

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Petition of KLM)	
Telephone Company for Suspension of the)	Case No. TO-2004-0401
Federal Communications Commission)	
Requirement to Implement Number Portability)	

**OPPOSITION TO WESTERN WIRELESS' APPLICATION
TO INTERVENE OUT OF TIME**

COMES NOW KLM Telephone Company ("KLM" or "Petitioner"), and in accordance with the Commission's April 26, 2004 *Order Regarding Time for Response*, states to the Commission as follows:

SUMMARY

The Petition to Intervene Out of Time filed by Western Wireless fails to comply with the Commission's rules. First, Western Wireless fails to show good cause for failure to file a timely intervention request required by 4 CSR 240-2.075(5). Second, Western Wireless fails to show that its interests will be adversely affected or that its intervention will serve the public interest pursuant to CSR 240-2.075(4). Third, Western Wireless fails to comply with 4 CSR 240-2.060(K) that requires Western Wireless to identify pending actions and final unsatisfied judgments or decisions against Western Wireless before state or federal agencies or courts. Accordingly, the Commission should DENY the out-of-time request for intervention.

DISCUSSION

1. **No showing of good cause.** Western states “it only recently became aware of the multiple filings by Missouri LECs for modification of the FCC’s LNP rules, and that no other wireless carrier has intervened to date.”¹ This is not a showing of “good cause.” More than thirty other small rural carriers have filed petitions for LNP suspension in Missouri, and the first of these small company Petitions was filed on February 9, 2004, well over two and a half months ago. No other wireless carrier has requested intervention during this time.

2. All of the LNP Petitions are public and available through the Commission’s electronic filing and information system (EFIS). Indeed, Western Wireless is currently involved in at least three other cases before the Commission,² so it should be well aware of EFIS. If Western Wireless was truly that concerned about implementing LNP in small rural exchanges, then Western Wireless would have monitored these cases and intervened long before now. Instead, Western Wireless offers an eleventh-hour application to intervene that lacks any specific “good cause” for filing over two months after KLM filed its Petition. Western Wireless should not be allowed to ignore the Commission’s rules. The Commission should deny Western Wireless’s last-minute intervention request.

¹ Western Wireless Petition, ¶ 9.

² *Western Wireless Application for Designation as Eligible Telecommunications Carrier*, Case No. TO-2004-0527; *BPS Telephone Co. et al. Complaint Regarding Unpaid Termination of Wireless Traffic*, Case No. TC-2002-1077; *Northeast Missouri Telephone Co. et al. Complaint Regarding Unpaid Termination of Wireless Traffic*, Case No. TC-2002-57.

3. **No Bona Fide Request**. Western Wireless's Petition claims that it "sent Bona Fide Requests ('BFRs') to implement LNP by May 24, 2004 to many of the rural local exchange carriers in Missouri, **including the petitioner**."³ KLM has no record of ever receiving such a request, and at this time KLM does not believe Western Wireless has made a BFR. In fact, the statement in Western Wireless's Petition may simply be a mistake because the prior paragraph references Cass County Telephone Company, not KLM. (See Western's Petition, ¶4.) Thus, it is incumbent upon Western Wireless to produce a copy of a BFR if Western Wireless seeks to intervene in this case on that basis. And if Western Wireless does not produce a BFR, then the Commission should question whether Western Wireless has standing to complain or object to KLM's request for suspension and modification.

4. **No showing of harm**. Western Wireless does not cite one example of how it will be harmed by KLM's request for suspension, only the blanket statement that they "would be harmed by any suspension – interim or long term – of the Missouri LEC's LNP obligations." In Colorado (as in this Missouri case) Western Wireless was the only wireless carrier to intervene in the small carrier requests for suspension and modification of LNP. Although Western had not yet requested LNP implementation in many of the Colorado small company exchanges, Western Wireless indicated that it expected to do so in the future. The Colorado Public Utilities Commission was not convinced, and it granted the small companies a one-year suspension:

³ Western Wireless Petition, ¶ 5. (Emphasis added.)

We find that a one-year waiver of the LNP requirements should give Big Sandy adequate time to make necessary facilities hardware and software upgrades, and to work with vendor(s) for the administration part of portability. In addition, a one-year waiver should not unduly harm Western Wireless given the fact that it is not yet offering service in Big Sandy's exchange.⁴

(See Attachment A.) Thus, the Colorado Commission granted LNP suspensions for small companies and determined that suspension should not unduly harm Western Wireless. This Missouri Commission should deny intervention and grant suspension for the same reason.

5. No Showing of Demand. KLM has received no requests to port a wireline number to Western Wireless. Not one. And Western Wireless has offered nothing to indicate any present demand for this service in Petitioner's service area. Similarly, Western Wireless has offered nothing to show that the consumer benefits of mandating wireline-to-wireless LNP in small rural exchanges (absent demand) outweigh the adverse economic impact on consumers, the economic burden on Petitioner, or the technical challenges raised by the FCC's unresolved identification of call rating and routing issues.

6. As a practical matter, implementing wireline-to-wireless LNP will result in no tangible benefit for Petitioner's rural customers. Instead, these customers will bear burdensome and unnecessary costs. Rural consumers are indeed "increasingly choosing wireless service for their telecommunications

⁴ *In the Matter of Big Sandy Telecom, Inc.'s Combined Petition for Suspension and Motion for Expedited Treatment*, Docket No. 04M-129T, *Decision Granting*

needs,”⁵ but this choice has little or nothing to do with wireline-to-wireless LNP. Western Wireless has offered nothing to indicate any current demand for this service.

7. **Failure to Identify Pending Actions and Final Decisions.**

Western Wireless claims that it “has no pending action or final unsatisfied judgment or decision against it which involve customer service or rates, which occurred within three years of this application.”⁶ However, the cases discussed below demonstrate that Western Wireless does in fact have a number of such pending actions or decisions against it. Indeed, there are at least two complaint cases against Western Wireless pending before this very Commission. Therefore, Western Wireless’s Petition fails to comply with Commission Rule 4 CSR 240-2.060(K).

A. **Missouri Public Service Commission Complaint Cases for Failure to Pay Lawful Tariff Rates.** Over two years ago, a group of small rural carriers filed a complaint against Western Wireless (along with other wireless carriers) for failing to pay compensation for the use of the small companies’ facilities and services.⁷ This complaint is still pending before the Commission. A second complaint filed by a different group of small companies (including KLM) has been pending against Western Wireless (and VoiceStream a/k/a T-Mobile) for nearly two years involving Western Wireless’s failure to pay the rural carriers’

Petition in Part, April 20, 2004.

⁵ Petition, ¶3.

⁶ Western Wireless Petition, ¶ 11.

⁷ *Northeast Missouri Rural Tel. Co. et al.*, Case No. TC-2002-57.

lawful and Commission-approved wireless termination service tariff rates.⁸ Both of these cases involve rates, and both cases are still pending before the Commission. At the very least, Western Wireless should have identified the case involving KLM in its Petition because it involves the same Commission, the same parties, and the same counsel.

B. **Kansas Case – Unlawful Use of Federal USF Support.** Last month, the Kansas Corporation Commission (KCC) issued an order directing an investigation into whether Western Wireless had unlawfully obtained federal universal service support under its Eligible Telecommunications Carrier (ETC) designation and violated Commission orders. (See Attachment B.) The KCC Staff had requested the investigation:

to determine whether Western Wireless unlawfully obtained federal universal service support for customers in telephone exchanges not included within its ETC designation and whether Western Wireless unlawfully obtained federal universal service support for services beyond the scope of its ETC designation.⁹

Specifically, the Kansas Staff alleged that Western Wireless had received federal USF support for non-supported services and in unauthorized areas. The Kansas Commission's Staff proposed revoking Western Wireless's ETC designation "for

⁸ *BPS Telephone Company et al.*, Case No. TC-2002-1077.

⁹ *In the Matter of GCC Licence Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. 99-GCCZ-156-ETC, 2004 Kan. PUC LEXIS 296, *Order Directing Investigation*, Mar. 16, 2004. (Emphasis added.)

what Staff asserts to be egregious violations of the Commission's Orders.¹⁰

The KCC issued its *Order Directing Investigation* on March 16, 2004, which is clearly within the three (3) year requirement of the Missouri Commission's rule 4 CSR 240-2.060(K).

