

**ATTACHMENT E**

**to**

**Comments of Western Wireless**

**in**

**FEDERAL-STATE JOINT BOARD ON UNIVERSAL  
SERVICE SEEKS COMMENT ON CERTAIN OF  
THE COMMISSION'S RULES RELATING TO  
HIGH-COST UNIVERSAL SERVICE SUPPORT AND  
THE ETC DESIGNATION PROCESS**

**CC Docket No. 96-45**

**May 5, 2003**

# **The Public Interest is Served by the Designation of Competitive Eligible Telecommunications Carriers**

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# **The Public Interest is Served by the Designation of Competitive Eligible Telecommunications Carriers**

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## ***Executive Summary***

Western Wireless' experience as a competitive eligible telecommunications carrier ("ETC") is one committed and focused on rural consumers. Western Wireless' commitment to rural areas, and to the provision of high-quality basic and advanced services, cannot be disputed. State commissions have enthusiastically endorsed Western Wireless' entry into universal service markets. The real winner, however, has been and will continue to be the rural consumers, who must remain the focus of universal service policies as these programs continue to be implemented at the state and federal levels.

To ensure that consumers continue to receive the benefits of competitive universal service, Western Wireless makes the following recommendations:

- There should be no further expansion of the basic ETC criteria for purposes of determining eligibility for federal universal service support.
- Case law has established the relevant public interest analysis to be applied under Section 214(e); state commissions have, for the most part, properly applied the public interest analysis; and there is no need, at this time, to establish federal rules determining the scope of the public interest evaluation by state commissions.
- To ensure the rapid development of competition, state commissions should strive to review ETC petitions within six months of filing.
- State-imposed criteria for federal ETC designation should not conflict with federal law.
- States should fund universal service in a competitively-neutral manner.

## **I. SUMMARY OF COMPETITIVE ETC DESIGNATIONS**

### **A. Western Wireless Has Sought and Obtained ETC Designation Nearly Everywhere It Serves**

Western Wireless began seeking designation as an eligible telecommunications carrier ("ETC") in August 1998.<sup>2</sup> At that time Western Wireless filed petitions with more than ten state commissions seeking federal ETC designation under Section 214(e) of the Telecommunications Act of 1996 ("Act"), and state ETC designation where state universal service funding mechanisms were implemented. Western Wireless sought designation throughout its commercial mobile radio service ("CMRS") coverage areas, including non-rural telephone company exchanges and rural telephone company ("RTC") study areas. Additional ETC

petitions were filed by Western Wireless between 1999 and 2002, including one with the FCC. In all, Western Wireless has sought ETC designation in 15 of the 19 states in which it provides service.

Consumers stand to gain the most from Western Wireless' ETC petitions. In their review of the petitions, state commissions and the FCC (collectively "commissions") have found that Western Wireless meets all requirements for federal ETC designation. Commissions have also found that designating Western Wireless as an additional ETC in areas served by RTCs serves the public interest by providing clear and unmistakable benefits to rural consumers. In fact, Western Wireless has now been designated as a federal ETC in 14 of the 15 states in which it has filed a petition, and a petition in the 15th state is pending. In addition, Western Wireless has been designated as a state ETC in all eight states in which state universal service mechanisms have been established. Table 1 below lists the proceedings and duration of Western Wireless' ETC designation for these 15 states, as well as the FCC's designation of Western Wireless for the Pine Ridge Reservation in South Dakota.

**Table 1. Duration of Western Wireless ETC Cases**

<b>State</b>	<b>Date Filed</b>	<b>Date Completed</b>	<b>Duration of Process</b>
California	5-16-2000	Granted 7-20-2000 (non-RTC area)	2 months, 4 days
Colorado	3-28-2000	Granted 5-4-2001	1 year, 1 month, 6 days
Iowa	4-28-2000	Granted 11-21-2000	6 months, 24 days
Kansas	9-2-1998	Granted 1-18-2000 (non-RTC areas) Granted 10-12-2001 (RTC areas)	3 years, 1 month, 10 days
Minnesota	9-1-1998	Preliminary 10-27-1999 Final 4-19-2000	1 year, 7 months, 18 days
Montana	8-17-1998	Voluntarily withdrawn 11-3-1999 due to onerous discovery	1 year, 2 months, 17 days
Nebraska	8-31-1998	Granted 11-21-2000	2 years, 2 months, 21 days
Nevada	6-2-2000	Granted 8-22-2000	2 months, 20 days
New Mexico	9-8-1998	Granted 5-7-2002	3 years, 7 months, 29 days
North Dakota	8-17-1998	Granted 12-15-1999 (non-RTC areas) Granted 10-3-2001 (RTC areas)	3 years, 1 month, 16 days
Oklahoma	8-28-1998	Granted 4-11-2001	2 years, 7 months, 14 days
South Dakota	8-25-1998	Denied 5-19-1999 Appeal granted 3-22-2000 Granted 10-18-2001	3 years, 1 month, 23 days
Texas	3-15-2000	Granted 10-30-2000	7 months, 15 days
Utah	8-31-1998	Granted 7-21-2000 (non-RTC areas)	1 year, 10 months, 21 days
Wyoming	9-1-1998 9-29-1999	Dismissed on jurisdiction 8-13-1999 Granted 12-26-2000 (by the FCC)	11 months, 12 days (state); 1 year, 2 months, 27 days (FCC); over 2 years, 2 months (total)
Pine Ridge Reservation, South Dakota	1-19-2001	Granted 10-5-2001 (by the FCC)	8 months, 16 days

Average length of Commission proceeding: 21 months

Shortest Commission proceeding: 2 months, 4 days (California)

Longest Commission proceeding: 3 years, 7 months, 29 days (New Mexico)

