

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

2001 OCT 15 P 5: 14

In the Matter of)
)
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 /

REIVED

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. In this Order, we grant the petition of Western Wireless Corporation (Western Wireless) to be designated as an eligible telecommunications carrier (ETC) for service offered to tribal members on the Pine Ridge Reservation in South Dakota pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).¹ In so doing, we conclude that Western Wireless has satisfied the statutory eligibility requirements of section 214(e)(1).² Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. In addition, we find that the designation of Western Wireless as an ETC in those areas of the reservation served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to tribal members on the Pine Ridge Reservation that suffer from significant impediments to affordable telecommunications service.

II. BACKGROUND

A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal

¹ *Western Wireless Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, filed January 19, 2001 (Western Wireless Petition). See 47 U.S.C. § 214(e)(6). As we discuss below, a companion order released today explains our conclusion that the Commission has jurisdiction under section 214(e)(6) to make this ETC designation.

² 47 U.S.C. § 214(e)(1).

service support.”³ Section 214(e)(1) requires that a common carrier designated as an ETC must offer and advertise the service supported by the federal universal service mechanisms throughout the designated service area.⁴

3. Pursuant to section 214(e)(2), the state commissions have the primary responsibility for designating carriers as ETCs.⁵ Section 214(e)(6), however, directs the Commission, upon request, to 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.”⁶ Under section 214(e)(6), upon request and consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1).⁷ Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.⁸ On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission designation as an ETC pursuant to section 214(e)(6).⁹

B. *Twelfth Report and Order and the Western Wireless Petition*

4. In the *Twelfth Report and Order*, the Commission concluded that a carrier seeking a designation of eligibility to receive federal universal service support for telecommunications service offered on tribal lands may petition the Commission for designation under section

³ 47 U.S.C. § 254(e).

⁴ 47 U.S.C. § 214(e)(1) provides that:

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier’s service (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

⁵ 47 U.S.C. § 214(e)(2).

⁶ 47 U.S.C. § 214(e)(6). See *Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O’odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, 13 FCC Rcd 4547 (Com. Car. Bur. 1998); *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, 13 FCC Rcd 22433 (Com Car. Bur. 1998).

⁷ 47 U.S.C. § 214(e)(6).

⁸ 47 U.S.C. § 214(e)(6).

⁹ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419 (rel. Dec. 29, 1997). In this Public Notice, the Commission delegated authority to the Chief of the Common Carrier Bureau to designate carriers as ETCs pursuant to section 214(e)(6).

214(e)(6), without first seeking designation from the state commission.¹⁰ The Commission indicated that it would proceed to the merits of such a petition if the Commission determines that the carrier is not subject to the jurisdiction of a state commission.¹¹

5. On January 19, 2001, Western Wireless filed with the Commission a petition pursuant to section 214(e)(6) seeking designation of eligibility to receive federal universal service support for service to be offered on the Pine Ridge Reservation in South Dakota.¹² In its petition, Western Wireless contends that the Commission should assume jurisdiction and designate Western Wireless as an ETC pursuant to section 214(e)(6) because the South Dakota Public Utilities Commission (South Dakota Commission) lacks jurisdiction over Western Wireless' provision of service on the reservation.¹³ In addition, Western Wireless contends that it satisfies the statutory and regulatory prerequisites for designation as an ETC under section 214(e).¹⁴ On October 5, 2001, the Commission released the *Pine Ridge Jurisdictional Order* concluding that the South Dakota Commission did not have jurisdiction to designate Western Wireless as an ETC for the provision of service to tribal members on the Pine Ridge Reservation, and therefore that the Commission is required to make that limited ETC designation.¹⁵

III. DISCUSSION

6. We find that Western Wireless has met the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for a designated service area that includes tribal members residing on the Pine Ridge Reservation in South Dakota. Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service area upon designation as an ETC. In addition, we find that designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of affordable telecommunications service to consumers that suffer from significant impediments to telecommunications subscribership.

7. *Offering the Services Designated for Support.* We conclude that Western Wireless has demonstrated that it will offer the services supported by the federal universal service mechanism upon designation as an ETC. We therefore conclude that Western Wireless complies with the requirement of section 214(e)(1)(A) to "offer the services that are supported

¹⁰ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 15 FCC Rcd 12208 at 12265, para. 115 (2000) (*Twelfth Report and Order*).

¹¹ *Twelfth Report and Order*, 15 FCC Rcd at 12267, para. 121.

¹² See generally Western Wireless Petition.