C. FCC Notice – Environmental Violations and Unlawful Operation.

Less than a year ago, on May 12, 2003, the Federal Communications Commission (FCC) released a Notice of Apparent Liability proposing that Western Wireless be held liable for a \$200,000 forfeiture for operating radio transmitting equipment from an unauthorized location in violation of the Communications Act. Specifically, Western had constructed a 180-foot tower on a ridge overlooking Medora, North Dakota, near sites that are listed in the National Register for Historic Places. The FCC's decision found that Western Wireless had:

willfully and repeatedly violated [the Telecommunications Act] by operating radio transmitting equipment from an unauthorized location in Medora, North Dakota. Specifically, Western unlawfully constructed and continues to operate a facility that has a significant environmental effect without obtaining [FCC] authorization following preparation of an Environmental Impact Statement ("EIS")¹¹

¹⁰ *Id.* at ¶1. (Emphasis added.)

¹¹ *In the Matter of Western Wireless Corporation*, File No. EB-02-TS-659, 2003 FCC LEXIS 2642, *Notice of Apparent Liability for Forfeiture*, rel. May 12, 2003. (Emphasis added.)

The FCC noted, "It is important that Western not be permitted to benefit from its failure to comply with the environmental rules."¹² Accordingly, the FCC proposed a \$200,000 forfeiture for the unlawful operation and failure to comply with environmental rules.¹³ (See Attachment C.)

CONCLUSION

Western Wireless has failed to show good cause for late intervention. Moreover, Petitioner has no record that Western Wireless sent Petitioner a BFR, and Petitioner has received no customer requests to port a number to Western Wireless. Finally, Western Wireless has failed to comply with the Commission's rules by failing to identify pending actions and decisions against it, including two complaint cases before the Missouri Commission. For these reasons, the Commission should deny the application to intervene out-of-time.

Respectfully submitted,

By Brian T. McCartney

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¹² *Id.* at ¶21. (Emphasis added.)

¹³ The FCC noted that this was the first case in which it had proposed a monetary penalty for failure to comply with environmental rules.

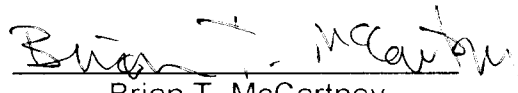
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 28th day of April, 2004, to the following parties:

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Brian T. McCartney

Decision No. C04-0407

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04M-129T

IN THE MATTER OF BIG SANDY TELECOM, INC.'S COMBINED PETITION FOR
SUSPENSION AND MOTION FOR EXPEDITED TREATMENT AND WAIVER OF
RESPONSE TIME.

DECISION GRANTING PETITION IN PART

Mailed Date: April 20, 2004
Adopted Date: April 13, 2004

I. BY THE COMMISSION

A. Statement

1. On March 19, 2004, Big Sandy Telecom, Inc. (Big Sandy), filed a Combined Petition for Suspension and Motion for Expedited Treatment and Waiver of Response Time (Petition) requesting that the Commission temporarily suspend its wireline to wireless local number portability (LNP) obligations to Commercial Mobile Radio Service (CMRS or wireless) providers in its Simla exchange until May 24, 2006. Big Sandy makes this request pursuant to § 251(f)(2) of the Telecommunications Act of 1996 (the Act), 47 U.S.C. § 251 (f)(2).

2. At our weekly meeting on March 31, 2004, we shortened the notice period to this Petition to 15 days. On April 5, 2004, we received an Entry of Appearance and Notice of Intervention, or in the Alternative, Petition to Intervene of WWC Holding Co., Inc. (Western Wireless).

3. The Simla exchange is geographically located outside the Denver Metropolitan Statistical Area (MSA), which is the only MSA in Colorado that is in the top 100 in the United States. The Federal Communications Commission (FCC) rules require that telecommunications

carriers providing service outside the top 100 MSAs provide LNP by May 24, 2004, or six months after receiving a request to port a number, whichever is later. Big Sandy, in its Petition, requests that we find under § 251(f)(2) that it is contrary to the public interest and unduly economically burdensome for the Petitioner to implement LNP in its exchange.

4. Section 251(f)(2) of the Act provides:

Suspension and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

i. to avoid a significant adverse economic impact on users of telecommunications service generally;

ii. to avoid imposing a requirement that is unduly economically burdensome; or

iii. to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

5. Big Sandy qualifies as a “rural telephone company” as defined in 47 U.S.C. § 153(37) and is a local exchange carrier with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide.

6. Big Sandy states in its Petition that one of the most significant reasons why this Petition should be granted, and why the implementation of LNP by rural carriers is contrary to the public interest and unduly economically burdensome, is the complete lack of any demand for LNP in the Simla exchange. Big Sandy asserts that it has not received one customer request to

port a number since the enactment of the Act eight years ago, even with the increased publicity since November 2003. Further, Big Sandy states that its Simla exchange is not adjacent to a major transportation corridor, and thus wireless coverage is not extensive.

7. As to economic burden, Big Sandy states that its known costs for implementing LNP will be about \$6,000 for a switch upgrade and \$12,000 for fixed vendor costs to secure required database capability. The costs that Big Sandy cannot at this time estimate include monthly recurring costs for the "per dip" charge and the associated facilities costs. Big Sandy asserts that it is contrary to the public interest to force Big Sandy's customers (currently 1,147 access lines) to incur the expense for a service that they do not demand.

8. Big Sandy does admit in its Petition that it has received two requests for LNP from CMRS providers, Verizon Wireless and T-Mobile. These requests were received on November 14, 2003 and February 21, 2004 respectively, with each requesting LNP service by May 24, 2004. However, Big Sandy states that, to its knowledge, neither of the CMRS providers requesting LNP have either a point of interconnection nor numbering resources in the Simla exchange. Also, to Big Sandy's knowledge, none of its end-user customers has made any request to have his or her wireline number ported to a wireless carrier.

9. We note that neither Verizon Wireless, nor T-Mobile filed an intervention in this docket. In the Western Wireless Petition for Intervention, however, Western Wireless states that it has good cause for intervening in this docket. Western Wireless contends that while it has not yet requested LNP implementation in the Simla exchange, it expects to do so within the next two years. Therefore, Western Wireless will be affected by any decision reached by this Commission to grant the Petitioner's request for a two-year suspension.

10. In its November 10, 2003 order,¹ the FCC stated: "Carriers inside the 100 largest MSAs (or outside the 100 largest MSAs, after the transition period) may file petitions for waiver of their obligation to port numbers to wireless carriers, if they can provide substantial, credible evidence that there are special circumstances that warrant departure from existing rules." This high level of scrutiny imposed by the FCC is a direct result of the FCC's strong statement that "we continue to deem rapid implementation of number portability to be in the public interest."² Further, in its November 10, 2003 order, the FCC reiterated its position that "number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers."³

11. We agree with the Petitioner that consumers will not likely be adversely impacted by the grant of a waiver to this carrier. According to the Petitioner, it has not received requests or even inquiries from its customers concerning Big Sandy's ability to port their wireline numbers.

12. However, in balancing the FCC's and our State goals of increased competition throughout Colorado, including in the rural areas of the state, we believe that a two-year waiver of the LNP implementation requirements is too long. We agree with the FCC's statement in its January 16, 2004 order, that:

... [I]n order to offer intermodal portability to their subscribers, these smaller carriers must acquire the hardware and software necessary to provide porting, make the necessary network upgrades, and ensure that their upgraded networks work reliably and accurately. Some of the Petitioners also assert that Two Percent Carriers often lack the experience and technical experience with number porting

¹ See In Re Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No. 95-116 (November 10, 2003 Order).

² See In Re Telephone Number Portability, CC Docket No. 95-116 (January 16, 2004 Order).

³ November 10, 2003 Order, at ¶ 4.

to quickly implement the necessary upgrades to their systems to ensure accurate porting. Accordingly, we conclude that special circumstances exist to grant Two Percent Carriers who have not previously upgraded their systems to support LNP a limited amount of additional time to overcome the technological obstacles they face to successfully meet a request for wireline-to-wireless porting.⁴

13. In that order, the FCC granted these rural providers an additional six months to provide LNP. We find that a one-year waiver of the LNP requirements should give Big Sandy adequate time to make necessary facilities hardware and software upgrades, and to work with vendor(s) for the administration part of portability. In addition, a one-year waiver should not unduly harm Western Wireless given the fact that it is not yet offering service in Big Sandy's exchange.

14. Big Sandy is required to implement LNP in its Simla exchange no later than May 24, 2005, absent further order from this Commission.