## **B. Other Competitive ETC Designations**

Other competitive carriers have also sought and been granted ETC designation consistent with the FCC's goals of promoting competition as a means to preserve and advance universal service. Like the Western Wireless cases, state commissions have found other competitive ETCs meet the criteria for designation, and the granting of ETC status serves the public interest. Other competitive ETCs include wireless carriers,<sup>3</sup> CLEC affiliates of RTCs,<sup>4</sup> and competitive municipal providers.<sup>5</sup> According to filings by the Universal Service Administrative Company, there are now over 400 rural study areas nationwide that are being served by competitive ETCs.<sup>6</sup>

In addition to Western Wireless, a number of other carriers have successfully petitioned the FCC for ETC designation. In one of the first federal ETC orders, granting Saddleback Communications ETC status for the Salt River Reservation in Utah,<sup>7</sup> the Common Carrier Bureau explained the two-part analysis that applies to federal ETC petitions. First, the Commission must find that the petitioner is not subject to the jurisdiction of the state commission. Second, the FCC examines petitioner's compliance with the ETC requirements of section 214(e)(1) for a service area designated by the Commission.<sup>8</sup>

In later ETC orders, the Bureau provided additional details about the requirements of ETC designation. For example, in its order granting ETC status to Cellco Partnership d/b/a Bell Atlantic Mobile in Delaware,<sup>9</sup> the Bureau established that mobile service providers are eligible for universal service support.<sup>10</sup> The Bureau also declined to adopt a "landline substitutability" requirement "to protect consumers from the possibility that the incumbent carrier may relinquish its ETC designation upon designation of an additional ETC."<sup>11</sup>

The Bureau has granted ETC status to several providers in Alabama. In its order granting the petition of RCC Holdings, Inc., the Wireline Competition Bureau found that the existence of "dead spots" in the applicant's service area did not preclude a grant of ETC status, noting that the Commission's rules acknowledge the existence of dead spots.<sup>12</sup> The Bureau also stated that carrier need not provide "detailed description of its planned universal service offerings beyond its commitment to provide, or statement that it is providing, all of the services supported by the universal service mechanism."<sup>13</sup>

The Bureau has also granted ETC status to Cellular South License, Inc. in Alabama.<sup>14</sup> In that order, the Bureau emphasized the fact that universal service funds would be used to develop infrastructure capable of providing advanced services did not constitute a violation of section 254(e).<sup>15</sup> The Bureau also declined to address commenters' concerns about USF being used to support multiple lines provided by different technologies to the same customer.<sup>16</sup>

## **C. Commissions Have Consistently Applied Federal ETC Standards and Determined Western Wireless Meets All Applicable Requirements**

The requirements for federal ETC designation are found in Section 214(e) of the Act and in the FCC's Part 54 Rules.<sup>17</sup> An ETC must be a common carrier, and must demonstrate the intent and ability to offer and advertise the FCC's nine supported services within appropriate designated service areas. In addition to these "basic" ETC criteria, a commission may designate

a competitive ETC in an area served by an RTC only upon finding the designation will serve the public interest.

Commissions have consistently found that Western Wireless meets the "basic" criteria for federal ETC designation as established by Congress and the FCC. Because the FCC's Rules and Orders made clear these criteria were designed to be technologically and competitively neutral, it is now undisputed that Western Wireless is a common carrier and that its current network can and does provide the FCC's nine supported services.<sup>18</sup> In addition, commissions have recognized that an applicant meets the service obligations of an ETC by offering credible evidence that it has the intent and ability to offer service to those within its designated service areas within a reasonable time following designation.<sup>19</sup> Western Wireless meets this standard.

Given the clarity of the FCC's Rules, and the abundance of state commission and FCC decisions designating competitive ETCs, it is not necessary at this time for the FCC to further clarify the basic ETC criteria to be applied under Sections 214(e)(1) and 214(e)(6) of the Act. The current ETC criteria established by the FCC has resulted in balanced decision-making and, therefore, should be retained.

The FCC should, however, continue to make clear that state commissions may impose additional requirements for federal ETC designation only in a manner consistent with federal law. Although the Fifth Circuit Court of Appeals vacated the FCC's prohibition on state commissions adding additional requirements for federal ETC status, the issue raised in that case was whether Congress had prohibited states "from imposing service quality standards" consistent with state "regulation of intrastate service."<sup>20</sup> Clearly, commissions are not preempted from enforcing state-law rules on state-regulated carriers. This does not mean, however, that a state commission is free to impose additional requirements on a CMRS provider contrary to federal law. For example, the FCC has ruled that certification requirements, equal access obligations, rate regulation and carrier-of-last-resort requirements are preempted as applied to a CMRS provider, and thus cannot be conditions for ETC designation.<sup>21</sup> State commissions cannot ignore these federal directives under the guise of imposing "additional requirements." The FCC should continue to assert its jurisdiction to regulate CMRS providers consistent with federal law, and reject attempts by state commissions to require a CMRS provider that is an ETC to be regulated like a landline local exchange carrier.

In addition to the "basic" ETC criteria, the designation of a competitive ETC in RTC areas must serve the public interest. In considering the public interest, commissions have found substantial consumer benefits of designating Western Wireless as an additional ETC in areas served by RTCs, and have therefore found Western Wireless' designation meets this public interest standard. Commissions have considered the public interest consistent with the principles of the Act, which focus on the consumer benefits of competition and the advancement of universal service. The Act seeks to ensure that rural consumers have the same technology, level of service and choice of providers as their urban counterparts. Commissions have carefully evaluated these issues and have found significant consumer benefits will flow from designating Western Wireless as an additional ETC. In addition, commissions have considered and rejected claims that rural consumers will be harmed by allowing competitors to have non-discriminatory access to universal service funding. These determinations are discussed in more detail *infra* in Section III. Today, more than a dozen state commissions have made affirmative public interest

determinations under Section 214(e)(2). The FCC has also designated competitive ETCs in RTC areas under Section 214(e)(6), and in doing so has given guidance as to the proper public interest analysis under the Act for purposes of federal ETC designations.

