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IN THE MATTER OF THE APPLICATION OF
WWC LICENSE LLC ("WESTERN WIRELESS
CORPORATION") FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER
AND REDEFINITION OF RURAL TELEPHONE
COMPANY SERVICE AREA.

DOCKET NO. T-04248A-04-0239

Staff's Reply to Responses to
Supplemental Staff Report

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I. INTRODUCTION.

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The Utility Division's (Staff's) recommendations in this case have been described in the Supplemental Staff Report. The April 22, 2005 Procedural Order allowed Western Wireless and ALECA to respond to the Supplemental Staff report. The Procedural Order also allowed the parties to file replies to these responses. Accordingly, Staff provides this reply to the responses filed by Western Wireless and ALECA.

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II. STAFF'S RESPONSE TO WESTERN WIRELESS.

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A. Condition 1 - Policy Issues.

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Staff reaffirms its recommendation that the Commission require Western Wireless to file its five-year plan as described in Condition 1 prior to a hearing or decision in this matter. While Staff recognizes that the FCC has allowed pending ETC applicants until October, 1, 2006 to submit their five-year network improvement plans, Staff finds that it is appropriate to require Western Wireless to demonstrate how universal service funds will be used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support prior to ETC designation in the State of Arizona. With respect to the possibility that FCC-designated ETCs will seek reconsideration, modification, or clarification of the Report and Order, Staff finds that the Commission's decision in this docket is independent of the FCC's rulemaking.

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1 Staff recommends that Western Wireless be required to comply with Condition 1 regardless of any
2 further action by the FCC.

3 Designation as an ETC makes a carrier eligible to receive federal universal service funds.
4 If such designation is granted, Western Wireless would expect to qualify for and receive high-cost
5 universal service funds for years to come. As the Company is required by 47 U.S.C. Section
6 254(e) to utilize support it will receive in the future for the provision, maintenance, and upgrading
7 of facilities and services for which the support is intended, it is reasonable to assume that Western
8 Wireless has some idea of how it will comply with this requirement.

9 Staff recognizes that the Company may not currently have *detailed* plans in place for
10 network expansion and improvement in Arizona that extend five years into the future. Naturally,
11 the level of detail submitted in the five-year network improvement plan will decline with each
12 successive year. As Western Wireless indicated, plans for year one will be based on current
13 customer demand, current technology, and current available capital,¹ while the plans for year five
14 will likely be based on projections. Staff acknowledges that projected expenditures for years three,
15 four, and five will not be as specific as those for the earlier years and are subject to change. The
16 annual progress reports required by Condition 1.b will allow Western Wireless to notify the
17 Commission of deviations from its current-year plans and to update its future-year plans. As the
18 Company makes more specific investment and improvement decisions, it will communicate those
19 decisions to the Commission via the annual progress reports. As such, the rather uncertain plans
20 for year five as described by the initial five-year network improvement plan will be updated and
21 solidified in later reports.

22 With respect to the Company's concern that it must present its five-year network
23 improvement information on a wire center level, Staff notes that Western Wireless was fully
24 capable of providing a great deal of information on the wire center level in support of its request
25 for redefinition of the Verizon California, Inc.'s service territory from the study area to the wire
26 center level in this docket. Moreover, given the relatively small number of cell sites that are
27 present in the requested ETC service area, Staff believes that Western Wireless should be able to
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¹ WWC License LLC's Response to Supplemental Staff Report. Page 8. May 12, 2005.

1 2. *Rulemaking is not necessary.*

2 Continuing with its one-size-fits-all approach, Western Wireless next suggests that the
3 Commission can impose Condition 1 only if it adopts a rule applicable to all ETCs. Western
4 Wireless first points to 47 U.S.C. § 254(f), which includes the phrase a “state may adopt
5 regulations.” Of course, this phrase is permissive, not mandatory. More fundamentally, Section
6 254(f) does not even concern ETC proceedings. Instead, Section 254(f) gives states the authority
7 to implement their own universal service funds. This is shown by the language omitted from
8 Western Wireless block quote of Section 254(f): “Every telecommunications carrier that provides
9 intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory
10 basis, in a manner determined by the State to the preservation and advancement of universal
11 service in that State.” The Arizona Universal Service Fund (AUSF) is a fund authorized by
12 Section 254(f). This case does not involve AUSF funding, and thus section 254(f) is inapplicable.
13 The authority of state commissions over applications for federal ETC status comes from 47 U.S.C.
14 § 214(e)(2). As noted above, this section requires the states to apply the flexible “public interest,
15 convenience, and necessity” standard.