¹³ Western Wireless Petition at 1-7.

¹⁴ Western Wireless Petition at 19-29.

¹⁵ *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*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 01-284 (rel. Oct. 5, 2001) (*Pine Ridge Jurisdictional Order*).

by the Federal universal service support mechanisms under section 254(c).”¹⁶

8. As noted in its petition, Western Wireless is currently providing cellular service in South Dakota, including service on the Pine Ridge Reservation.¹⁷ Western Wireless indicates that it currently offers tribal members on the Pine Ridge Reservation each of the supported services enumerated in the Commission’s rules.¹⁸ No party disputes that Western Wireless has the capability to offer single-party service, voice-grade access to the public network, the functional equivalent to DTMF signaling, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers. Nor does any party dispute that Western Wireless complies with state law and Commission directives on providing access to emergency services. In addition, although the Commission has not set a minimum local usage requirement, Western Wireless currently offers several service options that include varying amounts of local usage in its monthly service plans.¹⁹ In fact, Western Wireless indicates that tribal members on the Pine Ridge Reservation receive unlimited local usage within the defined local calling area.²⁰ In sum, we conclude that Western Wireless has demonstrated that it will offer each of the supported services upon designation as an ETC on the Pine Ridge Reservation.

9. Offering the Supported Services Using a Carrier’s Own Facilities. We conclude that Western Wireless has satisfied the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier’s services.²¹ Western Wireless states that it intends to provide the supported services using “its existing cellular network infrastructure, consisting of switching, trunking, cell sites, and network equipment that it owns or leases, together with any expansion and enhancements to that network.”²² We find this certification sufficient to satisfy the requirements of section 214(e)(1)(A).

10. Advertise the Supported Services. We conclude that Western Wireless has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. Western Wireless certifies that it will advertise the availability of its universal service offering, and the charges therefor, using media of general distribution.²³ Specifically, Western Wireless indicates that it currently employs several advertising media to promote its service, including television,

¹⁶ 47 U.S.C. § 214(e)(1)(A). Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanisms to include: (1) single-party service; (2) voice grade access to the public switched network; (3) local usage; (4) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator service; (7) access to interexchange services; (8) access to directory assistance; and, (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

¹⁷ Western Wireless Petition at 19-20.

¹⁸ Western Wireless Petition at 20-24.

¹⁹ Western Wireless Petition at 20.

²⁰ Western Wireless Petition at 20.

²¹ 47 U.S.C. § 214(e)(1)(A).

²² Western Wireless Petition at 24.

²³ Western Wireless Petition at 24.

radio, newspaper, and billboard advertising. In addition, Western Wireless states that it will expand upon these media as necessary to ensure that tribal members on the Pine Ridge Reservation are fully informed of the new universal service offering.²⁴ Consistent with the Commission's direction in the *Twelfth Report and Order*, we encourage Western Wireless to promote awareness of its universal service offerings, including low-income programs, through non-traditional means that may take into consideration the cultural and linguistic characteristics of the tribal members of the Pine Ridge Reservation.²⁵ Moreover, given that ETCs receive universal service support only to the extent that they serve customers, we believe that strong economic incentives exist, in addition to the statutory obligation, to advertise the universal service offering on the Pine Ridge Reservation.

11. *Public Interest Analysis.* We conclude that it is in the public interest to designate Western Wireless as an ETC in those areas of the Pine Ridge Reservation that are served by rural telephone companies.²⁶ Western Wireless has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition and the provision of affordable telecommunications service to consumers. We note that tribal members residing on the Pine Ridge Reservation may face impediments to affordable telecommunications service that may be addressed by the introduction of wireless service. In addition, we note that Western Wireless has actively sought the participation of the tribe in formulating its service package and has entered into an agreement with the Oglala Sioux Tribe to specifically address the telecommunications needs of the Pine Ridge Reservation.²⁷

12. An important goal of the Act is to open local telecommunications markets to competition.²⁸ Designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies. Competition will allow tribal members on the Pine Ridge Reservation to choose service based on pricing, service quality, customer service, and service availability.²⁹ In addition, we find that the provision of competitive service will facilitate universal service to the benefit of tribal members on the Pine Ridge Reservation by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."³⁰

13. Granting Western Wireless ETC status also will serve the public interest by

²⁴ Western Wireless Petition at 24.

²⁵ *Twelfth Report and Order*, 15 FCC Rcd at 12250, para. 79.