Because state commissions and the FCC can and should continue to make public interest determinations consistent with the Act, there is no need for the FCC to codify specific public interest guidelines. Additional discussion of specific public interest findings and analyses follows below in Section II.

#### **D. State Universal Service Mechanisms Must Work Hand in Hand With the FCC's Rules**

Western Wireless has requested and obtained ETC designation for receipt of state universal service funding. However, states have not always met their obligations to ensure "specific, predictable and sufficient . . . State mechanisms" to advance universal service consistent with the FCC's rules.<sup>22</sup> In most cases, state universal service funds have not been implemented, and incumbent carriers otherwise continue to obtain implicit subsidies through above-cost intrastate access charges, below cost residential rates and geographically averaged rates. Until such state mechanisms are established, universal mandates of the Act will remain unfulfilled.<sup>23</sup>

In addition, some state universal service requirements are inconsistent with federal standards and discriminate against competitors, including a CMRS carrier that is not subject to state certification requirements.<sup>24</sup> Generally, in states that have established state universal service funds, those funds appear to have been designed to address incumbent landline carriers without sufficient input or consideration of competitors, including a CMRS provider. The FCC has given guidance that state universal service mechanisms that do not treat all market participants equally could be preempted as not "competitively neutral" and as contrary to important Congressional and FCC goals.<sup>25</sup> Yet, one state determined to deny federal and state ETC designation to a competitor in order to minimize the size of its state fund.<sup>26</sup> Another state denied a request for state funding solely because it was made by a competitor.<sup>27</sup> Such standards do not provide equal treatment to all market participants.

Questions have also arisen about a state's ability to condition state funding on certain requirements that would otherwise be preempted by federal law. For example, some states have established "equal access to interexchange carriers" as a state supported service.<sup>28</sup> Although the FCC has made clear that such a requirement is not applicable to a CMRS provider,<sup>29</sup> that limitation may not always be fully understood.<sup>30</sup> Such requirements would effectively prohibit CMRS providers from state universal service programs.

States should therefore recognize and act on their obligation to establish explicit state universal service funding mechanisms consistent with federal law. State eligibility requirements and rules that would keep a CMRS provider from being a full participant in state universal service programs are contrary to federal law and the public interest.

## **E. Western Wireless' ETC Proceedings Have Been Burdensome and Lengthy**

Western Wireless' desire to provide competitive universal services to high-cost and qualified, low-income consumers has required that it undertake substantial burdens over extended periods of time. As shown in Table 1 above, its applications filed in 1998 were, in some cases, not finally decided by state commissions for over three years. The state commission proceedings in all cases involved contested evidentiary hearings, including discovery, direct and cross-examination of witnesses, documentary evidence, oral arguments and post-hearing briefs. Many of the commission decisions were also subject to judicial appeals. In no circumstance did a state commission proceed "willy-nilly" in its decision-making process, but rather zealously afforded due process rights to all parties. Some might even suggest certain state commissions went overboard with its proceedings.

Although the FCC's Rules and Orders were clear that a CMRS provider can meet the requirements for ETC designation, Western Wireless faced fierce opposition on nearly every point in numerous states. To demonstrate its designation would serve the public interest, Western Wireless retained an expert consultant who addressed on a company-by-company basis claims that competition could not be supported in areas served by RTCs. In all but one state, commissions found clear and real benefits of designating Western Wireless as an additional ETC, and have determined that RTC service areas are able to support competition.

The FCC has expressed concern over a process that would require competitive ETCs to face rigorous, protracted proceedings that were not required of incumbent carriers.<sup>31</sup> Nonetheless, this is precisely what has happened—incumbents generally were allowed to self-certify their compliance with the basic ETC criteria, while Western Wireless was forced to spend years and millions of dollars to obtain its designations. Western Wireless recognizes that commissions must fully and carefully consider every ETC application and address legitimate issues that are raised. However, to ensure fairness and the rapid expansion of competition into rural areas, state commissions should strive to complete their review of federal ETC petitions within six months of a filing. This time requirement would be similar to the time limits mandated for interconnection proceedings under Section 252 of the Act, and is consistent with the time limitation the FCC uses when it acts under Section 241(e)(6).

## **II. COMMISSIONS HAVE ENTHUSIASTICALLY SUPPORTED THE PUBLIC INTEREST BENEFITS OF DESIGNATING WESTERN WIRELESS AS A COMPETITIVE ETC IN RTC AREAS**

When Congress adopted Section 214(e) of the Act, it required that a commission designate an additional ETC in an area served by a RTC only upon a finding that the designation would serve the public interest. Although Congress did not establish a specific "public interest" test, commissions have developed a public interest analysis consistent with the Act. The analysis balances the consumer benefits of designation against any demonstration that consumers in RTC areas would be harmed by the presence of an additional ETC. In applying this standard, commissions have made clear that rural consumers are fully entitled to obtain the benefits resulting from competition, and that the designation of an additional ETC will provide those benefits. Together, these determinations represent a tremendous endorsement of even-handed competition in rural America.

