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Before the
Federal Communications Commission
Washington, D.C. 20554

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
	)	(Terminated)
Petition of U.S. Cellular Corporation For Reconsideration of the Order on Reconsideration	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 2010 **Released: January 26, 2010**

By the Commission:

I. INTRODUCTION

1. This proceeding raised the question of whether the Basic Universal Service (BUS) offering formerly provided by Western Wireless Corporation (Western Wireless) in Kansas was properly classified as a Commercial Mobile Radio Service (CMRS). In this order, we affirm the Commission's 2007 decision that this question became moot after the BUS assets were sold to another provider and the BUS service, as offered by Western Wireless, was no longer being provided.

2. In its 2002 *Memorandum Opinion and Order* (*BUS Order*),[1] the Commission had held, based on a detailed analysis of Western Wireless's BUS offering in Kansas, that the offering was a CMRS offering. In the 2007 *Order on Reconsideration*,[2] the Commission vacated the *BUS Order* because facts that were essential to the decision no longer existed following the merger of Western Wireless and Alltel Corporation and the subsequent divestiture of the BUS assets to U.S. Cellular Corporation (U.S. Cellular). U.S. Cellular petitioned for reconsideration of this decision.[3] Because the Commission's holdings were

[1] 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*, 17 FCC Rcd 14802 (2002) (*BUS Order*).

[2] 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, Petition for Reconsideration and Clarification, WT Docket No. 00-239, *Order on Reconsideration*, 22 FCC Rcd 12015 (June 26, 2007) (*Order on Reconsideration*).

[3] 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, Petition for Reconsideration of the *Order on Reconsideration*, filed July 26, 2007 (U.S. Cellular Petition).

fact-specific and essential facts on which the Commission relied no longer exist, we deny U.S. Cellular's petition for reconsideration of the *Order on Reconsideration*.

II. BACKGROUND

3. *BUS Order*. In response to a petition for declaratory ruling jointly filed by the State Independent Alliance and the Independent Telecommunications Group (the Independents),[4] the Commission clarified in the 2002 *BUS Order* that Western Wireless's BUS offering in Kansas was a CMRS offering. In the *BUS Order*, the Commission explained that Western Wireless's specific BUS offering was properly classified as CMRS because it met the definition of "mobile" service under both the Communications Act and the Commission's rules and because it was ancillary, auxiliary, or incidental to Western Wireless's provision of traditional cellular service in Kansas.[5] The Commission emphasized that its holding was "a narrow one based on the particular facts in the record."[6]

4. *Independents' Petition for Reconsideration*. The Independents filed in 2002 a petition seeking reconsideration and clarification of the *BUS Order*.[7] The Independents' petition sought reversal of the conclusion in the *BUS Order* that BUS is a CMRS offering because the service is mobile. The Independents also sought reversal of the Commission's conclusion that the BUS offering is ancillary, auxiliary, or incidental to CMRS.[8]

5. *Order on Reconsideration*. On June 26, 2007, based on new developments following the merger of Western Wireless and Alltel Corporation (Alltel),[9] the Commission dismissed as moot the Independents' petition and vacated the *BUS Order*.[10] In its *Order on Reconsideration*, the Commission determined that the case became moot when Alltel, as a condition of its acquisition of Western Wireless, sold Western Wireless's BUS service, infrastructure, equipment, and customers that were the subject of

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[4] 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, Petition for Declaratory Ruling, filed November 3, 2000 (Independents' Petition). Independents include each of the 37 independent rural telephone companies operating in Kansas. *Id.* at 1.

[5] *BUS Order*, 17 FCC Rcd at 14809, para. 15. BUS was described and marketed by Western Wireless as wireless local loop service or wireless residential service, a substitute for local exchange service designed to compete with traditional wireline local exchange service. *See id.* at 14806-07, paras. 8-9.

[6] *Id.* at 14812, para. 20.

[7] 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, Petition for Reconsideration and Clarification, filed Sept. 3, 2002 (Independents' Reconsideration Petition).

[8] Independents' Reconsideration Petition at 3-10.

[9] *See Order on Reconsideration*, 22 FCC Rcd at 12016, para. 4. In the *Order on Reconsideration*, the Commission noted that since the release of the *BUS Order* several changes in the ownership of the BUS service that was the subject of the order had taken place which mooted the pending petition for reconsideration. First, on July 19, 2005, the Commission released an order approving the merger of Western Wireless and Alltel and conditioned its approval of that merger on Alltel's divestiture of certain Western Wireless operating units, including units in the Kansas market in which Western Wireless operated BUS. On January 31, 2007, Alltel, on behalf of its now wholly owned subsidiary, Western Wireless, notified the Commission that it had sold the BUS service, including all infrastructure, equipment, and customers, to U.S. Cellular. After the sale, neither Alltel nor Western Wireless had any further interest in the Kansas BUS service that was the subject of the *BUS Order* and of the petition for reconsideration.