²⁶ Three rural telephone companies serve portions of the Pine Ridge Reservation. These include: Fort Randall Telephone Co. d/b/a Mount Rushmore Tel. Co. (Fort Randall), Great Plains Communications, Inc. (Great Plains), and Golden West Telecommunications, Inc. (Golden West).

²⁷ Western Wireless Petition at 2-7. See also Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe, to Michael Powell, Chairman of the FCC, dated March 12, 2001.

²⁸ According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (Joint Explanatory Statement).

²⁹ Western Wireless Petition at 27-28.

³⁰ 47 U.S.C. § 254(b)(1).

removing impediments to increasing subscribership on the Reservation. In the *Twelfth Report and Order*, the Commission noted that along with depressed economic conditions and low per capita incomes, the following factors have been identified as impediments to subscribership on tribal lands: (1) the cost of basic service; (2) the cost of intrastate toll service (due to limited local calling areas); (3) inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in rural areas; and (4) lack of competitive service providers offering alternative technologies.³¹ The record indicates that such impediments to subscribership exist on the Pine Ridge Reservation. For example, although parties vary in their estimate of telephone penetration rates on the Pine Ridge Reservation, it is clear that subscribership on the reservation is substantially lower than the national average of approximately 94 percent.³² As the Commission noted in the *Twelfth Report and Order*, the lower-than-average subscribership levels on tribal lands are largely due to the lack of access to and/or affordability of telecommunications services in these areas.³³

14. We believe the designation of Western Wireless as an ETC will increase subscribership by providing to tribal members on the Pine Ridge Reservation substantial benefits that are not available from the incumbent carriers.³⁴ For example, Western Wireless will provide an expanded local calling area to enable tribal members on the reservation who may currently pay toll charges to reach local government offices, health care providers, and family outside of the incumbent carrier's local calling area.³⁵ This will substantially enhance the affordability of service to many tribal members living on the reservation.³⁶ In addition, wireless service may provide a viable technological alternative for those tribal members residing in the most remote areas of the reservation that cannot afford the cost of expensive line extensions. We find support for this conclusion in Western Wireless' assertion that of over 1,000 customers that have signed up for its service on the Pine Ridge Reservation, approximately 42 percent had no prior telephone service.³⁷

15. We reject the general argument that rural areas, such as the Pine Ridge Reservation, are not capable of sustaining competition for universal service support. In this case, parties have presented no evidence that designation of an additional ETC in areas served by rural telephone companies will reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas.³⁸ To the contrary, we believe that competition may provide

³¹ *Twelfth Report and Order*, 15 FCC Rcd at 12220, para. 20.

³² See, e.g., Western Wireless Petition at 26 (indicating that the penetration rate on the reservation is less than 50%); Golden West Comments at 15-18 (indicating that approximately 73% of households on the reservation are subscribers).

³³ *Twelfth Report and Order*, 15 FCC Rcd at 12220, para. 20.

³⁴ See Letter from John W. Steele, Tribal Chairman of the Oglala Sioux Tribe, to Magalie Roman Salas, FCC, filed June 13, 2001 (Oglala Sioux June 13 *ex parte*) (including 188 letters from members of the Oglala Sioux Tribe expressing satisfaction with Western Wireless' service offering and affordability).

³⁵ Western Wireless Petition at 28. *But see* Golden West Comments at 21-22 (contending that Golden West has an extremely large local calling area); Fort Randall at 6-7.

³⁶ Western Wireless Petition at 28.

³⁷ Western Wireless Reply Comments at 4.

³⁸ See, e.g., Fort Randall Comments at 6-7; Golden West Comments at 13-15; Great Plains Comments at 8.

incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to customers. Although we recognize that some rural areas may in fact be incapable of sustaining more than one ETC, no evidence has been presented to demonstrate that this is the case on the Pine Ridge Reservation. In addition, we note that only a small portion of the total number of lines served by the three rural telephone companies at issue are located within the boundaries of the reservation.³⁹ Moreover, the federal universal service support mechanisms support all lines served by ETCs in high-cost areas. Therefore, to the extent that Western Wireless provides new lines to currently unserved consumers or second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone company for those lines that it continues to serve.⁴⁰

16. In establishing a public interest requirement for those areas served by rural telephone companies, we believe Congress was concerned that consumers in rural areas continue to be adequately served should the incumbent carrier exercise its option to relinquish its ETC designation under section 214(e)(4).⁴¹ We are not presently persuaded by the record before us that the incumbent rural telephone companies will be forced to relinquish their ETC designation or withdraw service altogether to tribal members as a result of Western Wireless' designation as an ETC on the Pine Ridge Reservation.