16 Western Wireless next points to two Arizona cases that favor rulemaking. But while these
17 cases may favor rulemaking, they do not require it here. Both Arizona and federal administrative
18 law follow the fundamental principle that it is in the agency’s discretion to proceed by rulemaking
19 or by case-by-case adjudication. For example, in *Arizona Corp. Comm’n v. Palm Springs Util.*
20 *Co.*, the court found that the Commission can proceed “on a case by case approach, so long as
21 there exists a rational statutory or constitutional basis for the action...” 24 Ariz. App. 124, 129,
22 536 P.2d 245, 250 (1975); *see also General Motors Corp. v. Arizona Dept. of Revenue*, 189 Ariz.
23 86, 98, 938 P.2d 481, 493 (App. 1997)(applying *Palm Springs*). And in *Cagle Bros. Trucking*
24 *Serv. v. Arizona Corp. Comm’n*, the Arizona Supreme Court held that the Commission may adopt
25 new requirements without a rule if it affords the affected company a hearing.² 96 Ariz. 270, 272-
26 73, 394 P.2d 203, 205 (1964). *Palm Springs* and *Cagle Bros.* follow the bedrock principle of
27 administrative law that while rulemaking is preferred, an agency may establish new requirements

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² Western Wireless voluntarily waived its right to a hearing in this case.

1 by either rulemaking or adjudication. See *Pierce*, 1 *Administrative Law Treatise* § 6.9 (4th ed.
2 2002) see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Both *Pierce* and *Palm Springs*
3 quote extensively from the landmark *Chenery* case. In *Chenery*, the Court stated: "The choice
4 between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in
5 the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203
6 (1947).

7 Western Wireless lost this argument before. In Nebraska, one of Western Wireless's
8 affiliates argued that the Nebraska PSC had to establish rules in applying the public interest
9 standard in 47 U.S.C. § 214(e)(2) – the same standard that is at issue here. The Nebraska Supreme
10 Court soundly rejected Western Wireless's claim, holding that the Nebraska PSC does not have
11 any "affirmative duties... to engage in rulemaking when interpreting a federal statute." *In re*
12 *Application of No. C-1889 of GCC License Corporation (Western Wireless)*, 647 N.W.2d 45, 53
13 (2002). As in Nebraska, Western Wireless's argument should be rejected here. The Commission
14 has broad discretion to choose between rulemaking and case-by-case adjudication. The difficult
15 public interest issues raised by ETC cases suggest that an individually tailored, case-by-case
16 approach is appropriate here.

17 3. *Condition 1 is not a barrier to entry.*

18 Western Wireless also claims that Condition 1 would amount to a barrier to entry
19 prohibited by 47 U.S.C. § 253. However, Condition 1 would not bar Western Wireless from
20 entering the market. Indeed, it has long served the markets in question without Federal USF
21 funding. Western Wireless points to a FCC Declaratory Ruling (FCC 00-248, rel. Aug. 10, 2000).
22 In that order, the FCC found that a state commission could not require a competitive ETC
23 applicant to demonstrate that it offers ubiquitous service throughout the proposed ETC area.
24 Instead, the FCC found that the applicant had to be allowed a "reasonable opportunity to provide
25 service to requesting customers." *Id.* at ¶ 17. The FCC found that a requirement to build facilities
26 to provide ubiquitous service would require "substantial financial investment" that should not be
27 required "without some assurance that it will be eligible for federal universal support." *Id.* at ¶ 13.
28 Unlike a requirement to build expensive facilities prior to applying for support, Condition 1 merely

1 requires the applicant to submit a plan explaining how it intends to spend the substantial subsidy it
2 will receive. This is simply not a barrier to entry.

3 Moreover, even if Condition 1 were a barrier to entry, states may impose barriers to entry
4 under 47 U.S.C. ¶ § 253(b) if the state requirement is necessary to “preserve and advance universal
5 service, protect the public safety and welfare, ensure the continued quality of telecommunications
6 services, and safeguard the rights of consumers.” Condition 1 meets this standard by, among other
7 things, ensuring that the public’s funds are spent to expand or preserve wide access to phone
8 services, rather than simply lining the carrier’s pockets.