II. ORDER

A. The Commission Orders That:

1. The Petition for Suspension of the Local Number Portability Requirements of Big Sandy Telecom, Inc., is granted in part, consistent with the above discussion.

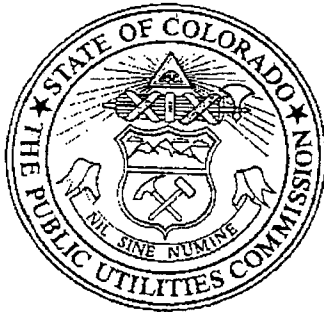
2. WWC Holding Co., Inc.'s Petition to Intervene is granted.

3. This Order is effective on its Mailed Date.

⁴ January 16, 2004 Order.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 13, 2004.

(SEAL)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

Commissioners

COMMISSIONER JIM DYER ABSENT.

1 of 2 DOCUMENTS

In the Matter of GCC License Corporation's Petition for Designation as an Eligible
Telecommunications Carrier

Docket No. 99-GCCZ-156-ETC

Kansas Corporation Commission

2004 Kan. PUC LEXIS 296

March 16, 2004, Dated

PANEL: [*1] Before Commissioners: Brian J. Moline, Chair; John Wine; Robert E. Krehbiel

OPINION: ORDER DIRECTING INVESTIGATION AND ESTABLISHING PROCEDURAL SCHEDULE

For the reasons more fully discussed below, the Commission declares that the Eligible Telecommunications Carrier (ETC) designation awarded Western Wireless Corporation and WWC License LLC (collectively Western Wireless) is and has been limited to Western Wireless's Basic Universal Service (BUS) offering and that Western Wireless is not and has not been designated by the Commission to obtain federal and state universal support for conventional cellular service. The Commission further declares that Western Wireless's ETC designation is and has been limited to the exchanges identified or listed in Commission's prior Orders and that exchanges not listed or identified in prior Orders are excluded from Western Wireless's ETC designation. Accordingly, the Commission directs that the investigation requested by Commission staff (Staff) proceed as provided below.

INTRODUCTION

1. On July 22, 2003, Staff filed its Motion to Reopen Docket, to Clarify Order # 11 and to Determine if ETC Designation of Western Wireless Should Be Revoked (Motion). Staff [*2] requests the Commission to initiate an investigation to determine whether Western Wireless unlawfully obtained federal universal support for customers in telephone exchanges not included within its ETC designation and whether Western Wireless unlawfully obtained federal universal support for services beyond the scope of its ETC designation. Staff alleges that notwithstanding the limitation placed upon the scope of Western Wireless's federal ETC status by the Commission, Western Wireless sought and obtained federal universal service support for customers in Sprint/United exchanges. Motion at PP 2-11, and for customers of its conventional cellular service, a non-supported service. Motion at PP 11-20. In its Motion, Staff proposes remedies, including the revocation of the Western Wireless's ETC designation, for what Staff asserts to be egregious violations of the Commission's Orders. Motion at PP 20 and Summary. Staff also requests clarification because the Universal Service Administrator Company (USAC) prefers that orders designating ETC status in certain exchanges also state the exchanges are specifically excluded from universal service fund support. Motion at P 11.

2. Western Wireless [*3] filed a Response on October 21, 2003. As a threshold matter, Western Wireless asserts that the Commission lacks jurisdiction to entertain Staff's Motion. The Commission's Orders from which Staff's Motion is premised are currently on appeal to the District Court of Nemaha County, Kansas, and therefore, according to Western Wireless, the "Commission's jurisdiction is suspended during the pendency of the appeal." Western Wireless Response at 1. Western Wireless continues and argues that it may have mistakenly received federal universal support for customers in Sprint's operating territory but that the mistake has been corrected. Western Wireless Response at 5-7. Finally, Western Wireless argues that its ETC designation for federal universal service fund support was not restricted under the Commission's Orders to Western Wireless's BUS offering. Rather, the "only restriction established by the Commission related to Western Wireless's eligibility to receive KUSF [Kansas Universal Service Fund] support for the BUS offering utilizing wireless local loop equipment as set forth in the May 3, 2001 Order " Western Wireless Response at 19-20. According to Western Wireless, the Commission does [*4] not have the authority to place

conditions on Western Wireless's federal ETC status. Funding eligibility. Western Wireless avers, "is instead determined by USAC [Universal Service Administrator Company] once a carrier is designated as an ETC." Western Wireless Response at 8.

3. On October 31, 2003, Staff filed a Response to Western Wireless's Reply. Staff argues that Western Wireless has not interpreted federal law correctly. Staff, citing to 47 U.S.C. § 214(e), points out that the Commission has been granted the authority to designate a carrier as an ETC, provided that the carrier offers and advertises the services that are supported by federal universal support mechanisms throughout the service area for which the designation is received. Staff Reply at 4-7. Staff, citing to the record, also points out that Western Wireless explicitly stated that its basic universal service offerings for which Western Wireless sought ETC designation, does not and did not include conventional cellular service since Western Wireless's conventional cellular service could not serve the federally supported services throughout the designated service area. Staff Reply [*5] at 4-7. Finally, Staff, citing *In re Estate of Robinson*, 232 Kan. 752, 659 P.2d 172 (1983), asserts that the appeal filed by the Rural Telephone Companies from orders previously entered in this docket did not prevent the Commission from hearing Staff's Motion because the Motion does not attempt to reconsider or change those prior orders that are on appeal to the District Court. Staff Reply at 7-8.

4. On November 5, 2003, a prehearing conference was held. The parties agreed to conduct additional discovery to determine whether the issues could be resolved without hearing. Prehearing Conference Order, entered November 17, 2003. After the prehearing conference, Western Wireless filed a motion to compel Staff to answer certain data requests. Staff also filed a motion to compel against Western Wireless, which was subsequently withdrawn.

5. On February 27, 2004, Staff filed a Motion for Declaratory Judgment. Staff requests the Commission to declare that Western Wireless's ETC designation was limited to Western Wireless's BUS offering and that Western Wireless's ETC designation did not authorize Western Wireless to obtain federal and state universal [*6] fund support for conventional cellular service.

DISCUSSION

6. The Federal Telecommunications Act of 1996 (Federal Act) provides each state a critical role in administering the ETC designations within their respective state boundaries. In doing so, the Federal Act recognizes the states' interest in the provision of local telephone service and competition within state borders. The encouragement of fair competition in telecommunications markets, the development of new services, including construction and deployment of an advanced telecommunications infrastructure, and the protection of universal service, so as to ensure that telecommunications service is available at affordable rates throughout Kansas, are vital state concerns. *See* K.S.A. 2003 Supp. 66-2001.

7. The Federal Act delegated specific jurisdiction and authority to state commissions to determine ETC designations. The ETC designation is necessary for purposes of receiving state and federal universal service support by a telecommunications carrier for telecommunications operations within the respective state. 47 U.S.C. § 214(e). A state commission may qualify a carrier as an ETC if [*7] the carrier: (a) provides supported services, 47 U.S.C. § 214(e)(2) and 47 C.F.R. § 54.101, and (b) those supported services are available throughout the service area for which universal service support is sought. 47 U.S.C. § 214(e)(1). The service area for a rural telephone company is its study area. 47 U.S.C. § 214(e)(5). A state-awarded ETC designation is required before a carrier can receive any federal universal service fund support. 47 U.S.C. § 214(e)(2). n1

n1 The Federal Communications Commission (FCC) has the jurisdiction and authority to act on ETC matters in circumstances where a state commission declines, neglects or refuses to act.

8. Staff posits the question whether the ETC designation awarded Western Wireless for federal and state universal service support purposes included financial support for customers of Western Wireless's conventional cellular service. [*8] At issue, according to Staff, is the propriety of Western Wireless's conduct with respect to that ETC designation. Fundamentally, the universal service fund was not intended to compensate telecommunications carriers for services, which are not available throughout the service area or which are not supported services as defined by the Federal Act. The damage or harm from providing compensation to telecommunications carriers for services that do not fall within the definition of supported services or in areas where supported services are not provided throughout the service area or

study area is the inequitable subsidization of a competitor and improper increase of the end-user levy to finance the universal service fund. That harm or damage affects vital state concerns.

