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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition of	)	
	)	
STATE INDEPENDENT ALLIANCE and	)	
INDEPENDENT TELECOMMUNICATIONS GROUP	)	
	)	WT Docket No. 00-239
For a declaratory ruling that the Basic Universal	)	
Service offering provided by Western Wireless in	)	
Kansas is subject to regulation as Local Exchange	)	
Service	)	

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Federal Communications Commission
Office of the Secretary

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

United States Cellular Corporation ("U.S. Cellular") urges the Commission to reconsider and rescind its reconsideration order by which it vacated the declaratory ruling in issued in *State Independent Alliance*, 17 FCC Rcd 14802 (2002) ("*BUS Order*").

The Commission vacated the *BUS Order* solely on the basis of the erroneous finding that the Basic Universal Service ("BUS") offered by Western Wireless Corporation ("WWC") in Kansas, which was the subject of the declaratory ruling in 2002, does not exist today. However, in 2005, U.S. Cellular acquired: (1) the wireless network infrastructure used to provide BUS; (2) WWC's BUS customers; and (3) WWC's BUS wireless devices. It continues to provide BUS to customers in Kansas using the same wireless infrastructure originally installed by WWC. Because there has been no change in the material facts, there was no good cause to vacate the *BUS Order*.

In their original petition for declaratory ruling, the State Independent Alliance and Independent Telecommunications Group (the "Independents") claimed that they would "be harmed in their ability to continue providing high quality service at reasonable rates if they are forced to compete with a close substitute service which is not subject to comparable regulation." The Independents face the identical competitive harm today. They are competing with the very same "close substitute service" provided by U.S. Cellular "which is not subject to comparable regulation." That alleged competitive harm is still redressable if the Commission issues the declaratory ruling sought by the Independents: that the BUS offering is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it regulations and universal service requirements that are generally applicable to LEC services. Thus, the case is clearly not moot.

The *BUS Order* was the only declaratory ruling the Commission issued that determined whether a particular fixed wireless service was CMRS. Therefore, the decision stood as the lone precedent on important issues involving the regulatory treatment afforded fixed wireless services provided over CMRS spectrum. The *BUS Order* also included at least five significant rulings that clarified the boundary of state authority to impose universal service regulations on CMRS providers.

Vacatur is so closely associated with a merits decision that the Commission's action vacating the *BUS Order* will viewed and cited as a repudiation of the substance of the declaratory ruling and a disavowal of the legal standards the Commission adopted. Declaring the matter moot and vacating the *BUS Order* suggests a change in the Commission's position and serves only to create uncertainty and foment controversy. The far better course would be to reinstate the *BUS Order* and the petition for reconsideration and to dispose of the latter on its merits.

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To: The Commission

PETITION FOR RECONSIDERATION

United States Cellular Corporation ("U.S. Cellular"), by its attorneys and pursuant to § 405(a) of the Communications Act of 1934, as amended ("Act"), and § 1.106(b)(1) of the Commission's Rules, hereby petitions the Commission to reconsider and rescind its Order on Reconsideration, FCC 07-116 (June 26, 2007) ("Order") by which it vacated its prior Memorandum Opinion and Order, FCC 02-164 (Aug. 2, 2002) in this proceeding. *See State Independent Alliance*, 17 FCC Rcd 14802 (2002) ("*BUS Order*").

BACKGROUND

The Kansas Corporation Commission ("KCC") designated Western Wireless Corporation ("WWC") as an Eligible Telecommunications Carrier ("ETC") in six Rural Service Areas ("RSAs").[1] WWC's Basic Universal Service ("BUS") offering in Kansas was marketed as a wireless local loop service or a "Wireless Residential Service" and described as a substitute for local exchange service designed to compete with traditional local exchange service. The service

[1] WWC was the licensee of cellular systems in the following RSAs: Kansas 3-Jewell (CMA430); Kansas 4-Marshall (CMA431); Kansas 8-Ellsworth (CMA435); Kansas 9-Morris (CMA436); Kansas 10-Franklin (CMA437); and Kansas 14-Reno (CMA441). *See WWC and ALLTEL Corp.*, 20 FCC Rcd 13053, 13112-13 (2005).

had a fixed wireless component: a BUS subscriber received service through a Telular terminal, which is a laptop-sized wireless access unit that provides a dial tone and connects to a conventional telephone. *See BUS Order*, 17 FCC Rcd at 14807.