17. *Designated Service Area.* We designate Western Wireless as an ETC for a service area that consists of tribal members residing on the Pine Ridge Reservation.⁴² This designation is consistent with our conclusion in the *Pine Ridge Jurisdictional Order* that we have jurisdiction under section 214(e)(6) only over Western Wireless' service to tribal members residing on the Pine Ridge Reservation.⁴³ The designated service area differs from the study areas of three rural telephone companies (Fort Randall, Golden West, and Great Plains) in as much as these study areas extend both beyond the boundaries of the Reservation and to non-tribal members residing on the Reservation. This modification is necessary, however, because under section 214(e)(6) the Commission's authority to designate carriers as ETCs is limited to areas in which the state does not have jurisdiction. As a result, the Commission's authority to designate Western Wireless as an ETC in this instance is limited to those tribal members residing

³⁹ Fort Randall Comments at 2 (indicating that 45 out of 6,317 lines in its study area are located on the Reservation); Golden West Comments at 3 (indicating that approximately one-quarter of the 16,066 lines in its study area are located on the Reservation); Great Plains Comments at 2 (indicating that 121 out of 33,895 lines in its study area are located on the Reservation). See also Federal Universal Service Fund Size Projection and Contribution Base for the Third Quarter 2001, filed by the Universal Service Administrative Company on May 2, 2001 – Appendix HC1.

⁴⁰ As noted above, Western Wireless indicates that nearly half of its customers on the Pine Ridge Reservation are new subscribers to the network.

⁴¹ We note that even if the incumbent carrier determined that it no longer desired to be designated as an ETC, section 214(e)(4) requires the ETC seeking to relinquish its ETC designation to give advance notice to the Commission. Prior to permitting the ETC to cease providing universal service in an area served by more than one ETC, section 214(e)(4) requires that the Commission “ensure that all customers served by the relinquished carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier.” The Commission may grant a period, not to exceed one year, within which such purchase or construction shall be completed. 47 U.S.C. § 214(e)(4).

⁴² Western Wireless is therefore eligible to receive federal universal service support only for its provision of service to tribal members.

⁴³ See generally *Pine Ridge Jurisdictional Order*.

within the boundaries of the Pine Ridge Reservation.

18. We reject the contention of a few parties that the Commission must consult with the South Dakota Commission before designating Western Wireless as an ETC for a service area that differs from the rural telephone company's study area.⁴⁴ We conclude that the federal-state process in section 214(e)(5) contemplates situations in which only one entity, either the state commission or this Commission, has the authority to designate the rural telephone company's entire study area as the ETC's service area.⁴⁵ The statute does not address circumstances in which an existing study area for a rural carrier may extend beyond jurisdictional boundaries, and in which more than one designating entity might be involved in establishing the service area. In any event, we do not believe that Congress envisioned that the designating entity might need to involve another regulatory body, or seek its permission, before designating an ETC for a service area otherwise lying wholly within its jurisdiction, or that a regulatory body without jurisdiction over a carrier could interfere with the designating entity's authority to designate that carrier an additional ETC within its own jurisdictional authority. In addition, we note that the Commission rule and process cited by the South Dakota Commission and other commenters, as set forth in section 54.207 of the Commission's rules, was established prior to the adoption of section 214(e)(6).⁴⁶ This rule therefore did not contemplate the current situation in which the Commission, in the absence of state jurisdiction over a carrier, has a statutory obligation to be the sole designating entity under section 214(e)(6).⁴⁷

19. To the extent that commenters are concerned that state commissions have an opportunity to express any concerns regarding the designated service area, we note that the South Dakota Commission has been given ample opportunity to participate in this proceeding. Under the procedures established in the *Twelfth Report and Order*, the Commission has ensured that the South Dakota Commission received notice of Western Wireless' petition for designation as an ETC and has been provided with an opportunity to participate in this proceeding.⁴⁸ Pursuant to the guidelines established in the *Twelfth Report and Order*, the Bureau released, and published in the Federal Register, a public notice establishing the pleading cycle for Western Wireless'

⁴⁴ See, e.g., Golden West Comments at 12; South Dakota Commission Comments at 20-24. We note that the South Dakota Commission makes no substantive allegations that the designation of a service area that differs from the rural telephone company's study area will harm consumers in this case.

⁴⁵ See *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, Memorandum Opinion and Order, CC Docket No. 96-45, DA 00-2896 (rel. Dec. 26, 2000) at para. 24.