[10] *Id.* at 12017, para. 5.

the *BUS Order* to U.S. Cellular.[11] The Commission reasoned that the determination of the regulatory status of fixed services operated in conjunction with CMRS is made on a case-by-case basis, focused on the specific facts of the carrier's particular offerings. Finding that the subject of the *BUS Order* – the BUS service operated by Western Wireless in conjunction with its other wireless services – no longer existed, the Commission concluded that it was appropriate to dismiss the petition for reconsideration as moot and vacate the *BUS Order*.[12]

6. *U.S. Cellular's Petition for Reconsideration.* U. S. Cellular filed on July 26, 2007, a petition for reconsideration of the *Order on Reconsideration*, urging the Commission to rescind its *Order on Reconsideration* and reinstate the *BUS Order*.[13] U.S. Cellular contends that the Commission erroneously concluded that the BUS service offered by Western Wireless in Kansas does not exist today.[14] U.S. Cellular argues that as the successor-in-interest to Western Wireless, it continues to provide BUS service to customers in Kansas using the same wireless infrastructure originally installed by Western Wireless. The Independents filed on August 6, 2007, an opposition to U.S. Cellular's Petition, contending that U.S. Cellular has failed to demonstrate that the Commission's rationale for finding the *BUS Order* moot and vacating that decision was incorrect.[15] U.S. Cellular filed on August 13, 2007, its Reply to the Independents' Opposition,[16] restating that the Commission mistakenly found that the "Kansas BUS offering that the Commission considered in its *BUS Order* no longer exists."[17]

III. DISCUSSION

7. We reaffirm the Commission's conclusion that the holdings in the *BUS Order* were specific to Western Wireless's offering and that changes in the essential facts have rendered the case moot.[18] Agency decisions become moot when no live controversy remains for review,[19] such as where an original decision is based on a specific set of facts that no longer exists.[20] In the case of the *BUS Order*, the specific facts on which the Commission based its decision ceased to exist when Western Wireless was merged into Alltel and Alltel divested itself of Western Wireless's BUS assets in Kansas. While U.S. Cellular asserts that it now offers a similar service, we cannot conclude whether that service is CMRS without a fact-specific record involving U.S. Cellular. Accordingly, the case has been rendered moot.

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[11] *Id.* at 12016-17, paras. 4-5.

[12] *Id.* at 12017, para. 5.

[13] U.S. Cellular Petition.

[14] *Id.* at ii, 6, 8.

[15] 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, Opposition to Petition for Reconsideration of the *Order on Reconsideration* (filed August 13, 2007) (Independents' Opposition).

[16] 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, Reply to the Opposition to Petition for Reconsideration of the *Order on Reconsideration* (filed August 13, 2007) (U.S. Cellular Reply).

[17] *Id.* at 3.

[18] *Order on Reconsideration*, 22 FCC Rcd at 12017, para. 5.

[19] *See Tenn. Gas Pipeline Co. v. Fed. Power Comm'n.*, 606 F.2d 1373, 1379 (D.C. Cir. 1979) (*Tennessee Gas Pipeline*).

[20] *Id.* at 1381.

8. In its petition, U.S Cellular argues that because it continues to provide a BUS offering that uses the same wireless infrastructure originally installed by Western Wireless, the controversy remains live.[21] But the regulatory classification of a particular wireless service is made on a case-by-case basis,[22] and the Commission's two findings in the *BUS Order* that Western Wireless's provision of BUS met the definition of "mobile" service and was ancillary, auxiliary, or incidental to its traditional cellular service were both fact-specific to Western Wireless. The Commission emphasized that its holding was "a narrow one based on the particular facts in the record before us."[23] Specifically, to determine that Western Wireless's BUS offering was a mobile service, the Commission relied on facts specific to that service which U.S. Cellular has not addressed with respect to its own service, such as: that Western Wireless representatives demonstrated the mobility of BUS to customers, that the terms of Western Wireless's BUS offering allowed unlimited use within their local service area and roaming on Western Wireless's system outside that area, and that Western Wireless customers actually incurred roaming charges.[24] Similarly, when the Commission made its separate determination that the service was incidental to Western Wireless's traditional mobile cellular service, it relied on the facts: that Western Wireless's BUS used the same spectrum and infrastructure as its conventional mobile service, that the proportion of Western Wireless's customers that used the service was minimal, and that the provision of BUS would not diminish the quality, increase the costs, or cause other adverse effects on Western Wireless's primary cellular offerings.[25]

9. By contrast, the record before us does not address U.S. Cellular's service offerings to its customers, how such service offerings might be integrated with U.S. Cellular's other mobile service offerings, and the relationship between U.S. Cellular's network and its BUS offering.[26] In the absence of a similar, detailed service-specific record, we cannot assume that another company's subsequent BUS offering could under the same reasoning also be characterized as a mobile service or as a service incidental to this new company's commercial mobile service offerings. Accordingly, we find that U.S. Cellular failed to demonstrate that the Commission erred in finding that the subject of the *BUS Order* – the BUS operated by Western Wireless in conjunction with its other wireless services – no longer existed, and it was appropriate to dismiss the Independents' petition for reconsideration as moot and vacate the *BUS Order*.

