

**Before the
Federal Communication Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the State Independent)	
Alliance And The Independent)	
Telecommunications Group For a)	WT-Docket No. 00-239
Declaratory Ruling that the Basic)	
Universal Service Offering Provided)	
by Western Wireless in Kansas is)	
Subject to Regulation as Local Exchange)	
Service)	

**Comments Of:
Fred Williamson and Associates, Inc. (“FW&A”)**

BACKGROUND AND SUMMARY OF COMMENTS

FW&A is a consulting firm that represents small rural Incumbent Local Exchange Carriers (ILECs) that are Eligible Telecommunications Carriers (ETCs). As ETCs the ILECs must abide by the ETC requirements specified by both the Federal Communication Commission and by the States. In this proceeding, the Commission has issued a Memorandum Opinion and Order (MO&O) in which it finds that CMRS carriers that are seeking ETC status need not provide equal access to toll carriers, even if that is one of the ETC requirements adopted by a state such as Kansas. In addition, the Commission found that States may not regulate the rates and entry of a CMRS provider's Basic Universal Service offering and that a CMRS provider is not subject to federal regulation as a Local Exchange Carrier. The FCC requests comments on these conclusions reached in the MO&O.

FW&A believes that a reasonable reading of the applicable statutes does not support the FCC's finding in the MO&O for the following reasons:

- Section 332(c), which the FCC relies upon to preclude Kansas' equal access ETC requirement, was intended to avoid regulations (rate and entry and equal access) that would potentially impede CMRS entry into state markets. Section 332(c) is applicable unless the CMRS provider also seeks to qualify for universal service funding by applying for ETC status. If it does, then Sections 214(e) and 254(f), not Section 332(c) governs its ability to qualify as a universal service provider. Application of Sections 214(e) and 254(f) in no way hampers the ability of a CMRS provider, as Congress intended, to enter markets without the interference of rate and entry or equal access regulations. However, in the special circumstance where a CMRS provider would hold itself out as a universal service provider to the public and

receive funding to do so, then Congress intended the public interest provisions of Sections 214(e) and 254(f) to apply to its services, as it does to the services of all other carriers that apply for ETC status.

- Section 332(c)(8) allows the FCC to make a public interest finding that CMRS providers must provide equal access service for consumers. The FCC should make this finding for CMRS providers that seek ETC status and hold themselves out as providers of universal service. Further, if Kansas finds that Western Wireless or any other CMRS provider must provide equal access as part of its universal service offering in order to serve the public interest under Section 214(e), this requirement is neither contrary to state law or federal law and is within Kansas' jurisdiction and authority to so require.
- The Fifth Circuit Court has held that although specific eligibility criteria are set forth in the federal statutes for designation as an ETC, Section 332(c)(3) did not prohibit the states from adopting additional Section 214(e) requirements [such as equal access] for ETC designation for carriers who would be eligible to receive support.

For these reasons, the FCC should reverse its MO&O finding and allow States the latitude allowed by the Act and Court decisions, to require all ETCs, including CMRS providers to provide equal access service.

THE FCC ERRED IN ITS MEMORANDUM OPINION AND ORDER. KANSAS MAY, UNDER THE ACT, REQUIRE ALL ETCs TO PROVIDE EQUAL ACCESS.

FW&A believes that the Federal Communication Commission (FCC) erred in its decision that, "...Kansas may not regulate BUS [Basic Universal Service] entry or rates and may not

require equal access for telephone toll services...[and that] Western Wireless is not subject to federal regulation as a LEC [Local Exchange Carrier] with respect to the BUS offering.”¹

The plain facts are that differing sections of the Act, which must be reconciled, govern a state’s ability to regulate CMRS service - Section 332(c) and Section 214(e). Section 332(c)(3)(A) prohibits the imposition of rate and entry regulation on CMRS providers by a state while Section 332(c)(8) prohibits imposition of equal access requirements. However, Section 214(e) and Section 254(f) allows a state to impose additional criteria for carriers, including CMRS providers, which are requesting designation as Eligible Telecommunications Carriers (ETCs) in order to be eligible to receive universal service support. When properly reconciled, these statutes are not in conflict and do not, as the FCC finds in the MO&O, preclude a state from imposing additional obligations on carriers, including CMRS providers that provide fixed or mobile service, which choose to be designated as an ETC. If the CMRS provider seeks to provide universal service and to qualify for universal service funding, Sections 214(e) and 254(f) require that it, in the public interest, just like all other applicants for universal service funding, meet the Act’s Section 214(e) and ETC criteria as well as additional ETC criteria imposed by a State under Section 254(f). The provisions of 332(c), 214(e) and 254(f) are not at odds because in normal circumstances when a CMRS provider offers service in a state and does not seek ETC status, the state may not regulate its rates or entry nor will equal access be required. In those circumstances, however, when a CMRS provider chooses to seek ETC status in order to receive universal service funding, the Act requires the CMRS provider, as a direct result of that choice, to meet federal and state imposed ETC criteria.

