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December 21, 2001

Thomas Sugrue, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St. S.W.  
Washington, D.C. 20037

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Petition of the State Independent Alliance, et al, WT Doc. No. 00-239, Ex Parte Submission

Dear Mr. Sugrue:

The State Independent Alliance and the Independent Telecommunications Group ("Petitioners") have reviewed the October 16, 2001 *ex parte* submission of Western Wireless Corp. in this proceeding and have the following comments in response:

• Background and Context

Contrary to Western Wireless' assertion, the very essence of this proceeding is about preemption. It is Western Wireless, however, not Petitioners, which advocates preemption of state regulation. Petitioners' request is simply that the Commission find that the Kansas Corporation Commission is *not* preempted from regulation of Western Wireless' service by Section 332 of the Communications Act because the service is not a mobile service. Petitioners do not seek to have this Commission impose any regulation on Western Wireless, they seek only a ruling that state law is not preempted.

• Facts

The record does not support Western Wireless' claim that "BUS is just one component of Western Wireless' overall cellular service when it is shown to be separately marketed, have a different price structure and different operating characteristics.

The record shows that the Telular units do not ordinarily move and the three factors claimed by Western Wireless are contradicted by the record.

- a. The fact that the unit "can" operate while in motion is irrelevant to the question of whether it ordinarily does move. Petitioners acknowledge the unit

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is capable of motion, but have shown that given its weight, size, and awkwardness caused by the need to attach a telephone instrument and the availability of modern truly portable handsets makes it ludicrous to suggest that it “ordinarily” moves.

- b. The fact that a few customers may occasionally use the unit as a vehicular telephone does not rise to the level of “ordinarily moves” for even those customers, let alone the ordinary user.
- c. The record shows that Western Wireless’ marketing does *not stress* mobility, in fact mobility is usually not even mentioned.

- Law

The regulatory parity sought to be achieved by the 1993 Budget Act was between mobile carriers and dispatch carriers. What Western Wireless is seeking to achieve is a regulatory *disparity* which would extend the already favored status of mobile carriers to the fixed services of mobile carriers designed to compete directly with wireline carriers. Nothing in the history of the Budget Act gives the slightest hint that this was a Congressional objective.

- FCC Precedents

The evolution of policy from permitting only mobile use of certain frequencies, to the present rules permitting fixed service on a co-primary basis shows only that the Commission recognizes that there may be instances in which fixed services utilizing cellular frequencies are not properly regulated as mobile services.

- Public Policy

Contrary to Western Wireless’ rhetoric, the Commission cannot ignore the plain language of the statute and find that a service involving a station that does not “ordinarily” move is a mobile service on the grounds that calling a fixed service mobile encourages competition. Nor can the Commission ignore the law in an effort to favor one provider of fixed service over another.

Similarly, the Commission cannot ignore Western Wireless’ own prior public statements already detailed in the record that belie any claims now that the service at issue here is “incidental.”

Moreover, Western Wireless cannot rely on the “definition of ‘incidental’ services” because that term was used to determine whether a licensee would be permitted to provide fixed service utilizing frequencies then otherwise reserved for mobile use. Since the Commission has changed its rules to permit fixed services to be provided on CMRS spectrum on a co-primary basis with mobile services, the distinction between “primary” and “ancillary” is irrelevant in the context of distinguishing between fixed and mobile services. Moreover, the Commission’s order so modifying

its rules and establishing the current “ad hoc” procedure demonstrates that it is still an open question as to whether state regulation of specific fixed wireless services is preempted.

In any event, the very concept of a service that meets the requirements for its provider to be an Eligible Telecommunications Carrier is entirely inconsistent with the notion of “incidental.” Although there has never been a rigorous standard for what constitutes an “incidental” service, the dictionary definition of the word suggests something that is subordinate to the primary service. This is borne out by Section 22.323 of the Commission’s rules, which states the conditions on which an incidental service may be offered. These conditions include: 1) charges to customers who subscribe only to the primary service are not increased; 2) the quality, growth, and availability of the primary service does not deteriorate as a result of provision of the incidental service; and 3) the provision of the incidental service is not otherwise contrary to the Act or the Commission’s rules and policies. These conditions make clear that the incidental service cannot do harm to the provision of the primary service. If the incidental service harms the primary service, which the record indicates could occur with the service at issue, then the incidental service cannot be provided.

This subordination of and limitation on the provision of incidental services is directly contrary to the concept of Universal Service. It is fundamentally contradictory to view a service as so important to the public good that it merits monetary support to ensure that it is universally available to all while at the same time viewing that same service as so unimportant that it must be discontinued anytime it interferes with the provision of another service, especially one that itself is not deemed worthy of similar support. Yet, this is exactly what Western Wireless asks the Commission to do.

Finally, Petitioners agree that denial of their petition would preserve the status quo, but emphasize that the status quo is that Western Wireless has led state commissions to the erroneous conclusion that fixed services are legally mobile. It is incumbent on this Commission to correct that error, and the Kansas Commission has requested such advice.

Pursuant to 47 C.F.R. § 1.1206(b)(1), two copies of this letter are being filed with the Secretary.

Sincerely yours,



David Cosson  
John B. Adams

Counsel to State Independent Alliance and  
Independent Telecommunications Group

CC: Qualex