9. The Commission's Order awarding ETC designation to Western Wireless were premised upon Western Wireless's BUS offering and not conventional cellular service. As Staff has correctly pointed out through extensive citations to the record, Western Wireless was not seeking ETC designation for its conventional cellular service. Rather, Western Wireless sought ETC designation based solely upon its BUS offering which meets [*9] the necessary criteria to qualify as a supported universal service. Specifically, Western Wireless's BUS offering encapsulated the necessary supported services or functionality, as defined by 47 C.F.R. § 54.10, and Western Wireless averred that those supported services were available throughout the service areas in which ETC designation was sought. Those service areas did not include exchanges within the Sprint/United service territory.

10. While some wording in the Commission's Orders was general, its intent is specific. The Commission directed Western Wireless to disclose details of its BUS offering in order to evaluate whether the offering met the statutory criteria for supported services. Order 10 at P 9. A hearing was conducted on the BUS offering and Western Wireless was questioned extensively by the parties and by the Commission on whether the ETC designation it sought was limited to the exchanges where its BUS offering was available or whether Western Wireless was seeking ETC designation for its conventional cellular service. May 10, 2000 Hearing Transcript. Western Wireless acknowledged that the ETC designation it sought was limited to service areas in which it made its BUS [*10] offering. Western Wireless further acknowledged that its conventional cellular service did not qualify because the conventional cellular service it offered did not include the provision of supported services, as required by the Federal Act. May 10, 2000 Hearing Transcript, at pp. 51-52, 117-118, 125, 202-205 and 223.

11. From review of the prior Orders and other filings in this docket, it is clear that most of the discussion in those documents relates to Western Wireless's BUS offering and not to its conventional cellular service. Of particular note would be the Commission's ETC Order, n2 the Commission's Order Adopting Criteria, n3 and Western Wireless's own Proposed Order designating it as an ETC in rural areas. n4 Clearly, the Commission's Orders and ETC designation pertained to the supported universal service offered by Western Wireless through its BUS offering--and not the conventional cellular services, which were acknowledged to be deficient from qualifying as supported universal service.

n2 Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, Docket No. 99-GCCZ-156-ETC, entered October 12, 2001. [*11]

n3 Order Adopting Criteria for Receipt of Support from the Kansas Universal Service Fund for Wireless Eligible Telecommunications Carriers in the Non-Rural Areas on an Interim Basis, Docket No. 99-GCCZ-156-ETC, entered May 3, 2001. n4 WWC License L.L.C.'s Proposed Order Designating WWC as an ETC in Areas Served by Rural Telephone Companies, Docket No. 99-GCCZ-156-ETC, dated June 1, 2001.

12. The Commission declares that the ETC designation awarded Western Wireless by this Commission is and has been applicable only to the extent Western Wireless satisfied the statutory criteria for the ETC designation. Western Wireless's ETC designation is and has been limited to its BUS offering. Western Wireless is not and has not been designated by the Commission eligible to obtain federal and state universal support for conventional cellular service.

13. The Commission further declares that Western Wireless's ETC designation is and has been limited to the exchanges identified or listed in Commission's prior Orders and that exchanges not listed or identified in prior Orders are excluded from Western Wireless's [*12] ETC designation. Specifically, Western Wireless does not comply with the requirements of section 214(e) of the Federal Act in Sprint/United service areas and thus does not qualify for federal support in those service areas. The scope of Western Wireless's Application was limited to certain exchanges. Therefore, the prior Orders enumerated the exchanges in which the ETC designation was awarded, as limited by the scope of relief requested by Western Wireless. In that context, it is not necessary to identify, with particularity, the exchanges excluded because the Commission is making its determination based upon the relief requested, as limited by the Application. That is, the Application filed by Western Wireless in this matter was not seeking an ETC designation for all exchanges and therefore, a specific ruling on exchanges not covered by the Application was unnecessary. Nonetheless, without an ETC-designated exchange, the universal service fund is neither appropriate nor authorized for those service areas.

14. Because a state-awarded ETC designation is required to receive federal universal service fund support, a state commission must have enforcement powers. That is, if a state commission [*13] has jurisdiction to grant ETC status, it must also have the power to enforce and determine the rights and responsibilities associated with the ETC designation on an ongoing basis. This Commission, as the state agency entrusted with the regulatory supervision over telecommunications service providers, has the power and authority to protect vital state concerns with respect to the provision of those services within state borders and assure that the ETC designation awarded by this Commission to Western Wireless is used properly, appropriately and not manipulated and used to the detriment of the public interest. *See Pitts v. Kansas Dental Board*, 267 Kan. 775 (1999) (the Kansas Supreme Court implied a jurisdictional grant of authority to allow an administrative agency to perform a function the court considered to be vital). Indeed, it has been recognized by the Federal Communications Commission (FCC) that "where an ETC fails to comply with requirements in section 214(e) and any additional requirements proposed by the state commission, the state commission ... may rescind a certification previously granted." Recommended Decision, *In the Matter of the Federal-State* [*14] *Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04J-1, released February 27, 2004, at P 48 (citations omitted). The Commission can and should investigate whether Western Wireless acted unreasonably or improperly by claiming state or federal funds beyond the scope of its Commission-awarded ETC designation, especially in light of the Commission's original finding that Western Wireless's ETC designation served the public interest.

15. This investigation is further supported by the recent Recommended Decision of the Federal-State Joint Board on Universal Service. *Id.* That recommended decision contains findings that "state commissions should apply a particularly rigorous standard to the minimum qualifications of applicants seeking ETC designations in rural carrier service areas," *Id.* at P 18; that "the state certification process provides the most reliable means of determining whether carriers are using support in a manner consistent with section 254," *Id.* at P 46; and that "states should use the annual certification process to ensure that federal universal service support is used to provide the supported services and for associated infrastructure costs," *Id.* [*15] at P 47. Accordingly, this Commission can and should review the extent to which federal universal service support has been used to provide the supported BUS offering and associated infrastructure costs.

16. Western Wireless asserts that the Commission lacks jurisdiction to decide Staff's Motion because the Orders previously entered in this docket are presently on appeal. Staff's Motion, however, does not seek to set, change or amend the regulatory policy and related decisions. Rather, Staff's Motion seeks to enforce and assure compliance with the Commission's Orders by Western Wireless. Because Staff's Motion involves enforcement and does not seek to amend the nature, substance and scope of the original orders, the Commission may proceed to hear and decide the motion without interfering with the District Court's review of the policy decisions made in the prior orders. This power to enforce and assure regulatory compliance is necessary and proper to discharge the Commission's duties on an ongoing, prospective basis. *See In re Estate of Robinson*, 232 Kan. 752, 659 P.2d 172 (1983). Accordingly, Staff is directed to proceed and investigate [*16] (a) whether Western Wireless obtained state or federal universal support for customers of its conventional cellular service and (b) if so, how much support did Western Wireless collect for those customers. The Commission expects that this investigation would include (a) assessing data on the actual, specific number and location of BUS subscribers served by Western Wireless in Kansas, (b) the actual, specific number of conventional cellular customers served by Western Wireless in Kansas, and (c) a comparison of these customer counts with the number of customers for which Western Wireless has sought and received federal universal service fund support since its ETC designation for BUS was awarded by the Commission. Furthermore, Staff is to seek, and Western Wireless is to provide, information demonstrating that the federal universal service support obtained from the USAC is used to provide the supported BUS service in Kansas and showing whether there is any shortfall/overage of federal universal service support versus costs to provide the supported BUS service in Kansas. In addition, Staff should investigate (a) whether Western Wireless obtained federal universal support for customers [*17] in exchanges located in the Sprint/United service territory; (b) if so, how much support did Western Wireless collect; and (c) whether Western Wireless has corrected the mistake, as indicated in its Response, filed October 23, 2003. Staff should also compile and discuss relevant background information and propose relief or remedies that would be appropriate for any violations of the Commission's prior Orders that Staff believes have occurred.

DISCOVERY MATTERS AND PROCEDURAL SCHEDULE

17. Western Wireless filed a motion to compel Staff to disclose its legal analysis supporting an investigation into whether Western Wireless has unlawfully obtained federal universal service support. Similarly, Western Wireless also seeks an order compelling Staff to provide the record basis upon which Staff asserts that Western Wireless limited its ETC application to its BUS offering. *See Western Wireless's Motion to Compel, Data Requests 8, 9, 13, 14, 18, 19, 23,*

26 and 27. Staff states that its legal analysis is fully set forth in its Motion and that the record cites, including citation to hearing transcript record wherein testimony for Western Wireless's witness explains its ETC application [*18] in detail, are also set out in its Motion. Staff's Motion does not seek to amend or modify the regulatory policy decided in prior Orders. Rather, Staff's Motion seeks to enforce a prior Commission order. The legal and record basis upon which Staff makes its request is contained in its Motion. In this context, inquiry into Staff's legal reasoning is neither appropriate nor relevant. The Commission ultimately decides the legal issues and determines whether a legal basis exists for the Commission to investigate this matter. That decision is not limited to the legal arguments and research of Staff nor is it limited the legal arguments and research received from other parties participating in the docket.