¹ WT-Docket No. 00-239, Memorandum Opinion and Order, released August 2, 2002, [MO&O] para. 1, information in brackets added for clarity.

In finding that the State of Kansas may not impose an equal access requirement as a condition of seeking ETC status as clearly allowed by Sections 214(e) and 254(f) of the Act, the FCC in its MO&O has inappropriately given preference to Section 332(c) and has disregarded Sections 214(e) and 254(f). FW&A believes that this statutory interpretation by the FCC is flawed and at odds with a reasonable interpretation of Sections 332(c) and 214(e)/254(f) of the Act. Normally, the appropriate standard of review to be applied when reviewing an agency's (FCC's) interpretation of statutes, gives considerable weight to the statute construction applied by the agency that administers the statute. This standard of review which gives deference to an agency's interpretation of statute is applicable to the FCC's MO&O decision because the issues to be decided arise from Kansas' interpretation of the meaning and reach of the state's authority and obligations under Sections 214(e) and 254(f) of the Act to include an equal access ETC requirement, as they may conflict with the prohibition of state rate and entry authority under Section 332(c) of the Act. The practice of giving deference to an agency's statutory interpretation (in this case the FCC's) has been followed if the choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

FW&A believes that a reasonable reading of the applicable statutes does not support the FCC's finding in the MO&O. The judgment is inconsistent with the Congressional intent for the statutes and is not an interpretation that Congress would likely sanction. Section 332(c), which the FCC relies upon to preclude Kansas' equal access ETC requirement, was intended to avoid regulations (rate and entry and equal access) that would potentially impede CMRS entry into state markets. Section 332(c) is applicable unless the CMRS provider also seeks to qualify for universal service funding by applying for ETC status. If it does, then Sections

214(e) and 254(f), not Section 332(c) governs its ability to qualify as a universal service provider. Application of Sections 214(e) and 254(f) in no way hampers the ability of a CMRS provider, as Congress intended, to enter markets without the interference of rate and entry or equal access regulations. However, in the special circumstance where a CMRS provider would hold itself out as a universal service provider to the public and receive funding to do so, then Congress intended the public interest provisions of Sections 214(e) and 254(f) to apply to its services, as it does to the services of all other carriers that apply for ETC status.

**KANSAS HAS THE AUTHORITY TO CONDITION WESTERN WIRELESS' ETC
DESIGNATION UPON ITS ACCEPTANCE OF AN EQUAL ACCESS OBLIGATION
IN ORDER TO MEET THE PUBLIC INTEREST REQUIREMENT UNDER 47 U.S.C.
§ 214(e)(2).**

In 1996, Congress enacted the Telecommunications Act of 1996 (the “Act”) that amended the Communications Act of 1934. These amendments were designed to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunication technologies. Universal telephone service denotes Federal and State efforts to make communications services available to all Americans at affordable rates. In the past, universal service has been achieved largely through implicit subsidies that are designed to shift costs from rural to urban areas, from residential to business customers, and from local to long distance service. Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of

subsidies would have to be re-examined. To attain the goal of local competition while preserving universal service, Congress directed the FCC to replace the patchwork of explicit and implicit subsidies with specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service. The Act created the Federal-State Joint Board (the “Joint Board”) to coordinate Federal and State interests, and the Joint Board issued its recommendation on the implementation of the universal service provisions of the Act. The FCC in its Universal Service Order² at paragraphs 21-42 designated a set of core services eligible for universal service support, proposed a mechanism for supporting those services and established a timetable for implementation.

Under Section 254(e) of the Act and the FCC rules³, only an eligible telecommunications carrier designated under Section 214(e) of the Act shall be eligible to receive universal service support. Section 214(e)(1)(A) and (B) of the Act and the FCC rules⁴ set forth the eligibility criteria that must be met by a common carrier, Section 254(f) allows the states to adopt

² In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, released May 8, 1997; as corrected by Federal-State Board on Universal Service, CC Docket No. 96-45 Erratum, released June 4, 1997, aff’d in part, rev’d in part, remanded in part, Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Circuit 1999)

³ 47 CFR 54.201(a) Carriers eligible to receive support. “...only eligible telecommunications carriers designated under paragraphs (b) through (d) of this section shall receive universal service support...”