In November 2000, the State Independent Alliance and Independent Telecommunications Group (the "Independents") filed a petition for a declaratory ruling by the Commission that WWC's BUS is not a Commercial Mobile Radio Service ("CMRS") and, therefore, the KCC was not preempted from imposing Universal Service Fund ("USF") requirements applicable to wireline local exchange carriers ("LECs") on WWC's BUS. In seeking a declaratory ruling, the Independents were adhering to a procedure adopted by the Commission under which any party requiring a determination as to whether a fixed wireless service should be treated as CMRS was to petition the Commission for a declaratory ruling on the issue. *See Amendment of the Commission's Rules to Permit Flexible CMRS Service Offerings*, 15 FCC Rcd 14680, 14683 (2000) ("*Second CMRS Flex Order*").

The Commission issued its *BUS Order* denying the Independents' petition in August 2002. It declared that WWC's BUS was properly classified as CMRS for two "independently sufficient reasons." *BUS Order*, 17 FCC Rcd at 14809. First, the Commission determined that the service met the definition of "mobile" under §§ 153 and 332(d)(1) of the Act and § 20.3 of the Rules. *See id.* at 14810-17. Second, the Commission found that the BUS was ancillary, auxiliary, or incidental to WWC's provision of traditional cellular service. *See id.* at 14817-18.

In September 2002, the Independents petitioned the Commission to reconsider and clarify the *BUS Order*. The United States Telecom Association ("USTA") subsequently petitioned the D.C. Circuit to review the *BUS Order*. *See USTA v. FCC*, No. 02-1301 (D.C. Cir. filed Oct. 1, 2002). A panel of that court issued an order in December 2002 to hold the *USTA* case in

abeyance pending the Commission's disposition of the Independents' petition for reconsideration. Neither the Commission nor the court stayed the effectiveness of the *BUS Order*.

While the matter was pending before the Commission and held in abeyance before the D.C. Circuit, the Commission approved the merger of WWC and Alltel Corporation ("Alltel"). As a condition of its approval of the merger, the Commission required Alltel to divest certain WWC operating units, including the Kansas systems through which WWC provided BUS. *See WWC*, 20 FCC Rcd at 13112-13. *See also supra* note 1. Alltel complied with the divestiture requirement in part by selling its cellular assets in the six Kansas RSAs to U.S. Cellular.

The sale to U.S. Cellular was consummated on December 19, 2005.[2] U.S. Cellular acquired: (1) the wireless network infrastructure used to provide BUS; (2) WWC's BUS customers; and (3) WWC's BUS wireless devices.[3] It continues to provide BUS to customers in Kansas using the same wireless infrastructure originally installed by WWC.

Finding that WWC no longer offers or provides its BUS in Kansas, the Commission decided that it would be appropriate to vacate its *BUS Order* and to dismiss the Independents' petition for reconsideration as moot. *See* Order, FCC 07-116, at 3. It concluded that its findings in the *BUS Order* were moot because the Kansas BUS offering "no longer exists." *Id.*

STANDING

To establish administrative standing to seek reconsideration, a nonparty must: (1) state how its interests are adversely affected by the action taken; and (2) show good reason why it was not possible to participate earlier in the proceeding. *See* 47 C.F.R. § 1.106(b)(1). With regard to

[2] *See* Letter from Michele C. Farquhar to Marlene H. Dortch, WT Docket No. 00-239, at 1 (Jan. 31, 2007).

