

TO: Jeffrey Steinberg; James Schlichting; David Furth; Rose Crellin  
FR: "Rubin, Mark" <Mark.Rubin@wwireless.com>  
DT: 01/04/02 11:44AM >>>

I wanted to forward this to you in case you missed it. Although we disagree with the headline's characterization of the nature of the service, we are pleased with the decision. Speak with you soon.

Happy new year.

Mark

---

### N.D. SUPREME COURT RULES FIXED WIRELESS IS 'MOBILE,' BACKING EARLIER PSC CONCLUSIONS

The North Dakota Supreme Court has ruled that Western Wireless Corp.'s fixed wireless residential service in Regent, N.D., is a commercial mobile radio service as defined by federal law and doesn't require a certificate of public convenience and necessity from the state's public service commission. Consolidated Telephone Cooperative had challenged a PSC ruling and a lower district court decision affirming the PSC's conclusion.  
<http://www.court.state.nd.us/COURT/OPINIONS/20010146.htm>

The state Supreme Court ruled that Consolidated's argument that the North Dakota PSC or the state courts had "the power to declare invalid or to simply ignore" a questionable FCC regulation or interpretive ruling was incorrect. Federal appeals courts have exclusive jurisdiction to review FCC rulings, the court said in its Dec. 28 opinion. It also found that the PSC ruled correctly based on a preponderance of the evidence before it.

The court said it would affirm the PSC's findings "if a reasoning mind reasonably could have determined the findings were proved by the weight of the evidence." Even though Consolidated had the right to ask for review of statutory interpretation, the court said it would give "appreciable deference to agency expertise if the subject matter is highly technical."

The dispute dates back to 1999, when Western Wireless began offering fixed wireless services in Regent after signing an interconnection agreement with Consolidated. Consolidated then

disconnected Western's customers, saying the wireless carrier needed an operating certificate from the state PSC.

Western maintained that its service, which uses a laptop-size transmitter, was a "mobile" service under federal law and not subject to PSC jurisdiction. After conducting an administrative hearing, the PSC concluded that the fixed wireless service was mobile based on the federal definition. Section 332 of the Communications Act of 1934, as amended, preempts state commissions from regulating the rates and market entry of CMRS providers (TR, Sept. 6, 1999).

After having the case remanded to the PSC, which upheld its earlier decision, Consolidated then challenged the definitions of "mobile service" and "mobile station" in section 153 of the Act in the state Supreme Court. It argued that Western's device "ordinarily does not move and was not intended for mobile use." Congress defined the terms in the Omnibus Budget Reconciliation Act of 1993, which established the FCC's preemption authority over CMRS.

The FCC has ruled that telecom services provided through dual-use equipment and having both fixed and mobile capabilities fall within the statutory definition of "mobile service." Justice William A. Neumann wrote the opinion in "Consolidated Telephone Cooperative v. Western Wireless Corp." (case 20010146). -- Ed Rovetto, [erovetto@tr.com](mailto:erovetto@tr.com) TR Daily 1/3/02