18. Western Wireless also seeks an order compelling Staff to provide the factual basis upon which Staff asserts that Western Wireless acted intentionally and purposefully in violation of the Commission's prior Orders. *See* Western Wireless's Motion to Compel, Data Requests 20, 21, 22 and 24. Staff contends that it has provided a factual basis to warrant revocation in its Motion. Staff alleged in its Motion that the intentional and purposeful misconduct of Western Wireless is an aggravating [*19] circumstance that warrants revocation of its ETC designation in the state of Kansas. Western Wireless is entitled to know what evidence - - whether direct or circumstantial - - Staff relies upon to show that Western Wireless's conduct was so "egregious" that it warrants revocation of Western Wireless's ETC designation. The Commission, in this Order, is not ruling that Western Wireless violated prior Orders or that revocation is appropriate. These are issues best addressed through the evidentiary hearing ordered in this case. Accordingly, Staff is directed to specify the facts, documents or other information it believes will support the allegations contained in its Motion, including the allegations of intentional and purposeful misconduct, in its prefiled testimony required by this Order. By directing Staff to answer Western Wireless's data requests in prefiled testimony, discovery will be facilitated and better focused on issues under investigation. Further, discovery may lead to other relevant evidence, and Staff should be permitted to incorporate such evidence into its prefiled testimony.

19. The Commission recognizes that it is, in essence, directing Staff to answer the Western [*20] Wireless's data requests, albeit through the use of prefiled testimony. The requirement that Staff's prefiled testimony disclose the facts Staff relies upon to support its allegation of intentional and purposeful misconduct does not affect the decision to reopen the docket and investigate whether Western Wireless over-collected universal service fund support. The information sought in Western Wireless's Data Requests 20, 21, 22 and 24 relates to the appropriate relief or remedy (if it is proven that Western Wireless did, in fact, over-collect universal service fund support) and not to whether the docket should be reopened and the matter investigated.

20. As part of this investigation, Staff is required to prefile direct and rebuttal testimony, as provided in the procedural schedule below. Staff should address the specific issues identified above, including recommendations for relief or remedy appropriate for any violation of Commission's prior Orders. Western Wireless and any intervening party will be permitted an opportunity to respond and prefile direct testimony in accordance with the procedural schedule below. Accordingly, the following procedural schedule is hereby ordered:

[*21]

Staff prefiled direct testimony	April 16, 2004
Western Wireless and Intervenor prefiled direct testimony	June 18, 2004
Staff prefiled rebuttal testimony	July 2, 2004
Deadline for preliminary motions (9:30 a.m.)	July 16, 2004
Prehearing Conference (9:30 a.m.)	July 16, 2004
Technical hearing (9:30 a.m.)	July 20, 2004
Simultaneous initial briefs	July 30, 2004
Simultaneous reply briefs	August 6, 2004

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) Staff's Motions for Declaratory Order and to Reopen Docket are granted, as more fully set forth above. Western Wireless's Motion to Compel is ruled upon, as provided above.

(B) Notice is given that a prehearing conference shall be held in this matter on July 16, 2004, beginning at 9:30 a.m. for the purposes of determining and discussing any preliminary motion, establishing the schedule for witness presentation and the order of cross-examination, and any other matter to assist in an orderly and efficient investigation and hearing process. This prehearing conference will be held in the Third Floor Hearing Room at the Commission offices, 1500 S.W. Arrowhead Road, Topeka, Kansas. Advisory Counsel will preside.

(C) Notice [*22] is given to the parties that an evidentiary hearing in this matter shall commence on July 20, 2004, at 9:30 a.m. and continue thereafter until completed. This hearing will be conducted in the First Floor Hearing Room at the Commission's Offices, 1500 S.W. Arrowhead Road, Topeka, Kansas. One day has been reserved for hearing. The Commissioners shall preside.

(D) Any party who fails to attend or participate in the prehearing or any other stage of this proceeding may be held in default under the Kansas Administrative Procedures Act, K.S.A. 77-520.

(E) The attorney designated to appear for the agency in this proceeding is Mr. Robert Lehr, Assistant General Counsel, 1500 S.W. Arrowhead Road, Topeka, Kansas 66604; (785) 271-3110.

(F) A party may file a petition for reconsideration of this Order within fifteen (15) days of the date of this Order. If this Order is mailed, service is complete upon mailing and three days may be added to the above time frame.

(G) The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Wine, Com.; Krehbiel, [*23] Com.

Dated: MAR 16 2004

Susan K. Duffy

Executive Director

LEXSEE 18 FCC RCD 10319

In the Matter of Western Wireless Corporation and WWC Holding Co., Inc., Licensee of
Cellular Radio Station KNKN343, CMA583 -- North Dakota 4 -- McKenzie RSA

File No. EB-02-TS-659; NAL/Acct. No. 200332100004; FRN 0003764719

FEDERAL COMMUNICATIONS COMMISSION

18 FCC Red 10319; 2003 FCC LEXIS 2642

RELEASE-NUMBER: FCC 03-109

May 12, 2003, Released; May 6, 2003, Adopted

ACTION: **[**1]** NOTICE OF APPARENT LIABILITY FOR FORFEITURE

JUDGES:

By the Commission: Chairman Powell issuing a separate statement

OPINION:

[*10319] I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")*, we find that Western Wireless Corporation and its wholly owned subsidiary, WWC Holding Co., Inc. ("WWC"), cellular radio licensee in CMA583 North Dakota 4 -- McKenzie RSA (collectively "Western"), apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended ("Act"), n1 by operating radio transmitting equipment from an unauthorized location in Medora, North Dakota ("Medora Site" or "Medora Tower"). Specifically, Western unlawfully constructed and continues to operate a facility that has a significant environmental effect without obtaining Commission authorization following preparation of an Environmental Impact Statement ("EIS"). n2 We conclude, pursuant to Section 503(b) of the Act, that Western is apparently liable for a forfeiture in the amount of two hundred thousand dollars (\$ 200,000). n3

n1 *47 U.S.C. § 301.*

n2 *See 47 C.F.R. § 1.1305.*

n3 *47 U.S.C. § 503(b).* **[**2]**

2. Western's unlawful operation here stems from its failure to comply with the Commission's environmental rules. Continued unlawful operation may result in additional enforcement action, e.g., increased forfeitures, initiation of a license revocation proceeding, or both. In this regard, we order Western to provide a sworn statement within 30 days regarding its plan to cease operation from the Medora Site or bring that site into compliance with our environmental rules. We also remind Western of its obligation to file an Environmental Assessment ("EA") if any of its actions in response to this NAL or subsequent orders may have a significant effect on the environment.

II. BACKGROUND

3. Under the Commission's rules implementing the National Environmental Policy Act of 1969, as amended, ("NEPA"), n4 licensees are required to assess proposed facilities to determine whether [*10320] the facilities may

significantly affect the environment as defined in Section 1.1307 of the Commission's Rules ("Rules"). n5 The rules provide that licensees must prepare and submit to the Commission an EA for an action that may have a significant environmental effect. n6 This includes actions for which no pre-construction [**3] authorization is otherwise required. n7 In light of the Commission's obligations under the National Historic Preservation Act of 1966, as amended ("NHPA"), n8 Section 1.1307(a)(4) of the Rules requires that a licensee must prepare and submit to the Commission an EA if a planned facility may affect one or more properties listed, or eligible for listing, in the National Register of Historic Places ("NRHP") ("Historic Properties"). n9 If the Commission finds after submission of an EA that a proposed action will not have a significant environmental effect, it will issue a finding of no significant impact ("FONSI") and process the application. n10 If a proposed action will have a significant environmental effect and the applicant does not choose to amend its application, n11 the Commission will not grant the application unless the Commission first completes an EIS. n12

n4 42 U.S.C. §§ 4321-4335.

n5 47 C.F.R. § 1.1307.

n6 47 C.F.R. §§ 1.1308 and 1.1311.

n7 47 C.F.R. § 1.1312. *See also* 47 C.F.R. § 22.165(c).

n8 16 U.S.C. § 470 *et seq.* In particular, Section 106 of the NHPA (16 U.S.C. § 470f) requires Federal agencies, such as the Commission "... prior to the issuance of any license ... [to] take into account the effect of the undertaking on any district, site, building, structure or object that [qualifies as a Historic Property]." [**4]

n9 47 C.F.R. § 1.1307(a)(4).

n10 47 C.F.R. § 1.1308(d).

n11 *See* 47 C.F.R. § 1.1308(c), 1.1309.

n12 *See* 47 C.F.R. § 1.1305, 1.1314, 1.1315, 1.1317.