[3] *See id.* at 1-2.

the second prerequisite for standing, U.S. Cellular first acquired an interest in the matter three years after the *BUS Order* was released, when it relied in part on the effectiveness of the Commission's declaratory ruling to go forward with the acquisition of WWC's BUS operations in Kansas. The *BUS Order* provided some comfort to U.S. Cellular that it would not be regulated as a LEC simply by virtue of stepping into WWC's shoes and offering its BUS in Kansas. However, prior to stepping into WWC's shoes in December 2005, U.S. Cellular had no interest in the reconsideration of the *BUS Order* and no reason to participate in this proceeding.

To judge whether U.S. Cellular's interest in the *BUS Order* is cognizable for the purpose of establishing the first element of standing, the Commission must bear in mind that the relief U.S. Cellular seeks is the rescission of the vacatur of the *BUS Order*. In effect, U.S. Cellular is asking the Commission to reinstate the declaratory ruling that it issued in August 2002. Since it seeks the reinstatement of a declaratory ruling, U.S. Cellular's standing should be determined under the standard applicable to a party that asks for such a ruling.

Section 5(e) of the Administrative Procedure Act ("APA") provides that a federal administrative agency, such as the Commission, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). The Commission issued its declaratory ruling in this case pursuant to § 1.2 of its Rules, which mirrors the APA by providing that the Commission may "on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. Because there are no statutory or regulatory standing requirements applicable in the declaratory ruling context, *see Omnipoint Communications, Inc.*, 11 FCC Rcd 10785, 10788 (1996), the Commission adjudicates petitions for declaratory rulings when the requirements of standing "are not strictly met." *American Communications Services, Inc.*, 14 FCC Rcd 21579, 21589 (1999). In this case,

U.S. Cellular has a particularlized interest in the *BUS Order* sufficient to make it an appropriate party to seek the reinstatement of the Commission's declaratory ruling.

As a direct result of the Commission's *WWC* divestiture order and its approval of U.S. Cellular's acquisition of the WWC operating units in Kansas that provided its BUS, U.S. Cellular effectively became a real party in interest to the Commission's reconsideration of the *BUS Order*. U.S. Cellular became the ETC that provides the very same BUS in Kansas that the Commission found to be CMRS in the *BUS Order*. Because the *BUS Order* was entirely favorable to U.S. Cellular, the vacatur of the Commission's ruling was immediately unfavorable to U.S. Cellular.[4]

Vacatur of that *BUS Order* had a direct and adverse affect on U.S. Cellular's economic interests by depriving it of the protections afforded by the Commission's finding that the BUS is CMRS, and therefore protected by the explicit preemption of state regulation under § 332(c)(3) of the Act. *See* 17 FCC Rcd at 14809-10. The Commission's action nullifies its declaratory ruling that the KCC cannot "regulate BUS rates and entry or impose equal access requirements on BUS." *BUS Order*, 17 FCC Rcd at 14810. That in turn reinstates uncertainty and leaves U.S. Cellular exposed to increased regulation at the renewed insistence of the Independents.

The Independents have not abandoned or disavowed their quest for a declaratory ruling that the BUS offering in Kansas is not CMRS and that KCC regulation of the service is not preempted by § 332(c)(3) of the Act. Unless the vacatur is vacated, U.S. Cellular — and the Commission — will face the likelihood that it will be forced to expend substantial effort and resources relitigating the issues that were decided in the *BUS Order*. That economic injury is sufficiently likely to confer standing on U.S. Cellular to seek the reinstatement of the

[4] The injury that U.S. Cellular stands to suffer does not arise merely from the precedential effect of the Commission's vacatur. The particular activity adjudicated in this proceeding and addressed in the *BUS Order* is the very same service provided by U.S. Cellular.

Commission's declaratory ruling. *See American Communications*, 14 FCC Rcd at 21590.

