

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)

To: The Commission

**REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

United States Cellular Corporation (“U.S. Cellular”), by its attorneys and pursuant to § 1.106(h) of the Commission’s Rules (“Rules”), hereby replies to the opposition filed by the State Independent Alliance and the Independent Telecommunications Group (“Independents”) with respect to U.S. Cellular’s petition for reconsideration of the Commission’s 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*”).

The Independents do not challenge U.S. Cellular’s standing to seek reconsideration of the Order. *See* Opposition to Petition for Reconsideration, at 1-2 (“Opp.”). Nevertheless, they address several factual matters that touch on the issue of standing. We will do the same.

The Independents speculate that U.S. Cellular “may” have: (1) been aware of

the letter by which Alltel Communications, Inc. (“Alltel”) notified the Commission that it no longer offered its predecessor’s so-called Basic Universal Service (“BUS”); and (2) had a duty to notify the Commission that it continued to offer the service. *See Opp.*, at 2. In fact, U.S. Cellular was not served with a copy of Alltel’s letter and was not otherwise aware of its filing with the Commission. U.S. Cellular first learned of the letter after it was cited in the Order.

U.S. Cellular’s records indicate that the matter of the BUS offering was brought to its attention by Alltel two days before its letter was submitted to the Commission. Alltel informally gave U.S. Cellular a “heads-up” to expect a call from the Commission’s staff inquiring as to whether the BUS was still being offered. As far as it can tell, U.S. Cellular received no such inquiry from the staff. Assuming that it would be contacted by the staff if information about the service had decisional significance, U.S. put the matter aside.

Even if it was aware of the significance of its BUS offering, U.S. Cellular was under no legal obligation to come forward to address the matter. U.S. Cellular would have been obliged to do so if this proceeding involved a pending application and it was the applicant. *See* 47 C.F.R. § 1.65(a). However, this proceeding was for a declaratory ruling on an issue that did not involve a pending application and U.S. Cellular was not a party to the proceeding. No duty to notify the Commission can be placed on U.S. Cellular considering that parties to a “declaratory ruling proceeding” are exempt from the obligation placed on parties to investigatory and adjudicatory proceedings to ensure that all material information is included in the

record. *See id.* § 1.17(a).

The fact of the matter is that U.S. Cellular was not aware of the significance of its BUS offering in this proceeding (or in the appeal before the D.C. Circuit). Since the staff found it unnecessary to inquire as to the service, U.S. Cellular cannot be faulted for not seeing the necessity of bringing the matter to the staff's attention.

Contrary to the Independents' claim, *see* Opp. at 2-3, U.S. Cellular directly addressed the Commission's rationale for the vacatur of the *BUS Order*. The Commission's decision rested on the finding that the "Kansas BUS offering that the Commission considered in its *BUS Order* no longer exists." Order, at 3. U.S. Cellular directly addressed that finding by representing that the Kansas BUS offering (that was examined in the *BUS Order*) still exists. *See* Petition for Reconsideration, at 3, 6-7 ("Pet."). Therefore, the Commission's rationale was in error.

The Independents' main argument is that U.S. Cellular failed to show that the vacatur of the *BUS Order* will have "any actual material effect" based on the current number of BUS subscribers. Opp., at 3. The force of that argument is negated by the Independents' failure to contest U.S. Cellular's standing. For as U.S. Cellular established, the doctrines of standing and mootness are substantially the same. *See* Pet., at 7-8. The standing doctrine requires a litigant to show that there is a "live controversy" at the time the litigation commences; the mootness doctrine ensures that that there is a live controversy "through all stages of the

controversy.” *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003).

To have Article III standing, a party must have suffered “injury in fact,” which is an invasion of a legally protected interest that is (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The law of standing does not require a party to show that its injury in fact will have a “material” or substantial adverse effect. It follows that the mootness doctrine does not require that the party show that the injury in fact will have a “material effect” throughout the litigation.

The Independents did not challenge U.S. Cellular’s allegation that the vacatur of the *BUS Order* will cause it economic injury by leaving it “exposed to increased regulation” and facing the likelihood of having to “expend substantial effort and resources relitigating the issues that were decided in the *BUS Order*.” Pet., at 5. The Independents also did not take the opportunity to moot the case by disavowing their quest to have the Kansas BUS offering subjected to increased state regulation, thereby ensuring that U.S. Cellular will incur no expenses establishing its service as CMRS. Because U.S. Cellular still faces the same economic injury-in-fact that established its standing, the controversy remains live for the purposes of the mootness doctrine.

It is noteworthy that the Commission considered the “minimal number” of BUS subscribers in 2002 as relevant to the issue of whether the BUS offering could be considered an “ancillary, auxiliary, or incidental” service under former § 22.323

of the Rules. *BUS Order*, 17 FCC Rcd at 14818. However, the Commission subsequently 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). Consequently, it is questionable whether the number of U.S. Cellular’s BUS subscribers will be a material consideration now – five years after the Commission eliminated § 22.323. However, it is absolutely clear that the level of U.S. Cellular’s BUS subscribership will have no decisional significance in the Commission’s reconsideration of its *BUS Order*.

The number of subscribers had no bearing on the Commission prior determination that the BUS offering meets the statutory definition of a mobile service. *See BUS Order*, 17 FCC Rcd at 14810-17. That determination alone was sufficient reason for the Commission to conclude that the BUS offering was properly classified as CMRS. *See id.* The fact that there is still only a “minimal number” of subscribers to the BUS offering is immaterial to whether the service meets the statutory definition of a mobile service. That issue remains a “live controversy.”

Finally, the Independents correctly note that U.S. Cellular is bound to the “factual claims and legal arguments made by Western Wireless.” *Opp.*, at 2. That being the case, there is no need for U.S. Cellular to respond to the Independents’ arguments on the merits of their 2002 petition for reconsideration. *See id.* at 4-6. In any event, U.S. Cellular did not put the merits of that petition at issue.

For all the foregoing reasons, the Commission must rescind its Order and

issue a decision on the Independents' petition for reconsideration of the *BUS Order*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Russell D. Lukas, of the law firm Lukas, Nace, Gutierrez and Sachs, do hereby certify that on this 13th day of August 2007, I emailed a copy of the foregoing Reply to Opposition to Petition for Reconsideration to the following:

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