### **A. The "Public Interest" Under the Act**

Congress did not establish a specific public interest test to be applied in ETC proceedings. As a result, the "public interest" must be analyzed consistent with the purposes and goals of the Act itself. The express objectives of the Act are to: "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>32</sup> The Act requires universal service policies to promote competition so that all consumers, including those in rural areas, have access to basic and advanced services comparable to those in urban areas.<sup>33</sup> The Act mandates that markets, not regulators, determine who will compete for and deliver universal services to customers.<sup>34</sup> Protection from competition is, therefore, "the antithesis of the Act."<sup>35</sup>

### **B. Early State Commission Decisions Recognized that the Purposes of the Act are Served by Designating Western Wireless as an ETC**

Western Wireless was the first CMRS provider to request "public interest" determinations under Section 214(e)(2). State commissions had to develop appropriate public interest factors where none existed in the Act or the FCC rules. The first state commission decisions struck an appropriate balance that considered the goals of the Act, benefits to consumers and potential detriments that some parties asserted would result from the designation of an additional ETC. The application of these standards to Western Wireless resulted in comprehensive findings that the public interest was indeed served by Western Wireless' designation as a competitive ETC.

The Minnesota commission was a pioneer in designating an additional ETC in areas served by RTCs.<sup>36</sup> The Minnesota commission acknowledged that Congress and the Minnesota Legislature were "deeply committed to opening local markets to competition," but that it was responsible under Section 214(e)(2) to determine on a case-by-case basis whether some RTC areas could not sustain or benefit from competition.<sup>37</sup> The commission first looked to whether Western Wireless' designation would benefit consumers in rural Minnesota, and determined that Western Wireless would bring reliability, high service quality, affordability, customer choice and new and innovative services.<sup>38</sup> These factors demonstrated consumer benefits and weighed in favor of granting the designation. In response, RTCs relied on general statements of economic theory to claim that none of the RTCs in the state could withstand the impact of competition. The commission found these generalized arguments were not persuasive, and that the RTCs had not presented a compelling reason why the commission should find such a large area of the state could not support competition.<sup>39</sup> To the contrary, the commission recognized that instead of hurting consumers in rural areas, "competition could perform its widely recognized function of motivating the incumbents to find and implement new operating efficiencies, lowering prices and offering better service in the process."<sup>40</sup> Ultimately, the commission found the evidentiary issue was "not close" and that designating Western Wireless' as an additional ETC served the public interest.<sup>41</sup> After one year and seven months of analysis and review, the Minnesota commission issued an order designating Western Wireless as an ETC.

Subsequent state commission decisions have also recognized the importance to consumers of bringing competitive universal service offerings to rural areas, and continued to

address RTC claims of adverse impacts. After nearly two years, the Kansas commission issued an order designating Western Wireless as an ETC in RTC areas and establishing how the public interest would be reviewed in other smaller RTC territories:

The clear and unmistakable public policy imperative from both the federal and state legislatures is that competition is a goal, even in rural areas. Arguments have been made that competition is not in the public interest in any rural telephone company service area because it may jeopardize universal service. However, there has been no basis presented for reaching the broad conclusion that competition and universal service are never able to exist together in rural areas. The Commission does not accept the assertion that designating additional ETCs in rural areas will necessarily threaten universal service. The benefits of competition and customer choice are available to Kansans living in non-rural areas. General concerns and speculation are not sufficient justification for adopting a policy that would result in benefits and services that are available to other Kansans not also being available to rural telephone customers. The Commission finds, as a general principle, that allowing additional ETCs to be designated in rural telephone company areas is in the public interest.<sup>42</sup>

Fourteen months later, and after taking further testimony, the Kansas commission found the RTCs had not demonstrated any adverse impacts, that competition should not be withheld from customers in those areas<sup>43</sup> and designated Western Wireless as a federal and state ETC.

The Texas commission followed, echoing the importance of competition in rural areas, and carefully evaluating the claims of adverse impact advanced by opposing RTCs. The Texas commission, after a four-day evidentiary hearing, designated Western Wireless as a federal and state ETC in 14 RTC study areas.<sup>44</sup> The Texas commission's public interest analysis was guided by both the "fundamental goal of preserving and advancing universal service,"<sup>45</sup> and the "strong statutory, regulatory, and public policy predilection in favor of facilitating the spread of technology and the fostering of competition by allowing new competitors into the marketplace."<sup>46</sup> The commission found that Western Wireless' designation would "bring a choice of providers to consumers in rural areas, many of whom are now served by a single provider."<sup>47</sup> This choice of providers was expected to provide consumers with a range of services and choices "driven by the market place, rather than the monopolistic needs of a single provider."<sup>48</sup> The commission further rejected claims that RTC areas could not support competition, and committed to addressing any adverse impacts through other means if that became necessary.<sup>49</sup>

Clearly, these early commission decisions recognized the substantial benefits of allowing Western Wireless provide competitive universal services in rural areas. The references to promoting competition were based on achieving a means to an end. These commissions also allayed fears that RTC areas could not sustain competition, and ultimately concluded that such fears could not justify denying rural consumers the benefits enjoyed in urban areas.<sup>50</sup>

### **C. The FCC's Designation of Western Wireless in Wyoming Confirmed the Proper Public Interest Analysis**

In December 2000, the FCC for the first time conducted a "public interest" analysis under Section 214(e)(6), resulting in the designation of Western Wireless as an additional ETC in certain RTC areas in Wyoming.<sup>51</sup> The FCC's analysis not only provided a model for FCC designations, it also gave further guidance to state commissions making public interest determinations under Section 214(e)(2).