10. U.S. Cellular's argument that the Commission's *Order on Reconsideration* overlooked the harm caused by vacating the *BUS Order* is also not persuasive. The alleged injury rests on U.S. Cellular's belief that the Commission's removal of the precedential effect of the *BUS Order* would allow Kansas to *potentially* impose regulations on its service. But the decisions in the *BUS Order* were case-

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[21] U.S. Cellular Petition at 6-7.

[22] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Service, WT Docket No. 96-6, *Second Report and Order and Order on Reconsideration*, 15 FCC Rcd 14680, 14683, para. 7, 14687, para. 15 (2000) (*Second CMRS Flex Order*); *see also* Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8987-88, para. 53 (1996); Amendment of Subpart K, Part 22 of the Commission's Rules, to facilitate the development of cellular radio telecommunications service in the rural areas of the country, RM-4882, *Memorandum Opinion and Order*, 102 FCC 2d 470, 473, paras. 10-12 (1985).

[23] *BUS Order*, 17 FCC Rcd at 14812, para. 20.

[24] *Id.* at 14811-12, para. 18.

[25] *Id.* at 14817-18, para. 27.

[26] *Id.* at 14802, 14811-13, 14817-18, paras. 18, 20, 27, 28.

specific, and consequently any precedential effect of that order was necessarily limited.[27] Moreover, an alleged harm must be more than speculation, and the "'mere precedential effect of an agency's rationale'" is insufficient to support a live controversy.[28] Further, when U.S. Cellular purchased the assets from Alltel, the *BUS Order* remained subject to reversal by the Commission due to the pending Petition for Reconsideration. U.S. Cellular therefore could not reasonably have relied on a favorable outcome in that proceeding. Thus, even to the extent the *BUS Order* otherwise had precedential value, U.S. Cellular lost little from that order being vacated.

11. We also note that U.S. Cellular can petition for a specific ruling from the Commission whether the service it offers is CMRS. If U.S. Cellular is able to make the appropriate showing and obtain a favorable ruling based on its facts, then that would foreclose the possibility of "harmful" regulation by the Kansas Commission in violation of the Act. Alternatively, if US Cellular cannot show that its service is CMRS, then vacating the *BUS Order* did it no harm because that order had no application to its case.

12. Once the Commission determined that the case was moot, it then correctly vacated the *BUS Order*. When a petition for review of an administrative decision is rendered moot during the pendency of the review process, the underlying decision is normally vacated to avoid any legal consequences flowing from an unreviewable decision.[29] As is the situation here, when a case becomes moot because the assets at issue are sold, vacatur is the proper course.[30]

IV. CONCLUSION

13. The determination whether a service is mobile, or whether it is ancillary or incidental to the carrier's CMRS, and therefore to be treated as CMRS, is made on a case-by-case basis.[31] Because the Commission's holdings in the *BUS Order* were fact-specific and the essential facts that the Commission relied on no longer exist, our conclusion was correct that the findings in the *BUS Order* are rendered moot. The proper course of action when a case is rendered moot during review is to vacate the order. Accordingly, the Commission acted properly in dismissing the petition for reconsideration and clarification and vacating the *BUS Order*. For the foregoing reasons, we find that the petition for reconsideration is without merit. It is therefore denied.

V. ORDERING CLAUSES

14. IT IS ORDERED that pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and section 1.106 of the Commission's rules, 47 C.F.R. §

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[27] *See Radiofone, Inc. v. FCC*, 759 F.2d 936, 938-39 (D.C.Cir.1985) (explaining that, unlike harm arising from the adoption of a rule, an injury stemming only from the precedential effect of the *rationale* supporting of a case-specific agency decision is insufficient to give a party standing to challenge the decision).

[28] *American Family Life Assurance v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997) (quoting *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C.Cir.1985)) (*American Family Life Assurance*).

[29] *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329-30 (1961) (applying to administrative proceedings the general principle of vacatur of cases rendered moot and therefore incapable of judicial review). *See also United States v. Munsingwear, Inc.* 340 U.S. 36, 39-41 (1950) (where a civil case is rendered moot and hence unreviewable pending Supreme Court review, Court will vacate and remand the case with instruction to dismiss to avoid preclusive effect or other legal consequences); *American Family Life Assurance*, 129 F.3d at 630; *Tennessee Gas Pipeline*, 606 F.2d at 1382-83.

[30] *Tennessee Gas Pipeline*, 606 F.2d at 1382-83.

[31] *Second CMRS Flex Order*, 15 FCC Rcd at 14683, para. 7, 14687, para. 15.

1.106, the June 26, 2007 Order on Reconsideration, vacating the August 2, 2002 *BUS Order*, is AFFIRMED.

15. IT IS FURTHER ORDERED that pursuant to sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by U.S. Cellular on July 26, 2007, is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary