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December 21, 2001

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EX PARTE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Petition of the State Independent Alliance and the Independent
Telecommunications Group for a Declaratory Ruling that the Basic
Universal Service Offering Provided by Western Wireless in Kansas is
Subject to Regulation as Local Exchange Service, WT Docket No. 00-239

Dear Ms. Salas:

The State Independent Alliance and the Independent Telecommunications Group (together, "Petitioners"), by counsel, hereby update the record in the above-referenced proceeding and inform the Commission that the Kansas Corporation Commission ("KCC") has issued an order on reconsideration affirming its prior designation of Western Wireless as an eligible telecommunications carrier ("ETC") for the rural areas of Kansas. A copy of the order is attached.

Petitioners are appealing the KCC's order with respect to certain rulings regarding Kansas law, including the conclusion that Kansas law does not require an ETC to provide equal access as petitioners are required to do in order to be eligible for Kansas state universal service support.

Because the issue of whether federal law preempts a state requirement that ETC's, among other things, provide equal access on a competitively neutral basis remains open in Kansas, petitioners urge the Commission to soon issue a declaratory ruling to clarify whether Western Wireless' service is fixed or mobile.

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Pursuant to 47 C.F.R. § 1.1206(b)(1) an original and one copy of this letter, including the attachment, are being filed.

Sincerely,

A handwritten signature in cursive script that reads "John B. Adams".

John B. Adams, Esq.

Attachment

CC: Qualex

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equal access requirement upon Western; (3) K.S.A. 2000 Supp. 66-1,187(p) is more than a definitional provision as described by the Commission in its Order; (4) the Commission did not adopt a definition of universal service in Docket No. 94-GIMT-478-GIT (478 Docket) in compliance with K.S.A. 2000 Supp. 66-2002(a) and the 478 Docket Order did not permit direct access to toll carriers along with dial-around capabilities to constitute equal access to toll providers; (5) the Commission should follow the decision of the Nebraska Public Service Commission (NPSC) that Western must provide equal access; (6) the Commission is mistaken that Western preserves and enhances universal service; and (7) by designating Western as an ETC in rural areas, the Commission is providing Western with a windfall by providing it with the same per-line support as received by the RLECs; in short, the RLECs argue that equal support should only be provided for equal service.

3. Both Western and the Commission Staff responded to the RLECs' Petition for Reconsideration. The RLECs, in turn, replied to the responses of Western and Staff.

Nature of Western's Service Is not Relevant to These Proceedings

4. It is not relevant to the Commission's decision here whether Western's services as described in its basic universal service (BUS) offering is provided through a "fixed" or CMRS system. As explained in the Commission's Order, K.S.A. Supp. 66-2004(c) establishes the requirements that Western must meet in order to qualify for designation as an additional ETC:

Pursuant to subsection (f) of section 253 of the federal act, any telecommunications carrier that seeks to provide telephone exchange service or local exchange access in a service area served by a rural telephone company shall meet the requirements of subsection (e)(1) of section 214 of the federal act for designation as an eligible telecommunications carrier for that area before being permitted by the commission to provide such service; however, the [rural] guidelines

shall be consistent with the provisions of subsection (f)(1) and (2) of section 253 of the federal act.

Order ¶ 16. As the Commission explained, Western could be designated an additional ETC in rural telephone company service areas in accordance with K.S.A. 2000 Supp. 2004(c) if it (a) offers the services that are supported by federal universal service support mechanisms and (b) advertises the availability of, and charges for, those services in media of general distribution. *Id.*

5. To be sure, the Commission noted at one point in these proceedings that the nature of Western's service was crucial to the Commission's considerations. *See, Order #9: On Reconsideration, ¶ 8.* However, that observation focused on the exemption provision contained in 47 U.S.C. § 332(c)(8). The Commission clearly advised the parties that, once the detail of the service and all legal arguments had been made, it would be able to make an informed decision. *Id.* Further review of statutory provisions convinced the Commission that K.S.A. Supp. 2000 66-2004(c) controlled in this regard.

6. The RLECs never challenged the designation of Western as an additional ETC for federal universal service support services. Clearly, Western was properly designated an additional ETC in certain rural areas pursuant to K.S.A. Supp. 2000 66-2004(c).

RLECs' Analysis of K.S.A. 2000 Supp. 66-2008(c) Is Incorrect

7. The RLECs insist that the legislature required a telecommunications carrier to provide equal access before it could receive support from the Kansas Universal Service Fund (KUSF) because the definition of universal service in K.S.A. 2000 Supp. 66-1,187(p) pertains to the entire Kansas Telecommunications Act, including KUSF support draws.

8. The Commission is unable to make the leap in logic that the RLECs propose. K.S.A. 2000 Supp. 66-2008 is entitled: “Kansas universal service fund; funding; authorized expenditures; supplemental funding.” The RLECs argue that, because “universal service” is included in the term “KUSF”, the legislature limited KUSF draws to those carriers that provide equal access. K.S.A. 2000 Supp. 66-2008(c) does not stand for that proposition:

Pursuant to the federal act, distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers, that are deemed eligible both under subsection (e)(1) of section 214 of the federal act and by the commission.

If the legislature had intended KUSF distributions to be made only to those telecommunications public utilities, carriers and wireless companies that provided service in accordance with K.S.A. 2000 Supp. 66-1,187(p), it clearly could have required that. But, the legislature did not do so. What the legislature did was to provide for competitively neutral distributions to telecommunications service providers deemed eligible both under § 214(e)(1) of the federal act and by the commission. Western has qualified for ETC status, and KUSF draws, under both conditions.

9. The RLECs attempt to demonstrate that K.S.A. 2000 Supp. 66-1,187(p) forms the basis for universal service provision and funding in Kansas by citing to K.S.A. 2000 Supp. 66-2005(a) and K.S.A. 2000 Supp. 66-2008(e). However, 2005(a) applies only to local exchange companies such as the RLECs and not to wireless telecommunications service providers such as Western. Although 2008(e) permits supplemental KUSF funding for a number of purposes for all carriers, its qualification for supplemental funding of “additional investment required to provide universal service and enhanced universal service” is limited to local exchange companies such as the RLECs.

10. The substance of K.S.A. 2000 Supp. 66-2005(a) and K.S.A. 2000 Supp. 66-2008(e) simply does not support the RLECs' argument that the legislature intended KUSF distributions to be limited to carriers that provide equal access to toll providers.

Docket 478 Order not Necessary to Commission Decision

11. The RLECs correctly note that the Commission's 478 Docket Order pre-dated enactment of the Kansas Telecommunications Act of 1996. The Commission's impression, that its definition of universal service developed in Docket 478 was made to comply with K.S.A. 2000 Supp. 66-2002(a), was incorrect. However, the Commission's Order was not pivotal on this point. Indeed, the Commission's reference to Docket 478 was cumulative in nature and not determinative of the issue herein. Paragraph 18, therefore, is withdrawn from the Order.

RLECs' Other Arguments Insufficient

12. The RLECs request that, to the extent that the Commission relies upon other state proceedings, the Commission reconsider its determination based upon the Nebraska ETC order. Although the Commission may consider another state's determinations, it does not rely on such determinations for its own decisions. The Commission does note that the NPSC had previously granted Western ETC status and that the NPSC order cited by the RLECs was a review of Western's advertising plan. The Commission discussed at length in the Order its analysis of state and federal law that led to the Commission's conclusion that Western was not required to provide equal access to toll providers to either gain ETC status or qualify for draws from the KUSF. (Order ¶¶ 16 - 17.) The NPSC order fails to convince the Commission that it should reverse itself in this regard.

13. The Commission agreed with the FCC that a carrier was "preserving and enhancing universal service" when it provided each of the core services for support to low-income consumers

in rural, insular or high cost areas and by offering those services in accordance with § 214(e) of the federal Telecommunications Act of 1996. (Order, ¶¶ 22 - 23.) Contrary to the RLECs' assertions, the Commission fully substantiated its finding that Western would preserve and enhance universal service. The Commission is not convinced by the RLECs' continued argument in this regard that it should reverse its decision.

14. The RLECs also alleged:

[T]he Commission is providing a pure and immediate windfall to WW by providing them [sic] the same amount of per-line support received by the RLECs to the extent WW does not provide a service provided by the RLECs, such as equal access.

(Petition for Reconsideration, p. 9.) Such allegations were more pertinent to Docket No. 99-GIMT-326-GIT.¹ Indeed, the RLECs made similar arguments in that docket. The Commission is not convinced that it should reverse its decision here, based upon the RLECs' oft-repeated argument of "equal support should only be provided for equal service".

15. Finally, the RLECs believe that the Commission should be concerned about their allegation that Western's customers cannot dial-around to the toll provider of their choice. The RLECs did indicate by means of a footnote in their Petition for Reconsideration that it had come to the RLECs' attention that this situation existed. The observation by the RLECs does not rise to the level of an allegation. Furthermore, the RLECs failed to elaborate on how the information came to their attention and never asked the Commission to reconsider its decision based upon the RLECs passing comment in this regard. As such, the RLECs' statement cannot be considered here.

¹*In the Matter of an Investigation into the Kansas Universal Service Fund (KUSF) Mechanism for the Purpose of Modifying the KUSF and establishing a Cost-Based Fund, Docket No. 99-GIMT-326-GIT.*

RLECs Fail to Address Fatal Deficiency of Their Arguments

15. The Commission found that, as a general principle, designation of additional ETCs in rural telephone company service areas was in the public interest. (Order #10 ¶ 7.) To rebut this presumption, the rural telephone company serving a particular area was required to present “particular factual circumstances existing in a service area and on the effect of customers in the area.” (*Id.* ¶ 10.) In its Order, the Commission found:

[T]he issue to be determined herein is whether the RLECs have presented sufficient evidence to rebut the presumption that it is in the public interest to designate Western as an additional ETC in the specific rural telephone company service areas identified in this Docket.

(Order ¶ 11, footnote omitted.) The RLECs have failed to carry their burden because they never demonstrated those particular factual circumstances. (Order ¶ 35, *passim.*) The RLECs’ arguments in their Petition for Reconsideration do not cure that fatal deficiency.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Petition for Reconsideration by the State Independent Alliance and the Independent Telecommunications Group, Columbus, et al., is denied.

B. This Order constitutes final administrative action that is subject to judicial review. Pursuant to K.S.A. 2000 Supp. 77-529(c), the agency officer to receive service of a petition for judicial review on behalf of the Commission is Jeffrey S. Wagaman, Executive Director.

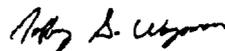
BY THE COMMISSION IT IS SO ORDERED.

ORDER MAILED

Wine, Chr.; Claus, Com.; Moline, Com.

NOV 30 2001

Dated: NOV 30 2001

 Executive Director

Jeffrey S. Wagaman
Executive Director