The FCC's *Wyoming Order* recognized that the "public interest" under Section 214(e) involves the balancing of the benefits of competition against any demonstrated detriments to universal service. The FCC found Western Wireless' designation would provide consumer benefits consistent with the goals of the Act, including increased customer choice, innovative services, and new technologies.<sup>52</sup> The commission further found that rural consumers would benefit by the deployment of additional network facilities and the incentives placed on incumbents to improve their own networks and services.<sup>53</sup>

The FCC then addressed claims made by RTCs that their service areas were not capable of sustaining competition by additional providers. Like the early state commissions discussed above, the FCC flatly rejected "the general argument that rural areas are not capable of sustaining competition for universal service support."<sup>54</sup> Instead of presuming that competition would create incentives to reduce investment in infrastructure, raise rates, or reduce service quality, the FCC found competition was more likely to provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.<sup>55</sup> The FCC further recognized that while it was possible that an RTC service area may not be able to support competition, the record did not support such a finding in Wyoming.<sup>56</sup>

The analysis adopted in the FCC's *Wyoming Order* has been utilized successfully in subsequent ETC proceedings under Section 214(e)(6) of the Act.<sup>57</sup> It has also provided valuable guidance to state commissions that continue to consider petitions under Section 214(e)(2).<sup>58</sup> The public interest standard adopted in the FCC's *Wyoming Order*, and followed by many state commissions, provides benefits to rural consumers consistent with the goals and policies of the Act.

### **D. Recent State Commission Decisions Have Continued to Find that Consumers Will Benefit From Designating Western Wireless as an Additional ETC**

Building on the rulings in the "first wave" of ETC cases, including the FCC's *Wyoming Order*, subsequent state commissions have acted with greater confidence in designating Western Wireless as an additional ETC consistent with the public interest. In doing so, commissions have continued to vigilantly promote and protect the public interest by assisting in the development of competition that will provide benefits to consumers in rural service areas.

In South Dakota, the commission found that Western Wireless' services and service offerings would benefit consumers, and there was no evidence that the designation would affect the RTCs' ability to provide universal services to their customers.<sup>59</sup> Western Wireless was ultimately designated over three years after it filed its petition. Similarly the Nebraska

commission designated Western Wireless as an ETC after finding substantial consumer benefits and no detrimental impacts. As to consumer benefits, the commission "found credible evidence, unrefuted by the Independents, that the offerings of Western Wireless provided important and unique benefits to rural customers, including mobility, an expanded calling area and increased choice."<sup>60</sup> The commission also gave "careful consideration" to a report sponsored by the RTCs claiming competition would hurt rural consumers. The commission found the report to be based on unsupported assumptions by an author with an admitted "lack of expertise" on the subject.<sup>61</sup> The Nebraska commission, after two years and seven months, designated Western Wireless in order to bring benefits to rural consumers.

State commissions in Colorado and New Mexico also recognized the benefits of designating Western Wireless as an ETC. The Colorado commission determined that designating Western Wireless an ETC would bring consumer benefits, including "increased customer choice for basic telephone service, product, and service innovation by telecommunications carriers, and incentives for efficiency on the part of competing carriers."<sup>62</sup> Similarly, the New Mexico commission agreed with its Hearing Examiner that "designating Western Wireless is in the public interest because consumers will benefit from competitive service and new technologies in high cost rural areas."<sup>63</sup>

The clear theme from these decisions is that state commissions have carefully reviewed these issues in detail and ultimately determined their rural constituents are entitled to competition. The North Dakota commission may have said it most clearly:

The commission finds that designating Western as an additional ETC . . . will facilitate competition, will provide choices for consumers of universal services, and will promote deployment of new technologies in rural areas. We find that effective competition is the surest incentive for carriers to provide quality telecommunications services in the most efficient and cost effective manner. Competition will elicit action from ILECs in response to competitive pressures brought by the designation of an additional ETC in rural areas, and will bring other benefits such as competitive pricing, better service quality, and better customer service.<sup>64</sup>

Clearly, the FCC and state commissions should continue to implement Sections 214(e)(2) and 214(e)(6) so that rural consumers obtain the benefits of competition that have been recognized in nearly every case in which these issues have been considered.

#### **E. Courts Have Recognized that the Public Interest Must Be Used to Advance the Goals of the Act**

Courts have recognized that state commissions must apply the ETC public interest standard in a manner that advances the goals and principles of the Act. These court determinations validate state commission decisions that use the public interest standard as a way to bring more choices and services to consumers in rural areas.

Most recently, the Washington Supreme Court affirmed the Washington commission's designation of US Cellular as being in the public interest.<sup>65</sup> The court evaluated the public

interest in light of the "interrelated goals of fostering competition and advancing universal service."<sup>66</sup> The court held that the commission properly considered the facts, and affirmed the commission's decision that designating a competitive ETC advanced both competition and universal service.<sup>67</sup> Similarly, the Nebraska Supreme Court approved the Nebraska commission's determination that designating Western Wireless as an additional ETC advanced the public interest consistent with Section 214(e)(2).<sup>68</sup> The court affirmed the commission's public interest standard as consistent with the Act and FCC guidance,<sup>69</sup> and further agreed that the additional ETC designation would bring substantial consumer benefits to areas that could support additional ETCs.<sup>70</sup>

Courts have also stepped in when a state commission fails to evaluate the public interest consistent with the Act. For example, the North Dakota commission had initially decided that the public interest was not served by designating Western Wireless because the state had not yet implemented a state universal service fund to ensure "sufficient" funding of all ETCs. On appeal, a North Dakota District Court found it would frustrate the purposes of the Act to deny federal ETC funds to a competitor because of this state deficiency.<sup>71</sup> On remand, the North Dakota commission applied appropriate public interest factors and found clear and significant benefits would be provided to its constituents.

In sum, courts have affirmed that the Act's twin goals of promoting competition and advancing universal service are achieved through the designation of additional ETCs. As a result, more and more consumers are able to receive the benefits of competition in some of the most rural areas of the United States.

### **III. INCUMBENT CARRIERS ARE NOT HARMED BY THE DESIGNATION OF ADDITIONAL ETCs**

Incumbent carriers have often claimed that the designation of additional ETCs in rural areas put the incumbents and their consumers at risk. These claims have universally been rejected by state commissions and the FCC, and in practice, RTCs have proven to be resilient and fierce market competitors wholly capable of responding to competition by additional universal service providers.