4. In August 1999, Western constructed a 180-foot monopole tower on a bluff overlooking Medora, North Dakota, for use by WWC in connection with its operation of Station KNKN343 in CMA583 - North Dakota 4 -- McKenzie. In November 1999, the State Historical Society of North Dakota ("Historical Society"), which is the State Historic Preservation Officer ("SHPO") for North Dakota, submitted a letter to the Wireless Telecommunications Bureau ("WTB") regarding the tower. n13 The letter states that Western's tower adversely affects properties which are listed in the National Register of Historic Places and/or the State Register of Historic Places. n14 The letter indicates that the tower affects the following nearby properties through a visual intrusion into their setting: the Chateau de Mores State Historic Site, the de Mores Packing Plant State Historic Site, the Theodore Roosevelt Maltese Cross Cabin, the Peaceful Valley Ranch, and various other historic properties in and around Medora. Several of the Historic Properties [**5] are within one quarter mile of the tower n15 and the tower is in open view from all of these sites. n16

n13 Letter from Michael E. Simonson, Review & Compliance Coordinator, State Historical Society of North Dakota, to Frank Stilwell, Commercial Wireless Division, Wireless Telecommunications Bureau (November 15, 1999) ("November 15, 1999 Letter").

n14 While the Commission's historic preservation rules do not expressly refer to properties listed on state or local registers of historic properties, such local registers are important sources of information. Where such locally-listed properties are found in the area of potential effects ("APE"), they should be evaluated for NRHP eligibility.

n15 Letter from Michael E. Simonson, Review & Compliance Coordinator, State Historical Society of North Dakota, to Frank Stilwell, Commercial Wireless Division, Wireless Telecommunications Bureau (January 31, 2000). *See also* Letter from Michael Deuel Sullivan, Esq., to Kathy Harvey, Technical and Public Safety

Division, Enforcement Bureau (February 3, 2003) ("Western February 2003 Letter") (stating that the nearest historic site to the tower is approximately one quarter of a mile away) [**6]

n16 *See, e.g.*, Letter from Noel R. Poe, Superintendent, National Park Service, U.S. Department of the Interior, to Dan Abeyta, Commercial Wireless Division, Wireless Telecommunications Bureau (March 15, 2001).

[*10321] 5. In December 1999, WTB informed Western Wireless that Western's tower "may have an adverse effect on historic properties" n17 The Bureau also informed Western that "until the requirements of the Commission's environmental rules are met, "construction *and operation*" of the facilities "may be in violation of the Commission's environmental rules" and "[a] company violating these rules may be subject to forfeitures" n18 The Bureau also directed Western to meet with the SHPO.

n17 Letter from Rose Crellin, Commercial Wireless Division, Wireless Telecommunications Bureau, to Grant Hoovestos, Western Wireless Corporation (December 14, 1999).

n18 *Id.* (emphasis added). In February 2000, WTB again informed Western that if the situation was not resolved, it "may be subject to enforcement action by the Commission."

6. Western continued to operate at the site. For several years, WTB worked with Western and the Historical Society to attempt to resolve [**7] the matter informally. These efforts having proved unsuccessful, WTB referred the matter to the Enforcement Bureau ("EB") for possible enforcement action. n19 On October 17, 2002, EB sent a letter of inquiry ("LOI") to Western, requesting information concerning Western's efforts to assess whether the tower might have a significant effect on the environment and why it did not submit an EA and undergo environmental review prior to constructing the tower. n20 Western submitted a response to the LOI on November 1, 2002. n21 In its response to the LOI, Western states that it complied in good faith with the Commission's rules prior to constructing its tower. Western claims that it is now able to provide "high-quality" cellular service to Medora and portions of I-94 adjacent to Medora. Western argues that prior to construction of the tower, the Governor of North Dakota requested that Western provide cellular service in Medora for the Western States Governors' Conference. According to Western, the lack of cellular coverage highlighted the need for cellular service in Medora, and with the support of the Mayor of Medora, it sought ways to improve cellular coverage in the area. Prior to the [**8] submission of a permit application for the current tower, argues Western, it worked with the City and consulted with the National Park Service to develop a set of three alternative sites for a possible tower. Western contends that the City selected the third alternative, which is the current location, and that this land was made available by the Theodore Roosevelt Medora Foundation, a local historic preservation group. Western indicates also that the City selected the tower location as the alternative farthest from any historic properties without being located within the national park, and that according to Western's engineer, the nearest historic site to the tower is approximately 1/4 mile away. Western states that it submitted a "City of Historic Medora Zoning -- Development Permit and Application Form" ("Application") for consideration by the City Council proposing a cellular communications facility. Western also indicates that it submitted a scale drawing of the tower and tower site with its application.

n19 Because the Commission has historically focused its environmental enforcement efforts on the kind of informal resolution attempted by WTB in this case, WTB and other licensing Bureaus have primary responsibility for environmental enforcement. 47 C.F.R. § 0.111(a)(11) Note. The rules also provide for referral of such matters from the licensing bureaus to EB upon mutual agreement of the Bureaus. *Id.*, § 0.111(a)(14). We take this opportunity to state our strong support for an enforcement-oriented approach in the protection of the environment. We direct referrals to EB of violations by licensees or tower owners where appropriate and continued strong enforcement action by EB where such action is appropriate. [**9]

18 FCC Rcd 10319, *; 2003 FCC LEXIS 2642, **

n20 Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Jim Blundell, Director of External Affairs, Western Wireless Corporation (October 17, 2002).

n21 Letter from Michael Denel Sullivan, Esq., to Kathy Harvey, Technical and Public Safety Division, Enforcement Bureau (November 1, 2002) ("Western November 2002 Letter")

7. Western claims that in reviewing zoning applications such as Western's, the City Council is charged with examining the possible effects of any proposed construction upon the historical integrity of the City. Western states that, under the City's Zoning Articles, the City Council is directed "to regulate all facets of construction to preserve the historical integrity of the City of Medora," and "to prevent [*10322] structures which detract from the aesthetic harmony, style, form, color, proportion, texture or materials of the district." n22 Further, Western claims that the Zoning Articles state that "in order to protect the City's historical integrity, the entire City and the areas under its zoning jurisdiction are hereby zoned as a Historical Integrity District." n23 Western states that this includes the site where it constructed [**10] its tower. Western indicates that its zoning application was placed on public notice, the community was given five days in which to file comments against the proposed tower construction, and no comments were received. Western states that subsequently, the Zoning Board unanimously approved its application on June 1, 1999.

n22 Chapter 6, Article 1, Introduction.

n23 Chapter 6, Article 3, § 6.0301.

8. Western asserts that it applies the criteria set forth in the Commission's rules to determine whether a proposed action may have a significant effect on the environment. Western also states that one of these criteria states that an EA is required if a proposed facility "may affect" a historical property of national significance." n24 Western adds that although the rule does not explicitly prescribe how licensees must make this assessment, a note following the rules suggests that "inquiries *also may be made* to the appropriate State Historic Preservation Officer," and thus such inquiry is one option available to licensees. n25 Western contends that in light of the foregoing, and particularly the city's review and approval, it believed the tower to be categorically excluded from [**11] FCC environmental processing on historic preservation grounds. n26 Western states that after its tower was constructed, it learned that the Historical Society had raised concerns with the Commission regarding the effect of the tower on properties listed or eligible for listing in the NRHP. Western claims that when it became aware of such concerns it undertook an extensive effort to obtain public comment and offered various mitigation measures, but that none of these proposals has been satisfactory to all parties. Western also states that it remains willing to prepare an EA upon Commission request. n27

n24 Western November 2002 Letter at 3. More precisely, Section 1.1307(a)(4) of the Rules, 47 C.F.R. § 1.1307(a)(4), requires an EA where a proposed facility "may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or eligible for listing in the National Register of Historic Places."

n25 Western November 2002 Letter at 3. *See also* 47 C.F.R. § 1.1307(a)(4) note (emphasis added).

n26 Western November 2002 Letter at 3. *See also* 47 C.F.R. §§ 1.1306(a), 1.1307(a)(4). [**12]

n27 Western November 2002 Letter, 47 C.F.R. § 1.1307(c) and (d).

