission has taken a misguided approach to effectuating Congress's intent. Rather than simply ensuring that carriers have a place to go when State commissions or courts conclude that a State lacks jurisdiction, the Commission has made itself the arbiter of competing jurisdictional claims made by States and Indian tribes. The Commission has chosen to displace State claims of jurisdiction based on its own analysis of the merits, using "a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law." Twelfth Report and Order, 15 FCC Rcd ¶ 108. The Commission should refrain from making such determinations. As a body devoted to the oversight of our nation's communications, we have neither the experience, skill, nor authority to make these complicated and contentious decisions regarding the power of Indian tribes and States.

Moreover, despite the Commission's best efforts, its decision in this case is fraught with legal and practical problems. Among other things, we have set up a regime in which Western Wireless will receive universal service funding for serving Indians but not non-Indians, even if they live on the same land. This approach conflicts with our statutory obligation to make ETC designations for a particular "service area," which, by statute, "means a geographic area." 47 U.S.C. § 214(e)(5). In this case, the Orders even acknowledge that the State has jurisdiction to make the designation with respect to some of the residents within the service area. To the extent the Commission could not lawfully make a designation for the entire geographic area, as its Orders conclude, it bolsters my view that we should not be making designations in such cases at all. Additionally, we have set up a regime in which different carriers serving the same people will be regulated by different entities, depending largely on whether the carrier has "consented to tribal jurisdiction." *Pine Ridge Jurisdiction Order* ¶ 21. This regime will only encourage forum shopping and make impossible any coherent telecommunications policy on the reservation. Finally, in designating Western Wireless as an ETC, we have made a public interest determination that may differ from the one made by the South Dakota Commission, which is in a superior position to assess the relevant local conditions.

I worry that this decision will only encourage more parties to come before the Commission seeking to displace State claims of jurisdiction. While Indian tribes may have legitimate claims of sovereignty in these situations, both they and the States deserve a better forum than this one to resolve their claims. I am convinced that the parties would be far better served by resolving such claims through the legal process in the courts and letting the Commission devote its limited resources to issues of communications. Accordingly, I respectfully dissent.