

**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)	

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

REPLY COMMENTS

FW&A is a consulting firm that represents small rural Incumbent Local Exchange Carriers that are Eligible Telecommunications Carriers (ETCs). As ETCs, the Incumbents 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 (BUS) offering and that a CMRS provider is not subject to federal regulation as a Local Exchange Carrier.

In its Comments, Western Wireless argues that the FCC's tentative decision in the MO&O hinges on the notions that:

1. Western Wireless' Basic Universal Service (BUS) offering qualifies as a mobile offering and thus the BUS offering should be regulated as a CMRS offering.
2. The BUS offering qualifies as an incidental service and therefore qualifies to be regulated as a mobile service.

The flawed logic flowing from these alleged facts¹ is that a CMRS offering, even when the service is an ETC offering, cannot be regulated by Kansas as to rates and terms (per Section 332(c) of the Act) and Kansas may not impose a requirement for equal access to toll (per Section 332(c)(8)). Western Wireless asserts that: “It would be unlawful to condition Western Wireless’ entitlement to federal and state universal service support for BUS based upon compliance with an equal access requirement that applies to incumbent local exchange carriers...”² and that the FCC: “...should affirm its conclusion that both Section 332(c)(8) and Section 254(f) prohibit the imposition of an equal access requirement on CMRS providers, regardless of whether they seek support from Federal and State Universal Service Funds.”³

Not surprisingly, Western Wireless further attempts to support this flawed position by trotting out in its comments the normal accusations that (a) The Independents are attempting to shut out the competition⁴ by requiring equal access as an ETC qualification criteria which would exclude an entire class of carriers (the CMRS providers)⁵ and (b) That the Independents request that all ETCs be treated equally is manifestly anti-competitive⁶.

FW&A finds it interesting that equal access, which was such a fundamental tenant of the introduction by the FCC of competition into the toll market and was clearly found to be in the public interest, could now be ignored by the FCC in the provision of basic

¹ In reality, the Western Wireless service is no more mobile than a landline wireless set and the service is clearly not incidental to Western Wireless’ business plan.

² Western Wireless Comments, page 15.

³ Id.

⁴ Id., page 2.

⁵ Id., page 17.

⁶ Id., page 14.

universal service. Western Wireless is currently using the same argument that AT&T used prior to divestiture – equal access is not an essential offering. The FCC rejected this argument when it found that IXC competitors to AT&T should not be provided inferior access but should be provided with equal access. However, inferior access is precisely what Western Wireless (and AT&T Wireless - AWS) is proposing – that it be allowed by the FCC as part of Western Wireless’ Basic Universal Service offering. Western Wireless does not have an automatic “entitlement” under the law to universal service funding unless it complies with ETC criteria. Also, it is not unlawful, as Western Wireless asserts, to allow Kansas to require that all ETCs provide the same basic offering, including equal access, a requirement that was, and still is, key to toll competition. Inferior access to toll may be acceptable to the FCC⁷ as it was to Congress when normal CMRS service is offered, however, it is neither acceptable nor mandated by the Act when a competitor seeks ETC status.

A reasonable reading of the applicable statutes does not support Western Wireless’ position or 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

⁷ Allowing CMRS providers when providing normal CMRS service to offer inferior access to toll providers is apparently acceptable in order to promote local competition. However, it is unacceptable from a public interest standpoint and at odds with the Act for the FCC to allow and require inferior access when a state, acting within the Acts requirements requires equal access for all, not some, ETCs.

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, not inferior 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 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.

Fundamentally, it is unlawful and at odds with Sections 214(e) and 254(f) of the Act to preclude a state such as Kansas from imposing symmetric ETC criteria (such as equal access) on all providers, on a technological neutral basis, when these requirements are not at odds with FCC rules.⁸ The notion that mobility and technological characteristics of a provider or class of providers determines if asymmetric ETC criteria can be imposed, is at odds with the Commission's goal of technological neutrality and must be avoided because it provides a competitive advantage to one technology versus another.⁹ At odds with the comments of Western Wireless, the Independents are not exhibiting anti-competitive behavior by supporting symmetric ETC criteria. Western Wireless is, however, attempting to obtain a competitive advantage for itself and its technology by receiving universal service funding for inferior access service and asymmetric ETC requirements for CMRS providers. Consequently, if any action is anti-competitive, it is granting ETC status to CMRS providers that are employing an inferior service that is not capable of promoting fair toll competition. Moreover, it is inappropriate to allow CMRS providers as ETCs to obtain universal service support based on the costs of the incumbents' services that are capable of providing equal access. This unwarranted cost

⁸ Equal access, not inferior access, has been a public interest requirement of the FCC for many years. While this requirement may be ignored for normal CMRS service offerings, it cannot be ignored for basic universal service offerings. CMRS providers should not be rewarded with universal service funding for providing inferior service. At odds with AWS' comments, CMRS "bucket" rate plans provide no basis for CMRS providers to provide inferior access to toll providers for customers. Equal access allows a customer to choose the toll service provider of its choice and does not depend on the jurisdictional nature of the traffic.

⁹ At odds with AT&T's comments on pages 3 and 4, allowing asymmetric ETC criteria and inferior access to toll services to be provided by a class of ETCs (CMRS providers) is at odds with the Commission's requirement that universal service mechanisms be administered on a technological-neutral basis and if allowed, biases support toward

recovery is anti-competitive in that it allows the CMRS/ETCs to recover costs they are not incurring to provide service and consequently subsidizes their service offerings and promotes unfair competition.

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. This requirement does not "...expand the scope of supported services and increase the financial burden on all contributing carriers..." as AWS contends.¹⁰ Instead, this requirement provides for the continuation of a long-standing Commission public interest policy against inferior access. Support would be targeted on a symmetrical basis, irrespective of technology, only to providers that provide equal access, not inferior access. Application of this ETC requirement by the Commission should refine the targeting of support to universal service providers of equal (not inferior) access and thus should minimize burdens on support funds. On the other hand, AWS' and Western Wireless' position, which would inappropriately burden federal and state funding, is that support should be paid even if inferior universal services are provided. If the Commission does not reverse its MO&O finding, then the Commission should, as the Nebraska Public Service Commission comments, make it clear that its MO&O applies only to federal ETC status and has no effect on state ETC requirements for state universal service funding.

wireless technology to the detriment of the public which receives inferior service and wireline ETCs.

¹⁰ AWS comments, page 2.

Respectfully submitted on behalf of the ILECs by,

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