Given the strong state and federal policy preferences for competitive markets in all areas of the nation—including rural areas—commissions have taken a measured approach to claims by RTCs that their service areas are unable to support competition. While it is important to ensure the continued delivery of basic universal service, it would be inappropriate to presume that significant areas of rural America are not entitled to competition. The FCC, as well as commissions in Minnesota, Kansas, Texas, North Dakota, Nebraska and elsewhere, have given RTCs the opportunity to prove, on a company-by-company basis, that consumers in RTC service areas must be shielded from competition. Without exception, commissions have found that additional ETC designations do not threaten the RTCs' continued provision of universal services.

RTCs opposing competitive ETC designation have often claimed that the entry of a competitive universal service provider will precipitate a "death spiral" of the incumbent carrier serving rural areas. Under this death spiral hypothesis, RTCs claim a competitor will take its customers, and that, without those lost revenues, it will have to raise local rates dramatically.

Raising rates, the theory goes, would cause further customer defections, and would ultimately leave the RTC with insufficient revenue to continue providing service at all. This "death spiral" claim has been consistently rejected. Commissions have instead recognized that RTCs will respond to competition by becoming more efficient, cutting costs, and marketing new and innovative services of their own to try to obtain and maintain customers.

For example, the Kansas commission gave the RTCs two separate chances to make an evidentiary record establishing the legitimacy of such concerns. The RTCs' evidence was not persuasive:

The RLECs assume that their operations are run at maximum efficiency and at cost. There is no proof in the record of either assumption. ... [The Commission] finds that the RLECs have not offered sufficient evidence that their rates would increase, or that their quality of service must necessarily decrease, because of the entry of Western into their service areas.<sup>72</sup>

The Kansas commission rejected the death spiral claim. Similarly, the North Dakota commission rejected RTCs' claims that their study areas could not support competition: "[T]he RTCG evidence does not show that any specific study area is unable to sustain competition from a wireless company as a result of that wireless company being granted ETC designation."<sup>73</sup> In rejecting the death spiral claim the commission noted that the record contained "basic financial information to show that the rural telephone companies are financially strong, with large cash reserves and significant investments in affiliated operations, despite declining populations in some areas of North Dakota."<sup>74</sup>

The Nebraska commission was similarly presented with a report theorizing that rural areas could not support competition.<sup>75</sup> The report concluded that most RTC areas "cannot effectively sustain the proposed competition without undermining necessary revenues to sustain current infrastructure investments."<sup>76</sup> The commission rejected that report because its conclusions were unreliable, and based "on the unproven presumption that competition in some counties of certain populations would harm the existing rural carriers."<sup>77</sup> In Texas, the RTCs' witness claimed that every dollar lost to a competitor would need to be recovered through increased local rates.<sup>78</sup> Western Wireless' witness pointed out flaws in this logic, including the utter failure to recognize operating efficiencies that RTCs could gain if market forces encouraged them to do so. One Texas RTC had incurred nearly a million dollars in corporate operations expenses and had only four employees.<sup>79</sup> Based on testimony such as this, the Texas Commission determined: "The evidence in this case does not prove that any affected area is unable to support more than one ETC."<sup>80</sup>

Commissions have thus soundly rejected the RTCs' "death spiral" allegations, and have instead determined that by allowing a new universal service provider into the market, universal service will be advanced through increased competition, better service quality, expanded networks and more services. In fact, Western Wireless' test-market experience in Regent, North Dakota provides concrete, experience-based evidence to show that RTCs can and will respond to competition in a way that advances, not harms, universal service. Western Wireless initiated a wireless local loop service offering as a market trial in Regent, North Dakota in January 1999. This offering included a local calling area larger than the incumbent's and was priced at \$14.99

per month. The citizens of Regent were receptive to the new services available from Western Wireless. In fact, some consumers found this offering was a way to obtain service in remote areas without incurring the substantial line extension costs charged by the incumbent. Ultimately, approximately half of Regent's 120 households subscribed.

More importantly, the incumbent in Regent responded to Western Wireless' offering, as one would expect in a competitive market, by offering enhancements to their age-old landline service offering. The incumbent offered customers a bundled local/long distance package that for an additional \$13.95 per month included an expanded local calling area, plus savings on monthly Internet service. This provision of more and better service options was a direct result of competition, with the winner being the consumers. Competitive pressures on both companies benefited all subscribers in Regent. Far from harming universal service, this competition advanced and preserved universal service and brought tangible benefits to those rural consumers.

Finally, the designation of a wireless ETC in RTC areas has no impact on the interconnection protections granted to RTCs under Section 251(f)(1)-(2) of the Act. Wireless ETCs operate their own networks, and are able to meet their ETC obligations without obtaining special interconnection arrangements or unbundling obligations from RTCs. These Section 251(f)(1)-(2) provisions, which have for the most part insulated RTCs from landline competition, are unaffected by the provision of universal services by wireless ETCs.

#### **IV. RURAL CONSUMERS BENEFIT BY THE PRESENCE OF COMPETITIVE ETCs**

It is essential that universal service funds continue to be used to support competitive providers in rural areas. Seven years after the Act, landline competition is all but nonexistent in areas served by RTCs. In addition, the rural telephone company exemptions on interconnection, access to beneficial transitional universal service funding and above-cost intrastate access charges have allowed RTCs to solidify their place as the predominant provider of local phone and data services in their markets. In many cases these RTCs also provide long distance, cable and wireless services. Given the market strength of these companies, a wireless provider represents the only significant chance to assure competitive telecommunications services are available in rural areas.

Wireless providers stand willing and able to provide competitive universal services in rural areas. If they are not given equal treatment in the ETC designation process, opportunities for meaningful competition will be lost. The result will be devastating to the rural consumers, who will be denied the Act's promise of having the same access to basic and advanced services as consumers in urban areas. Market-based competition cannot work unless all classes of carriers have the ability to obtain universal service funding when they succeed in obtaining the customer's business.

In the long term, only the funding of competitive ETCs will ensure that state-of-the art telecommunications networks are fully deployed in rural areas. Wireless technology continues to evolve, and the wireless networks of the future will be essential to deliver the full panoply of high-quality basic and advanced services in rural areas. These wireless networks are being built out today, and market forces guide carriers' decisions as to how and where to build those networks. A universal service policy that favors landline technology or incumbent carriers will

guarantee that rural consumers will be left behind as competitive providers seek to expand their networks.

State commissions have not been shy about exercising oversight over competitive universal service offerings. As an ETC in some states, Western Wireless files informational tariffs containing customer service agreements and makes E-911 compliance reports. Whereas non-ETC wireless carriers operate largely without state commission oversight, wireless ETCs are working with state commissions to implement universal service offerings consistent with the interests of the states. This growing partnership benefits the carrier, the commissions, and the consumers, and is yet another benefit of competitive universal service.

## ENDNOTES

1. This paper is authored by Mark Ayotte and Phil Schenkenberg, attorneys at the law firm of Briggs & Morgan. Mark Ayotte is a shareholder and a member of the Board of Directors in the firm of Briggs & Morgan and based in the Saint Paul office of the firm. Mark practices primarily in the areas of telecommunications, transportation and business litigation. Mark received his B.A. summa cum laude from St. Mary's University of Minnesota and his J.D. cum laude from the University of Minnesota Law School. Phil Schenkenberg is a shareholder at Briggs & Morgan and is also located in the firm's Saint Paul office. Phil's practice is primarily in the areas of telecommunications, transportation, bankruptcy, and business litigation. Phil received his B.A. cum laude, from Trinity University and his J.D. cum laude from the University of Minnesota Law School. Phil also received a Master's degree in Political Science from the University of Illinois and a Master's degree in Public Affairs from the University of Minnesota's Humphrey Institute.

2. Federal eligible telecommunications carrier status is governed by 47 U.S.C. § 214(e).

3. For example, US Cellular has been designated in Washington, Wisconsin, and Iowa.

4. For example, Mid-Rivers Telephone Cooperative's Montana CLEC interest has been granted ETC designation.

5. For example, Hawarden Municipal Utility has been designated in Iowa.

6. See Appendix HC07 to USAC's Q2 '03 universal service filing with the FCC, which can be viewed at: <http://www.universalservice.org/overview/filings/2003/Q2/>.

7. *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, Memorandum Opinion and Order, 13 FCC Rcd 22433 (Com. Car. Bur. 1998).

8. *Id.* at 22435, ¶ 6; see also *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (setting forth jurisdictional and other requirements that must be addressed by a carrier seeking ETC designation from the Commission).

9. *Federal-State Joint Board on Universal Service, Cellco Partnership d/b/a ell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

10. *Id.* at 43, ¶ 8.

11. *Id.* at 44, ¶ 10.

12. *Federal-State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 23532, 23538-39, ¶¶ 16-17 (Wireline Comp. Bur. 2002).

13. *Id.* at 23539, ¶ 19.

14. *Federal-State Joint Board on Universal Service, Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 24393 (Wireline Comp. Bur. 2002).

15. *Id.* at 23400, ¶ 19.

16. *Id.* at 23405-06, ¶ 32.

17. State commission designations are governed by Section 214(e)(2). When a state commission lacks jurisdiction, the FCC acts under Section 214(e)(6).

18. The nine supported services are: voice grade access to the public switched telephone network; local usage; dual tone multi-frequency signaling service or its functional equivalent; single-party service or its functional

ENDNOTES (continued)

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equivalent; access to emergency services; access to operator services; access to interexchange services; access to director assistance; and toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a)(1)-(9).

19. *See, e.g., In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket 96-45, FCC 00-248, ¶ 17 (rel. August 10, 2000).

20. *Texas Office of Public Utility Council v. FCC*, 183 F.3d 393, 417 (5th Cir. 1999).

21. *See In the Matter of Federal-State Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157, 78, 144, 147 (rel. May 8, 1997) ("*Universal Service Order*").

22. *See* 47 U.S.C. § 254(b)(5), (f).

23. *See Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1203-04 (10th Cir. 2001) (FCC must ensure federal-state partnership to implement sufficient and explicit universal service support).

24. 47 U.S.C. § 332(c)(3).

25. *In the Matter of Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Serv. Fund*, Memorandum Opinion and Order, File No. CWD 98-90, FCC 00-309, ¶¶ 8-11 (rel. Aug. 28, 2000).

26. *WWC Holding Co., Inc. v. Public Serv. Comm'n*, 44 P.3d 714, 719-20 (Utah 2002).

27. *In re Filing of WWC License LLC*, Nev. Pub. Utilities Comm'n Docket No. 01-6051, Order (Nov. 26, 2001).

28. *See e.g.* Nebraska Rules Title 291, Ch. 10, § 004.0245.

29. *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT-Docket No. 00-239, Memorandum Opinion and Order, FCC 02-164, ¶ 1 (rel. Aug. 2, 2002) (Kansas commission cannot impose equal access requirement on Western Wireless' universal service offering); *see* 47 U.S.C. § 332(c)(8).

30. *See also Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin*, Wisc. Pub. Serv. Comm'n Docket 8225-TI-102, Final Decision, p. 5 (Dec. 20, 2002) ("If US Cellular ever does apply for state USF money, then all of the state requirements for and obligations of ETC status [including equal access] shall again be applicable to US Cellular.")

31. *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket 96-45, FCC 00-248, ¶ 21 fn. 39 (rel. August 10, 2000).

32. *See* PubLaw 104-104, 110 Stat 56, preamble (1996) (emphasis added).

33. 47 U.S.C. § 254(b)(3).

34. *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608, 616 (5th Cir. 2000).

35. *Id.* at 621-22.

36. *In re Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Minn. Pub. Utilities Comm'n Docket No. P-5695/M-98-1285, Order Granting Preliminary Approval and Requiring Further Findings (Oct. 27, 1999).

37. *Id.* at 16.

38. *Id.*

39. *Id.* at 17.

ENDNOTES (continued)

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40. *Id.*
41. *Id.* at 16.
42. *In the Matter of GCC License Corporation*, Kansas Corp. Comm'n Docket No. 99-GCCZ-156-ETC, Order No. 10 (May 19, 2000).
43. *In the Matter of GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Kansas Corp. Comm'n Docket No. 99-GCCZ-156-ETC, Order on Petition of Western Wireless For Designation as an Eligible Telecommunications Carrier, p. 2 (Oct. 12, 2001).
44. *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, Texas Public Utilities Commission Docket Nos. 22289 and 22295, Order (Oct. 30, 2000) (substantially adopting ALJ's Proposal for Decision).
45. *Id.* at 26
46. *See id.* at 1 (incorporating Proposal for Decision. Quotation is from page 48 of the Proposal for Decision).
47. *Id.* at 19.
48. *Id.* at 19-20.
49. *Id.* at 20.
50. The Washington commission conducted a similar analysis in designating US Cellular as an ETC in RTC areas. *In the Matter of the Petition of United States Cellular Corp.*, Wash. Utils. And Transp. Comm'n Docket No. UT-970345, Third Supplemental Order Granting Petition for Designation as ETC (Jan. 2000). The Washington commission found that rural consumers would obtain benefits from the increased availability of wireless services, and ruled out RTC claims that universal service support would be eroded as being "overly speculative." *Id.* at 12-13.
51. *In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896 (rel. Dec. 26, 2000) ("*Wyoming Order*").
52. *Id.* ¶¶ 16-17.
53. *Id.*
54. *Id.* ¶ 22.
55. *Id.*
56. *Id.*
57. *See, e.g., Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 01-283 (rel. Oct. 5, 2001); *RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 02-3181 (rel. Nov. 27, 2002) ("*RCC Holdings Order*").
58. *See, e.g., In the Matter of the Petition of Midwest Wireless Comm., LLC*, Minn. Pub. Utilities Comm'n Docket No. PT-6153/AM-02-686, Order Granting Conditional Approval and Requiring Further Filings, p. 8 (March 19, 2003) (citing FCC analysis as applied in *RCC Holdings Order*).
59. *In the Matter of the Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, S.D. Pub. Utilities Comm'n Docket No. TC98-146, Findings of Fact and Conclusions of Law; Notice of Entry of Order, pp. 3-5 (Oct. 18, 2001).

ENDNOTES (continued)

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60. *In the Matter of the Application of GCC License Corporation Seeking Designation as an Eligible Telecommunications Carrier (ETC) that May Receive Universal Service Support*, Nebraska Public Service Commission Application No. C-1889, Order Denying Motion for Reconsideration, p. 5 (Feb. 21, 2001).
61. *Id.* at 4.
62. *In the Matter of Western Wireless Holding Co.*, Colorado Pub. Utilities Comm'n Docket No. 00K-255T, Decision on Exceptions, p. 17 (May 4, 2001).
63. *In the Matter of GCC License Corp. Petition for Designation as an ETC*, Final Order, New Mexico PRC Docket No. 98-484-TC (May 7, 2002) (Recommended Decision, p. 29).
64. *Western Wireless Corporation Designated Eligible Carrier Application*, ND Pub. Serv. Comm'n Case No. PU-1564-98-428, Order on Remand, p. 11 (Oct. 3, 2001).
65. *Washington Indep. Tel. Assoc. v. Washington Utils. & Transp. Comm'n*, 665 P.3d 319 (Wa. 2003).
66. *Id.* at 324.
67. *Id.*
68. *In re Application No. C-1889 of GCC License Corp. (Western Wireless)*, 647 N.W.2d 45, 54-55 (Neb. 2002).
69. *Id.* at 54.
70. *Id.* at 55.
71. *Western Wireless Corp. v. Rural Tel. Co. Group*, Civil No. 00-C-1800, Slip Op. (N.D. Dist. Ct. Nov. 9, 2000).
72. *In the Matter of GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Kansas Corp. Comm'n Docket No. 99-GCCZ-156-ETC, Order on Petition of Western Wireless For Designation as an Eligible Telecommunications Carrier, p. 18 (Oct. 12, 2001).
73. *Western Wireless Corporation Designated Eligible Carrier Application*, ND Pub. Serv. Comm'n Case No. PU-1564-98-428, Order on Remand, p. 14 (Oct. 3, 2001).
74. *Id.* at 13.
75. *In the Matter of the Application of GCC License Corporation Seeking Designation as an Eligible Telecommunications Carrier (ETC) that May Receive Universal Service Support*, Nebraska Public Service Commission Application No. C-1889, Order Denying Motion for Reconsideration (Feb. 21, 2001).
76. *Id.*, Hearing Exhibit 14.
77. *Id.* at 4.
78. Texas Public Utilities Commission Docket Nos. 22289 and 22295, July 25, 2000, Hearing Transcript, p. 344.
79. Texas Public Utilities Commission Docket Nos. 22289 and 22295, July 25, 2000, Prefiled Testimony of Joe Gillan, Ex. WWC-8, p. 21.
80. *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, Texas Public Utilities Commission Docket Nos. 22289 and 22295, Order, p. 20 (Oct. 30, 2000).