⁴⁶ See 47 C.F.R. § 54.207(d). 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 had no access to a forum in which they could obtain ETC designation. In 1997, Congress amended the Act with the addition of section 214(e)(6) to correct this "oversight." 143 Cong. Rec. S12568 (daily ed. Nov. 13, 1997) (statement of Sen. McCain).

⁴⁷ Section 54.207(d) of the Commission's rules contemplates situations in which the Commission may order a carrier to provide service under section 214(e)(3). Pursuant to section 214(e)(3), the Commission, with respect to interstate services, and the state, with respect to intrastate services, may order a common carrier to provide the supported services to an unserved community. See 47 U.S.C. § 214(e)(3).

⁴⁸ *Twelfth Report and Order*, 15 FCC Rcd at 12267, para. 120.

designation request.⁴⁹ In addition, the public notice was overnight-mailed directly to the South Dakota Commission to ensure that the state commission was notified of the notice and comment period. This process is specifically designed to notify and encourage participation by the states. In fact, the South Dakota Commission has filed comments in this proceeding that we have taken into consideration.⁵⁰

20. In addition, as the Commission concluded in *Universal Service Order*, the primary objective in retaining the rural telephone company's study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier's ability to provide service.⁵¹ We therefore also note that rural telephone companies now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service.⁵² Therefore, any concern regarding "cream-skimming" of customers that may arise in designating a service area that does not encompass the entire study area of the rural telephone company has been substantially eliminated.

21. Finally, we reject the contention of some commenters that Western Wireless is precluded by the *Twelfth Report and Order* from seeking designation from this Commission due to its pending designation request before the South Dakota Commission for service areas outside the Pine Ridge Reservation.⁵³ In so doing, we note that Western Wireless has removed the study areas of Golden West and Great Plains, which encompass the vast majority of the Pine Ridge Reservation, from its request for designation before the South Dakota Commission.⁵⁴ It appears, however, that a small portion of Fort Randall's study area is subject to both the designation proceedings before this Commission and the South Dakota Commission.⁵⁵ To the extent that this

⁴⁹ *Comment: Carrier Bureau Seeks Comment on Western Wireless' Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Public Notice, CC Docket No. 96-45, DA 96-278 (rel. Feb. 2, 2001). *See also* 66 Fed. Reg. 9705 (Feb. 9, 2001).

⁵⁰ *See* South Dakota Commission Comments.

⁵¹ *Federal-State Joint Board on Universal Service Order*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 at 8881, para. 189 (1997) (*Universal Service Order*) (subsequent history omitted).

⁵² *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 at paras. 144-164 (rel. May 23, 2001) (*Rural Task Force Order*).

⁵³ *See e.g.* Golden West Comments at 5-8; Great Plains Comments at 4; NTCA Comments at 2. *See also Twelfth Report and Order*, 15 FCC Rcd at 12268-69, para. 126 ("we will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2).").

⁵⁴ Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed June 5, 2001. *See also* Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed June 1, 2001; Letter from David Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, filed July 24, 2001 at 5.

⁵⁵ Letter from Bruce Hanson, Fort Randall Telephone Company, to Magalie Roman Salas, FCC, filed July 10, 2001 (Fort Randall July 10 *ex parte*).

overlap exists, we conclude that such overlap is *de minimis*.⁵⁶ Accordingly, we find that there is little potential for duplication of efforts by this Commission and the South Dakota Commission. For these reasons, we find that any *de minimis* overlap due to Fort Randall's study area would not preclude us from considering Western Wireless' petition.

IV. ANTI-DRUG ABUSE ACT CERTIFICATION

22. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214, unless the applicant certifies that neither it, nor any party to its application, is subject to the denial of federal benefits, including Commission benefits.⁵⁷ Western Wireless has provided a certification indicating that no party to its petition is subject to a denial of federal benefits, including Commission benefits, pursuant to section 5301 of the Anti-Drug Abuse Act of 1988.⁵⁸

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 4, and 214(e)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 214(e)(6), Western Wireless Corporation IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for service to the tribal members on the Pine Ridge Reservation in South Dakota, as discussed herein.

24. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Common Carrier Bureau to the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁵⁶ For example, Fort Randall indicates that it provides service to only 47 customers on the Pine Ridge Reservation. See Fort Randall July 10 *ex parte*.

⁵⁷ 47 C.F.R. § 1.2002(a); 21 U.S.C. § 862.

⁵⁸ Western Wireless Petition at 30, App. H.

**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 Subscriberhip 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.