ARGUMENT

I. VACATUR OF THE *BUS ORDER* WAS BASED ON AN ERRONEOUS FINDING OF FACT

The Commission presumes that its orders should remain intact and holds otherwise only upon "an exceptional demonstration of good cause." *International Settlement Policy Reform: International Settlement Rates*, 20 FCC Rcd 14106, 14110 (2005); *Starpower Communications, LLC*, 19 FCC Rcd 7592, 7594 (2004). Even in cases settled by the parties, the Commission will deny a request to vacate an order "unless the parties meet the significant burden of demonstrating some special circumstances beyond the mere fact that the case has been settled." *International Settlement*, 20 FCC Rcd at 14110; *Starpower*, 19 FCC Rcd at 7594. No special circumstances have been shown to exist in this case, and the Commission's implicit finding of good cause was based on a clearly erroneous finding of fact.

Despite being notified that the BUS equipment and customer base had been sold to U.S. Cellular, the Commission found that that "the WWC Kansas BUS offering that [it] considered in its *BUS Order* no longer exists." Order, FCC 07-116, at 3. Seeing that the "essential facts" considered in the *BUS Order* no longer existed, the Commission concluded that both its findings in the *BUS Order* and the petition for reconsideration were rendered moot. *Id.*[5] However, the only change in circumstances is that the Kansas BUS offering that the Commission considered in August 2002 is being provided by U.S. Cellular today. That change is entirely immaterial.

One of the two independently sufficient reasons for the Commission's decision in the *BUS Order* was that the BUS terminal equipment met the statutory definition of a "mobile

[5]That constituted the Commission's statutorily-required "concise statement of the reasons" for vacating the *BUS Order* and dismissing the Independents' petition. *See* 47 U.S.C. § 405(a).

station." *See BUS Order*, 17 FCC Rcd at 14811-14. Neither the terminal equipment not the statutory definition has changed. The equipment meets the definition when provided by U.S. Cellular just as it did when provided by WWC. There being no change in the essential facts, there was no cause to vacate the *BUS Order*.

II. THE PETITIONS FOR A DECLARATORY RULING AND FOR RECONSIDERATION ARE NOT MOOT

The doctrine of mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonians for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). However, as the Supreme Court recognized in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), there is a distinction between standing and mootness:

> Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died.... But the argument surely highlights an important difference between the two doctrines.[6]

The Commission did not deem the findings in the *BUS Order* moot because there had been a settlement. Nor did it find that events had transpired such that the Independents no longer have standing to pursue the declaratory ruling. In fact, the Independents' interest in the matter that existed at the commencement of this proceeding apparently continues.

In their petition for declaratory ruling, the Independents claimed that they "will be

[6] *Friends of the Earth*, 528 U.S. at 191-92 (footnote omitted).

harmed in their ability to continue providing high quality service at reasonable rates if they are forced to compete with a close substitute service which is not subject to comparable regulation."[7] The Independents face the same competitive harm today. They are competing with the very same "close substitute service" provided by U.S. Cellular "which is not subject to comparable regulation."

The competitive harm that the Independents' allegedly suffer is still redressable by a Commission declaratory ruling that the "BUS offering is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it regulations and USF requirements that are generally applicable to [LEC] services."[8] No events have transpired over the past seven years that render this adjudication "a matter of purely historical interest, with no present real-world consequences." *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985). A Commission decision on reconsideration will affect the rights of the Independents so the case is clearly not moot.

The record in this proceeding currently includes 98 filings. Several parties and the Commission have expended substantial effort to remove uncertainty specifically as to whether the Kansas BUS is a CMRS offering and generally as to the proper regulatory treatment of fixed wireless services. The Commission's decision to vacate the *BUS Order* will serve only to reinstate the uncertainty that the declaratory ruling attempted to remove. Moreover, it will disserve the public interest to abandon the effort to resolve the issues with certainty after it has "consumed substantial Commission and carrier resources." *The Western Union Telegraph Co.*, 1 FCC Rcd 820, 839 (1986). So long as material uncertainty continues on the issues the matter cannot be treated as moot.

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[7] Petition for Declaratory Ruling, Docket No. WT 00-239, at 4-5 (Nov. 3, 2000).

[8] *Id.* at 5.

