

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Reconsideration and	)	WT Docket No. 00-239
Clarification of Commission Order	)	DA 02-2266
Regarding Western Wireless' Basic	)	
Universal Service Offering in Kansas	)	

**COMMENTS  
OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby submits its comments in support of the State Independent Alliance and the Independent Telecommunications Group's (The Kansas Group) Petition for Reconsideration and Clarification of the Commission's Order regarding Western Wireless' basic universal service (BUS) offering in Kansas.

**I. THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT THE BUS EQUIPMENT "ORDINARILY DOES MOVE."**

The Order determined that the BUS offering is a CMRS because the terminal equipment meets the definition of Section 3(28) of the Communications Act which defines a "mobile station" as a "radio-communication station capable of being moved and which ordinarily does move." However, the Commission's<sup>2</sup> reasoning is flawed and does

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 555 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members also provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). And all of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> NTCA's Comments refer to the Commission's action in this matter, but given the fact that the majority of the Commissioners did not support the conclusion that the BUS offering "ordinarily does move," there remains debate over whether or not the decision was supported "By the Commission." See the Kansas Group Petition, p. 2.

not support its ultimate conclusion. The Order states that it is not necessary for a station to “usually or typically” move in order for it to be found ordinarily to move. But as the Kansas Group points out, the definition of “ordinary” is “usual.”<sup>3</sup> The Merriam-Webster Dictionary offers the following synonyms for ordinary: “customary, routine, normal, everyday.”<sup>4</sup>

The Commission attempts to re-define ordinarily by stating that a piece of equipment “ordinarily does move” if mobility is an inherent part of the service and it is reasonably likely and not an extraordinary or aberrational use of the equipment.<sup>5</sup> Not only does this ignore the plain meaning of the word “ordinarily,” the Kansas Group does an excellent job demonstrating that this definition is circular and does not permit the Commission to reach its conclusion that the BUS equipment ordinarily does move. “Not extraordinary means ordinary; not aberrational means not ‘deviating from ordinary, normal or usual.’”<sup>6</sup> The Commission’s definition merely brings it back to the accepted definition of ordinary, namely “usual.”

The Commission’s conclusion is ridiculous and laughable. All the Commission needs to do to determine what is mobile is to look around at the people using mobile service. They are not lugging 8.3 lbs. pizza size boxes. The more than 130 million subscribers in this country usually have a service used with equipment that clips on their belts or fits in their bags and pockets. The public is not carrying around 8.3 lbs stations.

Given the fact that nothing in the record supports a conclusion that mobility is a usual or customary use of the BUS equipment, the Commission erred in determining that

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<sup>3</sup> Kansas Group Petition, p. 3.

<sup>4</sup> The Merriam-Webster Dictionary, Merriam-Webster, Inc., 1997, p. 520.

<sup>5</sup> Order, ¶ 20.

<sup>6</sup> Kansas Group Petition, p. 4 (citations omitted).

the equipment ordinarily does move. The fact that the equipment may have hand-off capability does not support the conclusion that the capability is ordinarily used. Further, just because there is evidence that some customers may use the equipment in a mobile capacity does not mean that the usual customer ordinarily does. In fact, the only way the Commission could conclude that the BUS service is mobile according to the record is to read the Act as defining a mobile station as one capable of being moved and ignore the rest of the sentence reading “and which ordinarily does move.” It is not up to the Commission to re-write the law. If Congress had intended such a result, it would have so written the statute.

## **II. THE COMMISSION CANNOT AVOID THE “ORDINARILY DOES MOVE” REQUIREMENT BY CLASSIFYING A SERVICE AS ANCILLARY, AUXILIARY OR INCIDENTAL**

The Commission concludes that even if BUS were not considered to meet the statutory definition of “mobile,” it is still properly classified as CMRS because it is ancillary, auxiliary or incidental to Western Wireless’ provision of traditional mobile cellular service.<sup>7</sup>

As the Commission points out, prior to the 1996 amendments to the rules permitting CMRS carriers to provide fixed wireless services on a co-primary basis with commercial mobile services, the Commission “permitted CMRS providers to offer services that are ancillary, auxiliary or incidental to their primary mobile offerings, without change in their regulatory status.”<sup>8</sup> The Commission therefore found that the BUS offering meets the criteria of section 22.323 of the rules and is classifiable as an incidental service, properly regulated as CMRS.