9. On January 14, 2003, the Enforcement Bureau sent a second LOI to Western, requesting it to explain under what authority it believes it may provide service from its tower in Medora. In addition, Western was directed to explain what steps it took to comply with Section 1.1307(a)(4) of the Rules and what efforts it made to determine whether the Chateau de Mores, the de Mores Packing Plant, the Theodore Roosevelt Maltese Cross Cabin and the Peaceful Valley Ranch are listed, or are eligible for listing, in the NRHP. n28 Western submitted a response to the second LOI on February 3, 2003. n29 Western indicates that under Section 22.165(c) of the Rules, a licensee may operate "additional transmitters at additional locations on the same channel or channel block as its existing system" without prior Commission approval if certain conditions are met.

n28 Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Jim Blundell, Director of External Affairs, Western Wireless Corporation (January 14, 2003).

n29 Western February 2003 Letter.

10. Western contends that although its [**13] five year build out period in the McKenzie RSA expired before construction of the Medora Tower, the service area boundary of that site remained within Western's authorized Cellular Geographic Service Area ("CGSA"). Also, Western argues that its [*10323] environmental review under Sections 1.1301 through 1.1319 of the Rules indicated that construction and operation of the Medora site would not have a significant environmental effect. Western also states that it relied on the City Council's approval process to determine whether its tower would affect historic properties listed or eligible for listing in the NRHP. Western claims, that with the exception of the Peaceful Valley Ranch, the historic properties listed in the Commission's second LOI, as well as several other historic properties, are located in areas under the City's zoning jurisdiction. Western claims that potential impacts on the Peaceful Valley Ranch, located approximately five miles from the tower, had not previously been raised as an issue by any parties. n30 Western notes that a complete listing of properties in the NRHP is available online, but argues that the focus of its review has been whether its tower affected any of these [**14] sites. Finally, Western summarizes the information it provided in response to the first LOI.

n30 We note that in the Historical Society's November 1999 letter to the Wireless Telecommunications Bureau, it asserted that Western's tower adversely affected the Peaceful Valley Ranch.

III. DISCUSSION

11. Section 22.165 of the Rules states in part that "a [Public Mobile Services] licensee may operate additional transmitters at additional locations on the same channel or channel block as its existing system without obtaining prior Commission approval" if certain conditions are met. n31 One of the conditions that must be met is that the "additional transmitters must not have a significant environmental effect" under Sections 1.1301 through 1.1319 of the Rules. n32 Similarly, under Section 1.947(a) of the Rules, "all major modifications [of wireless licenses], as defined in § 1.929 of [the Rules] . . . , require prior Commission approval." n33 Section 1.929(a) classifies the following as a "major" modification for all services: "application or amendment requesting authorization for a facility that would have a significant environmental effect as defined by § 1.1301 through 1.1319 of [**15] the rules" n34

n31 47 C.F.R. § 22.165.

n32 47 C.F.R. § § 1.1301-1.1319, 22.165(c).

n33 47 C.F.R. § 1.929.

n34 47 C.F.R. § § 1.1301-1.1319.

12. Under Section 1.1312(b) of the Rules, an EA must be submitted to and ruled on by the Commission prior to the initiation of construction if a proposed facility that is not otherwise subject to pre-construction authorization "may have a significant environmental impact." n35 Section 1.1307(a)(4) specifies as one criterion of potential significant environmental effect "facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places." n36 Where approval of an application requiring an EA would have a significant environmental effect and a FONSI therefore cannot be issued, Section 1.1305 of the Rules requires the preparation of a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) (collectively referred to as EISs) prior to Commission action. n37

n35 47 C.F.R. § 1.1312(b); *see also* 47 C.F.R. § § 1.1307(a) (EA required where facility "may significantly affect the environment), 1.1308, 1.1311. [**16]

n36 47 C.F.R. § 1.1307(a)(4).

n37 47 C.F.R. § 1.1305; *see also* 47 C.F.R. § § 1.1308(i), 1.1314, 1.1315, 1.1317.

13. Here, Western's construction of the Medora Tower not only *may have* had a significant environmental effect but, in fact, *did* have and continues to have such an effect. It is undisputed that Western constructed its tower near, and in plain view of, sites that are listed, or eligible for listing, in the NRHP, including the Chateau de Mores State Historic Site, the de Mores Packing Plant State Historic Site, and the Theodore Roosevelt Maltese Cross Cabin. It is also undisputed that the Historical Society [*10324] did not conclude prior to construction that the tower would not have an adverse effect on Historic Properties. Therefore, we conclude that construction of the tower *may have* had a significant environmental effect under Section 1.1307(a)(4) of the Rules. n38 Our conclusion is supported by the fact that the Historical Society, which is the relevant SHPO, concluded after the fact that the tower *has* an adverse effect on historic properties. Consequently, at a minimum, Commission approval following the filing of an EA was required prior to construction [**17] and operation. As a result, contrary to Western's assertion, it was required to prepare and submit to the Commission an EA, and receive Commission authorization, prior to the construction of its tower and operation from that location. n39

n38 47 C.F.R. § 1.1307(a)(4).

n39 47 C.F.R. § § 1.1307(a)(4), 1.1308, 1.1311.

14. Moreover, in this instance not only was Western required to file an EA and obtain Commission authorization prior to construction, but because the constructed tower actually has significant environmental effects, it was required to await completion of an EIS. n40 Based on the Historical Society's recommendation, other documents in the record, and our independent assessment, we find that the Medora Tower has an adverse effect on at least four sites listed in the NRHP -- Saint Mary's Church, the Medora Doll House, the Old Billings County Courthouse, and the de Mores Packing Plant Ruins -- and on at least one eligible site, the Maltese Cross Cabin. With respect to each of these sites, all of which are located within approximately one half mile or less of the tower, the tower on the bluff presents a modern intrusion that looms over these Historic Properties, thus [**18] introducing an obtrusive incongruous element into a setting that otherwise retains largely the same feel that it had at the time the structures were built. Hence, under Section 800.5(a)(1) of the ACHP Regulations, 36 C.F.R. § 800.5(a)(1), n41 the tower has an adverse effect on Historic Properties.

n40 Where construction of a facility is deemed a Commission action and that facility has an unmitigated adverse effect on one or more Historic Properties, the Commission has for some time viewed such a facility as having a significant effect on the environment. For example, in its 1974 Report and Order implementing NEPA, the Commission determined that the following "classes of facilities" would be classified as "major" under NEPA: those "facilities which will affect districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology or culture which are listed in the National Register of Historic Places or are eligible for listing." *Implementation of the National Environmental Policy Act of 1969*, 49 FCC2d 1313, 1319-1320 (1974) *recon. granted in part and otherwise denied*, 56 FCC2d 635 (1975). [**19]

n41 An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. Section 800.5(a)(1) of the ACHP Regulations, 36 C.F.R. § 800.5(a)(1). *See also* 36 C.F.R. 800.5(a)(2)(v) "Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historical features."

15. In view of our finding that Western's Medora tower not only *may have*, but has had and continues to have, a significant environmental effect, we reject Western's argument that it has authority under Section 22.165 [**20] of the Rules n42 to operate its tower. Specifically, Section 22.165 provides that licensees may operate additional transmitters for existing systems only if, *inter alia*, the additional transmitters do not have a significant environmental effect. n43

Thus, under Section 22.165, a licensee may not operate additional transmitters without prior Commission approval if its action may have a significant environmental effect. Because Western's tower, in fact, has a significant environmental effect, it could [*10325] not have met the Commission's requirements for authorization without prior approval under Section 22.165 of the Rules. In addition, Western has violated Section 1.947(a) of the Rules, n44 which required Western to secure prior Commission approval of its construction of the Medora Tower because that tower "would have a significant environmental effect" and is, therefore, a major modification of Western's license under Section 1.929(a)(4) of the Rules. n45 Thus, Western constructed the Medora Tower and continues to operate at this site without Commission approval. Accordingly, we conclude that Western apparently willfully and repeatedly violated Section 301 of the Act by operating radio [**21] transmitting equipment from an unauthorized location. We note that this violation has continued into the one-year limitations period for a forfeiture. n46

n42 47 C.F.R. § 22.165.

n43 47 C.F.R. 22.165(c).

n44 47 C.F.R. § 1.947(a).

n45 47 C.F.R. § 1.929(a)(4).

n46 47 U.S.C. § 503(b)(6)(B).