III. VACATUR FOR MOOTNESS WILL ENGENDER DISPUTES AND DISSERVE THE PUBLIC INTEREST SERVED BY STARE DECISIS

When contemplating vacatur, the Commission also considers: (1) whether vacatur will eliminate numerous other substantial disputes; and (2) the "public interest in maintaining any precedential effect of the order in question." *International Settlement*, 20 FCC Rcd at 14112; *Starpower*, 19 FCC Rcd at 7594. In the case of the *BUS Order*, vacatur will foment litigation by rescinding the lone precedent on a contentious issue.

A. Vacatur Will Leave The Industry And State Agencies Without Any Guidance As To The Regulatory Treatment Of Fixed Wireless Services

The likelihood of litigation becomes clear when the *BUS Order* is placed in the context of the controversy over the regulatory classification of fixed wireless services provided on a "co-primary" basis with conventional cellular services under § 22.901(a) of the Rules. *See* 47 C.F.R. § 20.901(a). That controversy began in 1996 when the Commission attempted to remove the uncertainty that existed with regard to the provision of fixed services over CMRS spectrum. "Rather than continuing to define allowable fixed services in terms of whether they are 'ancillary,' 'auxilliary,' or 'incidental' to mobile services," the Commission decided to amend the Rules to "more broadly allow fixed services to be provided on a co-primary basis with mobile services." *Amendment of the Commission's Rules to Permit Flexible CMRS Service Offerings*, 11 FCC Rcd 8965, 8973 (1996). Thus, CMRS providers "could choose to provide exclusively fixed services, exclusively mobile services, or any combination of the two." *Id.* at 8977.

The Commission subsequently clarified the relationship between "incidental services" provided under former § 22.323 of the Rules and "co-primary fixed services" offered under § 22.901. *Second CMRS Flex Order*, 15 FCC Rcd at 14685. It explained that CMRS licensees

that provided fixed services on a co-primary basis were not subject to § 22.323, *see id.*, which only applied when CMRS licensees provided "other communications services incidental to the primary mobile service." *Second CMRS Flex Order*, 15 FCC Rcd at 14684. The Commission decided that the evolving nature of wireless services made it inappropriate to establish a "bright-line test" to determine whether a fixed service provided on a co-primary basis is a CMRS. *Id.* at 14683. Instead, it chose to take a "case-by-case approach to determine whether any particular service offering is CMRS." *Id.* It invited parties to file petitions for declaratory rulings if they needed a determination of whether a particular fixed wireless service is CMRS. *See id.*

The *BUS Order* was the only declaratory ruling the Commission issued that determined whether a particular fixed wireless service was CMRS. Therefore, the decision stood as the lone precedent on important regulatory issues involving fixed services.

First, the *BUS Order* contained the Commission's only explicit interpretation of the statutory definition of mobile service. *See* 17 FCC Rcd at 14813. It construed the statutory definition to have "two prongs: (1) it is capable of being moved: and (2) it ordinarily does move." *Id.* at 14811. And the Commission articulated the standard applicable to the second prong: "the test is met if mobile operation is an inherent part of the service offering that is reasonably likely and not extraordinary or aberrational use of the equipment." *Id.* at 14813. Thus, the Commission made it clear that the definition of mobility does not depend "on how most customers actually use a piece of equipment or service." *Id.* at 14814.

The *BUS Order* represented that only instance when the Commission applied the "incidental service" criteria set forth in § 22.323 of the Rules to classify a service as CMRS for regulatory purposes. *See id.* at 14817-18. Just a month after the *BUS Order* was released, the Commission eliminated § 22.323 in its entirety. *See Year 2000 Biennial Regulatory Review* —

Amendment of Part 22 of the Rules to Modify or Eliminate Outdated Rules Affect Cellular Service and other CMRS, 17 FCC Rcd 18401, 18435 (2002). However, the Commission stressed that the elimination of § 22.323 "in no way diminishes or otherwise alters either the right of Part 22 licensees to provided incidental service or the regulatory treatment of those service as CMRS." *Id.* With the elimination of § 22.323, the *BUS Order* became the sole authority on the incidental nature of fixed wireless services.