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<sup>7</sup> Order, ¶ 26.

<sup>8</sup> Order, ¶ 5.

Neither rule 22.323 nor the orders implementing it say anything about how an incidental service is to be regulated.<sup>9</sup> Further, the Commission never considered “incidental” services in the context of whether the state may condition the receipt of universal service upon the provision of certain services. Given the fact that a fixed offering may directly compete with the incumbent LEC and the state has a substantial interest in the service provided to its residents and in its universal service fund, it is foolish to jump to the overly-simple conclusion that Western Wireless’ BUS offering is an “incidental” service that should be regulated as CMRS without any discussion or reasoned decision making.

The Commission’s decision also completely disregards the statutory requirement that a mobile service involves mobile stations that “ordinarily” move. The Commission’s preemption authority is found in section 332 of the Act, which preempts certain regulatory actions by state commissions of *mobile* services. The Act defines mobile services as those that involve stations that “ordinarily” move. The Commission is bound to the authority Congress gave it.

### **III. THE COMMISSION SHOULD CLARIFY THAT STATES MAY ADD EQUAL ACCESS TO THE LIST OF SERVICES SUPPORTED BY STATE UNIVERSAL SERVICE FUNDS**

The Act permits a state to provide additional definitions and standards to preserve and advance universal service within the state, so long as the federal mechanisms are not affected.<sup>10</sup> Despite this clear Congressional directive and a court decision affirming the

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<sup>9</sup> In support for the Commission’s statement that “incidental” services are to be regulated as CMRS, the Commission cites to the *Second CMRS Flex Order* 15 FCC Rcd 14684, ¶9. The *Second CMRS Flex Order* incorrectly cited the *CMRS Second Report and Order*, 9 FCC Rcd 1424, ¶36. In fact, in no order does the Commission discuss and reach the conclusion that incidental services are to be regulated as CMRS.

<sup>10</sup> § 254(f).

right of states to impose additional universal service eligibility requirements,<sup>11</sup> the Commission suggests that Kansas is prohibited from making the provision of equal access a condition precedent for the receipt of state universal service funds. The Commission states, “states are precluded from requiring CMRS providers to provide equal access to common carriers for the provision of telephone toll services.”<sup>12</sup> It seems to assume that a condition for receiving support is the same as a requirement. However, participation in a state universal service fund is purely voluntary. A carrier makes the choice to participate in the program and must agree to abide by its provisions. Conditioning the participation in a voluntary program upon the provision of equal access in no way *requires* the CMRS provider to comply. As that Utah Supreme Court recently concluded, “only if an ETC wishes to receive state universal service funds must it comply . . . .”<sup>13</sup>

The Commission should be encouraging states to develop universal service support plans. Congress determined that universal service should be preserved and advanced. The states are in the best position to know what is necessary and needed in their own communities, whether it be access to competitive long distance service, or caps on the prices ETCs may charge.<sup>14</sup> As the 5<sup>th</sup> Circuit recognized, states have a “historical role in ensuring service quality standards for local service.”<sup>15</sup> Therefore, the Commission should clarify that states are permitted to establish programs that condition the receipt of state support on the provision of services such as equal access.

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<sup>11</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir 1999).

<sup>12</sup> Order, ¶30.

<sup>13</sup> *WWC Holding Co. Inc. v. Public Service Commission of Utah*, 44 P.3d 714 (Utah 2002).

<sup>14</sup> The Utah Supreme Court concluded that the state Public Service Commission was not preempted from establishing a maximum price to be charged by recipients of the state universal service support fund. *Id.*

<sup>15</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999).

#### IV. CONCLUSION

Western Wireless' BUS offering is a service designed, intended, and marketed to operate as a fixed service in direct competition with the incumbent LEC. Western Wireless wants to receive universal service support for its service, but does not want any additional obligations and avoids them in the subject order through the CMRS regulatory designation.

While a state may not regulate entry or rates of CMRS providers, there is nothing that withholds from the state the authority to condition the receipt of universal service support on the provision of services it deems necessary for the good of its citizens.

NTCA respectfully submits that the Commission may not, and at the very least should not, preempt a state's authority to impose additional obligations, such as equal access, on carriers seeking to receive state funded universal service support.

Respectfully submitted,

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October 16, 2002

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WT Docket No. 00-239, DA 02-2266 was served on this 16th day of October 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

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