⁴ 47 CFR 54.201(d)(1)&(2) states as follows: “A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive universal service support in accordance with section 254 of the Act and shall, throughout the service area for which the designation is received: (1) Offer the services that are supported by federal universal service support mechanisms...using its own facilities or a combination of its own facilities and resale of another carrier’s services...and (2) advertise the availability of such services and the charges therefore using media of general distribution.”

additional ETC criteria⁵ and Section 214(e)(2) of the Act grants states the authority to make such ETC designations.⁶

In line with this authority, Kansas may require all ETCs requesting universal service support to provide a core set of services, including equal access. The purpose of requiring an ETC to accept equal access obligations is to achieve the public interest goal of ensuring all citizens receive the competitive benefits of reasonable and affordable toll telephone service of the customer's choice, irrespective of the ETC that the customer chooses.⁷ Equal access obligations require that a carrier offering universal services provide the ability for all customers within its service territory to select the toll carrier of the customer's choice, thus preventing a carrier from imposing on those customers a toll provider, a practice that is at odds with the pro-competitive objectives of the Act. Allowing such practices would be contrary to the public interest, particularly when a carrier is receiving universal service support.

Section 214(e)(2) of the Act requires Kansas to find that it is in the public interest to designate an additional ETC in an area served by a rural telephone company before making

⁵ 47U.S.C. Section 254(f) reads as follows: "A state may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service....A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State...."

⁶ 47 U.S.C. Section 214(e)(2) reads as follows: "A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (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 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 a State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest."

⁷ This public interest requirement is in concert with Section 332(c)(8), which states that the Commission may (and should for all ETCs) afford CMRS subscribers unblocked access to the toll

such designation. However, the Commission in the Memorandum Opinion and Order argues that Kansas is prohibited from imposing the equal access obligation because it is contrary to the Acts Section 332(c) restrictions. This argument is irrelevant because the Commission itself, as provided for in Section 332(c)(8) can and should find that equal access is a requirement for a CMRS provider seeking ETC status. This argument is also irrelevant in light of the Fifth Circuit Court decision⁸ that states may impose additional criteria upon a carrier seeking ETC status. Equal access obligations are not rate and entry regulation as prohibited under Section 332(c), but are imposed to ensure the Act's goal of universal telephone service is achieved. Equal access obligations are only imposed upon Western Wireless as a result of its request to be an ETC for purposes of seeking universal service support in Kansas. Since equal access obligations are not rate and entry regulation, the Kansas Commission has the authority and the obligation to impose this requirement upon Western Wireless as a condition of its ETC designation.

The FCC also argues in the Memorandum Opinion and Order that the requirement to provide equal access does not apply because CMRS providers are exempt from this provision because they are not a LEC. This argument is also irrelevant when considering whether or not Kansas can require Western Wireless to accept equal access obligations as a condition of receiving universal service support. If in fact the Western Wireless universal service product is deemed to be a commercial mobile radio service, thereby making Western Wireless a CMRS provider with regards to its universal service product, the Commission, under federal and state law, must still determine that Western Wireless eligibility to receive universal

service provider of the subscribers choice if such denial (of equal access) is contrary to the public interest (as it is when the CMRS provider holds itself out as a universal service provider).

⁸ Texas Office of Public Utility Council v. Federal Communication Commission, 183 F. 3d 393, 5th Ckt. 1999.

service support is in the public interest. This public interest requirement is not predicated upon the designation as a CMRS provider or a LEC, but upon Kansas' public interest authority and obligations under the Act. If Kansas finds that Western Wireless or any other CMRS provider must provide equal access as part of its universal service offering in order to serve the public interest, this requirement is neither contrary to state law or federal law and is within Kansas' jurisdiction and authority to so require.

KANSAS HAS AUTHORITY UNDER FEDERAL LAW TO CONDITION WESTERN WIRELESS' ETC DESIGNATION UPON CRITERIA THAT ARE IN ADDITION TO THE CRITERIA SET FORTH IN 47 U.S.C. § 214(e).