Vacatur of the *BUS Order* will leave the industry and state agencies without guidance as to the regulatory classification of fixed wireless service. No matter how the Commission explains its action, the vacatur will be considered a Commission disavowal of both the substantive holdings of, and the legal standards articulated in, the *BUS Order*. It will mark a return to the uncertainty that existed in 1996. That uncertainty will affect cases pending before state agencies and undoubtedly spawn new disputes.[9] More importantly, vacatur will leave the Independents without the declaratory ruling they sought seven years ago and subject U.S. Cellular to litigation over whether its BUS is properly classified as CMRS.

U.S. Cellular submits that there appears to no reason to vacate the *BUS Order* that would justify eliminating that precedent. Furthermore, the action appears to renege on the promise that the Commission made in its *Second CMRS Flex Order* that it would clarify on a case-by-case basis what fixed CMRS services can be provided on a co-primary basis. Finally, it would be wasteful to abandon the case as moot after it has been litigated for nearly seven years. *See Western Union*, 1 FCC Rcd at 839.

[9] For example, the *BUS Order* is currently at the center of a dispute in the arbitration of an interconnection agreement by the Public Utilities Commission of Guam in Docket No. 07-5. Both the incumbent LEC and the requesting wireless carrier have cited the *BUS Order* on the issue of whether the interconnection agreement can restrict the provision of a fixed service by the CMRS provider.

B. The *BUS Order* Constitutes A Significant Precedent On The Limits Of State Regulatory Authority Over CMRS

The *BUS Order* contained at least five significant rulings that clarified the boundary of state authority to impose universal service regulations on CMRS providers. The Commission held that:

(1) A wireless carrier can be designated by a state or the Commission as an ETC whether it provides a fixed or mobile universal service offering if it complies with the requirements for designation as an ETC;[10]

(2) Although ETC status is a prerequisite to the receipt of universal service funding, it is not relevant to whether a service is CMRS or LEC service for regulatory purposes;[11]

(3) The KCC is precluded and preempted from imposing rate and entry regulation on the BUS, because it is regulated pursuant to federal law as a CMRS offering;[12]

(4) CMRS providers are not subject to federal or state regulation as a LEC regardless of whether they provide a substitute for local exchange service;[13] and,

(5) States are precluded from requiring CMRS providers to provide equal access to common carriers for the provision of telephone toll services.[14]

The decision whether to vacate depends in large part on "the seriousness of the order's deficiencies." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Vacatur is so closely associated with a merits decision that the Commission's action vacating the *BUS Order* will be viewed and cited as a repudiation of the substance of the

[10] *See BUS Order*, 17 FCC Rcd at 14816.

[11] *See id.* at 14818.

[12] *See id.* at 14818.

[13] *See id.* at 14803, 14820.

[14] *See id.* at 14819.

rulings on the preemption and USF issues.

If it stands by its declaratory ruling in all respects, the Commission should reinstate the *BUS Order*, reinstate and deny the Independents' petition for reconsideration, and defend its ruling before the D.C. Circuit. On the other hand, if it is reversing course on the USF issues, the Commission must issue an order overturning its prior rulings and providing an analysis indicating that its standards are being changed and not ignored. *See, e.g., Western Union*, 1 FCC Rcd at 835. Declaring the matter moot and vacating the *BUS Order* suggests a change in the Commission's position and serves only to create uncertainty and foment controversy. The far better course would be to reinstate the *BUS Order* and the petition for reconsideration and to dispose of the latter on its merits.

For all the foregoing reasons, U.S. Cellular respectfully requests the Commission to reconsider and rescind its Order and to issue a decision on the Independents' petition for reconsideration of the *BUS Order*.

Respectfully submitted,

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July 26, 2007

CERTIFICATE OF SERVICE

I, Tate Lukas, of the law firm Lukas, Nace, Gutierrez and Sachs, do hereby certify that on this 26th day of July 26, 2007, I caused copies of the Petition for Reconsideration to be mailed first-class, postage prepaid the following:

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