16. The fact that the City Council and others may have considered historic preservation issues, or that Western may have worked cooperatively with the WTB and others to try to resolve the problem after construction and operation of the Medora tower, has no bearing on the underlying violation in this case, which occurred before any such cooperative efforts and has continued since. In particular, we note that the Zoning Board's approval of Western's application is irrelevant to whether the tower has a significant environmental effect under the Commission's rules. Section 1.1311(c) of the Rules states that an EA should be accompanied with evidence of site approval obtained from local or Federal land use authorities, thus recognizing that such zoning approval does not preclude the need for an EA (or, in appropriate cases, an EIS). n47 Further, Section [**22] 1.1311(e) provides that an EA need not be submitted if another Federal Government agency has responsibility for deciding whether a proposed facility will have a significant environmental effect, thus recognizing that state or local environmental review does not replace the need for FCC or other federal environmental review. n48

n47 47 C.F.R. § 1.1311(c).

n48 47 C.F.R. § 1.1311 (e). With respect to Western's "consultation" with the National Park Service, the National Park Service has indicated that, at the time, it was unaware that the FCC had rules relating to the location of communications towers. Letter from Noel R. Poe, Superintendent, National Park Service, U.S. Department of the Interior, to RaeAnn Kelsch, Manager of External Affairs, Western Wireless Corporation (July 6, 2000). The National Park Service also notes: "It is not the National Park Service, TRMF [Theodore Roosevelt Medora Foundation], nor the City's responsibility to know and abide by FCC Regulations. That responsibility rests solely with WW [Western]." *Id.*

17. Similarly, our finding that Western is in violation of the Act and is apparently liable for forfeiture is not affected by Western's claim that [**23] it offered to file a post-construction EA with the Commission and that Commission staff discouraged such a filing. The rules require Western to file an EA *before* construction of a facility, such as the Medora Tower, that may significantly affect the environment. n49 Accordingly, a post-construction EA would not in itself end Western's violation of those rules. Moreover, because this tower, in fact, does have a significant impact on the environment, the filing of an EA for the existing tower would not have led to a FONSI that could have ended the violation. Finally, even if Western would have benefited from the filing of an EA but chose not to do so in reliance on the staff, such reliance was at Western's risk. n50

n49 See 47 C.F.R. § 1.1308(a).

n50 See *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1991).

18. Because the Medora Tower has a significant environmental effect under the Commission's rules, Western was required to obtain Commission approval following preparation of an EIS prior to construction of, and operation at, the site. Moreover, because the construction may have had a significant environmental effect, [**24] Western was required to file an EA and obtain a FONSI prior to [*10326] construction and operation. Thus, Western did not have authority to operate its tower under Sections 22.165 or 1.947 of the Rules, n51 and its continued unauthorized operation of its tower violates Section 301 of the Act.

n51 47 C.F.R. § § 22.165, 1.947.

Forfeiture Amount

19. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. n52 The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly. n53 The term "repeated" means that the violation occurred on more than one day. n54 Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$ 120,000 for each violation by a common carrier, or each day of a continuing violation, up to a statutory maximum of \$ 1,200,000 for a single act or failure to act. n55 In determining the appropriate forfeiture [**25] amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." n56

n52 47 U.S.C. § 503(b).

n53 Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "the term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act..." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

n54 Section 312(f)(2) of the Act provides that "the term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). [**26]

n55 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2).

n56 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 (1997); 47 C.F.R. § 1.80(b)(4).

20. *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines ("Forfeiture Policy Statement")* n57 and Section 1.80 of the Rules sets a base forfeiture amount of \$ 4,000 for operation at an unauthorized location. However, a significant upward adjustment is justified in this case since Western's violation continued for three and a half years after WTB informed Western that the tower "may have" a significant environmental effect, and continues to this date. Western's tower has had and continues to have a significant environmental effect on Historic Properties. n58 We therefore consider this to be a very serious instance of a Section 301 violation for which a sizable increase in the base forfeiture amount under the upward adjustment criteria contained in Section 1.80 and the *Forfeiture Policy Statement* is warranted. [**27] n59 Accordingly, applying the *Forfeiture Policy Statement* and statutory factors to the instant case, we conclude that Western is apparently liable for a \$ 200,000 forfeiture.

n57 12 FCC Rcd 17087 (1997), recon denied, 15 FCC Rcd 303 (1999).

n58 In addition, Western failed to obtain prior Commission approval for a facility that may have an adverse effect on one or more Historic Properties.

n59 47 C.F.R. § 1.80(b)(4). Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Red at 17117. Appendix A, Section II.

[*10327] 21. It is important that Western not be permitted to continue to benefit from its failure to comply with the environmental rules. Accordingly, Western is hereby directed to file, within 30 days of the release of this NAL, a sworn statement describing its plans to cease operation at its Medora Tower site or bring that site into compliance with our environmental rules. The statement must be filed either with Western's response to this NAL, or separately if it does not respond (e.g., if it pays the proposed [**28] forfeiture). Failure to cease operation will constitute an apparent further continuing violation that will subject Western to possible increased enforcement action, e.g., higher forfeitures and/or potential revocation of its underlying license for the community. We note that simply applying for authorization or applying for Special Temporary Authority ("STA"), or proposing a remedial plan would not bring Western into compliance and would not insulate Western from further enforcement action for operation prior to receipt of authorization. Finally, should Western plan any changes to its facilities or service in the Medora area in response to this NAL or subsequent Commission orders, we remind Western of its obligation under Section 1.1308(a) of the Rules n60 to file an EA if any of those changes may significantly affect the environment under Section 1.1307(a) of the Rules. n61

n60 47 C.F.R. § 1.1308(a).

n61 47 C.F.R. § 1.1307(a).

IV. CONCLUSION

22. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, n62 Western Wireless Corporation, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of two hundred [**29] thousand dollars (\$ 200,000) for willfully and repeatedly violating Section 301 of the Act.

n62 47 C.F.R. § 1.80.

23. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Western Wireless Corporation SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

24. IT IS FURTHER ORDERED THAT, within 30 days of the release of this *Notice of Apparent Liability for Forfeiture*, Western file a sworn statement in accordance with paragraph 21 above.

25. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) and the NAL/Acct. No. referenced in the caption.

26. The response, if any, and the statement referenced in paragraph 21 above, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, [**30] S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau - Technical and Public Safety Division and must include the NAL/Acct. No. referenced in the caption.

27. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of liability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

[*10328] 28. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554. n63

n63 See 47 C.F.R. § 1.1914.

29. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If [**31] you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Enforcement Bureau -- Technical and Public Safety Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

30. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail, Return Receipt Requested to Mr. Jim Blundell, Director of External Affairs, Western Wireless Corporation, 3650 131st Avenue, SE, # 400, Bellevue, WA 98006, and [**32] to its counsel, Michael Deuel Sullivan, Esq., Wilkinson Barker Knauer LLP, 2300 N Street, NW, Suite 700, Washington, DC 20037

Marlene H. Dortch

Secretary

CONCURBY: POWELL

CONCUR:

[*10332]

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Western Wireless Corporation and WWC Holding Co., Inc., Licensee of Cellular Radio Station KNKN343, CMA583 -- North Dakota 4 -- McKenzie RSA; Notice of Apparent Liability for Forfeiture

I recently announced a comprehensive, proactive approach for addressing the Commission's responsibilities in the communications tower-siting area. Enforcement action, where necessary, will be an integral part of this approach as demonstrated by our action today.

As I described in the Action Plan, the siting of communications towers places a number of worthy, but competing, federal interests in tension -- widespread deployment of advanced telecommunications networks, the protection of birds and endangered species, aviation safety, and the preservation of historic and cultural sites, to name a few. Balancing these interests requires cooperation from a number of interested parties -- including state and federal agencies, Indian tribes, environmental groups, and the communications and tower [**33] industries.