The FCC indicates in its Memorandum Opinion and Order that Federal law has preempted the Kansas Commission from regulating BUS entry or rates and from imposing additional criteria, such as equal access, that must be met by Western Wireless in order to be designated an ETC in certain Kansas exchange service areas. In support of its position, the FCC states, "Pursuant to section 332(c)(3), state or local governments may not, with very limited exceptions, regulate the entry or the rates charged by CMRS providers."⁹ Further, the FCC states, "CMRS providers are generally not subject to regulation as LECs even if they provide telephone exchange and exchange access services."¹⁰ Apparently the FCC is arguing that Section 332(c)'s Federal preemption of a state's regulation of a CMRS providers' rates and entry into the marketplace, combined with the notion that CMRS providers are not subject to regulation as LECs, somehow bars the Kansas Commission's imposition of any criteria in

⁹ WT-Docket No. 00-239, FCC Memorandum Opinion and Order, released August 2, 2002, para. 6, footnote deleted.

addition to those explicitly set forth in the Act for purposes of ETC designation, and that such additional criteria constitutes rate and entry regulation in violation of Section 332(c). However, 47 O.K. Section 332(c)(3)(A) states as follows: “Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services....”¹¹

In its review of the second phrase of this Section, the Fifth Circuit Court has held that although specific eligibility criteria are set forth in the federal statutes for designation as an ETC, Section 332(c)(3) did not prohibit the states from adopting additional Section 214(e) requirements for ETC designation for carriers who would be eligible to receive support.¹² The Fifth Circuit Court reversed that portion of the FCC’s Universal Service Order that prohibited the states from adopting additional eligibility criteria in order to be designated an ETC and receive federal universal service funds.¹³ Specifically, the Fifth Circuit Court reasoned as follows:

“The FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of how many carriers a state commission may

¹⁰ Id., para. 7.

¹¹ Various court interpretations regarding what constitutes “rate and entry regulation” and what constitutes “other terms and conditions” will be discussed in detail in section II below.

¹² This case was brought by several state agencies and telecommunications providers to challenge various parts of the Universal Service Order adopted by the FCC to implement the Telecommunications Act of 1996, including challenges regarding not only the issue of eligibility criteria for the designation of an ETC, but also the calculation of support for high-cost areas, the requirement of telecommunications carriers receiving support to provide unbundled services, disconnection of low-income customers from Lifeline services for failure to pay toll charges, the requirement of ILECs to recover their universal service contributions through interstate access charges, and the requirement of CMRS providers to contribute to the universal service system.

¹³ Id., para. 418.

designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.”¹⁴

It is clear from this case that states do have jurisdiction and authority over CMRS providers for purposes of adopting eligibility criteria for ETC designation. Lending support to the argument that federal law has not preempted state ETC jurisdiction over CMRS providers, The United States District Court for the Northern District of Texas states the plain language of Section 332(c)(3)(A) “manifests a clear Congressional intent to preempt the field with respect to rates and market entry.”¹⁵ The Bryceland Court continues in a footnote to this statement that “the preemptive effect of Section 332 is narrowly conceived. By its own terms, the statute preempts only state regulation of ‘the entry of or the rates charged by any commercial mobile service.’ States are not prohibited ‘from regulating other terms and conditions of commercial mobile services.’”¹⁶

CONCLUSION

Kansas has the jurisdiction and the authority under federal and state law to impose additional criteria upon CMRS providers, including Western Wireless as a condition of its ETC designation. Section 332(c) prohibits rate and entry regulation and equal access requirements on a CMRS provider that seeks to provide its services within a state such as Kansas.

¹⁴ Id. (footnote omitted, emphasis in original)

¹⁵ Bryceland v. AT&T Corp., 122 F.Supp.2d 703, 707 (N.D. Tex. 2000)(emphasis added).

¹⁶ Bryceland at 707, fn. 3.

However, if that CMRS provider also seeks to provide universal service and to qualify for universal service funding, Section 214(e) requires that it, in the public interest, just like all other applicants for universal service funding, meet the Act's Section 214(e) ETC criteria as well as additional ETC criteria imposed by a state under Section 254(f). Even if Section 332(c) of The Telecommunications Act of 1996 prohibits a state from regulating the entry of or rates charged by a CMRS provider, the equal access conditions imposed by the Oklahoma Corporation Commission do not constitute rate or entry regulation, the Commission may find that conditions are in the public interest (Section 332(c)(8)) and the imposition of such criteria is therefore a lawful exercise of Kansas' jurisdiction and authority.

Respectfully submitted on behalf of the ILECs by,

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