9 Further, each of Western Wireless’ legal objections must be viewed in light of the states’
10 broad authority to “imose[] additional eligibility requirements” in ETC cases. *Texas Office of*
11 *Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999). Federal law in this area was
12 enacted against the background of the states’ “historical role in ensuring service quality standards
13 for local service.” *Id.*

14 **C. Condition 6.**

15 Western Wireless also sought clarification of Condition 6 which requires the Company to
16 “demonstrate a commitment to meeting consumer protection standards and compliance with
17 Arizona Corporation Commission Customer Service Rules including R14-2-503 - Establishment of
18 Service, R14-2-504 - Minimum Customer Information Requirements, R14-2-505.A - Service
19 Connection and Establishment, R14-2-507.A,C, and D - Provision of Service, R14-2-508 - Billing
20 and Collection, R14-2-509 excluding A(2) - Termination of Service, R14-2-510 - Customer
21 Complaints.”³ The Company requested that Staff clarify its intent with respect to the word
22 “including.” Western Wireless states that the word “including” creates uncertainty about whether
23 any other applicable rules exist regarding customer service.

24 Staff clarifies that the list of customer service rules presented in Condition 6 were meant as
25 an exhaustive list of applicable customer service rules with which Western Wireless must comply.
26 Staff recommends that the word “including” be omitted from Condition 6.

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³ Supplemental Staff Report. Pages 6-7. April 15, 2005.

1 **III. ALECA's Responses to Staff's Supplemental Report.**

2 **A. Condition 1.**

3 In its Response to the Supplemental Staff Report, ALECA indicated that it generally
4 supports the revised recommendations presented in the Supplemental Staff Report but requested
5 additional clarification and supplementation on several points.

6 ALECA noted that the eligibility conditions set forth in the Supplemental Staff Report did
7 not specifically include language that restricts Western Wireless' use of federal high-cost support
8 from its rural ETC service area in Arizona to the deployment of telecommunications infrastructure
9 in rural Arizona.⁴

10 Staff notes that U.S.C. Section 254(e) requires that a carrier that receives universal service
11 support "shall use that support only for the provision, maintenance, and upgrading of facilities and
12 services for which the support is intended." Staff expects that any federal high-cost support
13 received by Western Wireless from its rural ETC service area in Arizona will be used in
14 accordance with Section 254(e). Moreover, as part of the annual reporting requirements set forth
15 in Condition 1.b of the Supplemental Staff Report, Staff and the Commission will have the
16 opportunity to review how much universal service support was received by Western Wireless and
17 how the support was used to improve its network, signal quality, coverage, or capacity at the wire
18 center level.⁵ Staff agrees with the intent of ALECA's proposed language but finds that it is not
19 necessary in light of Condition 1.b and 47 U.S.C. Section 254(e).

20 ALECA sought clarification on whether Condition 1.a contemplates more than one five-
21 year network improvement plan. ALECA also mentioned that the Supplemental Staff Report did
22 not indicate how long the annual network improvement plan progress reports required by
23 Condition 1.b must be filed. ALECA stated that it supports the filing of additional network
24 improvement plans beyond the initial five-year plan as required by Condition 1.a and proposes that
25 Condition 1.b (annual network improvement plan reports) should be required during the five-year
26 period covered by the initial five-year improvement plan as well as any subsequent improvement
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28 _____
⁴ ALECA's Response to the Supplemental Staff Report. Page 3. May 13, 2005.

⁵ Supplemental Staff Report. Pages 5-6. April 15, 2005.

1 plans that might be required by the Commission.⁶

2 Staff clarifies that Condition 1 requires Western Wireless to file one five-year network
3 improvement plan with five annual progress reports that describe Western Wireless' progress
4 towards meeting its five-year improvement goals. The word "initial" was used to indicate that the
5 five-year network improvement plan would be filed with the Utilities Division prior to ETC
6 designation as set forth in the Supplemental Staff Report.

7 ALECA requested that the five-year network improvement plan as required by Condition
8 1.a be filed in Docket Control so that it would have the opportunity to review the plan and file
9 comments before a hearing or decision on this matter.

10 Staff has recommended that the Commission require Western Wireless to provide detailed
11 and sensitive information about its network, facilities, customers, and investment decisions as part
12 of the five-year network improvement plan. Staff finds that much of the required information is
13 likely to be proprietary and should be submitted pursuant to the protective agreement in this
14 docket.

15 **B. Condition 5.**

16 In addition to Condition 5.a which requires Western Wireless to file annually a report of
17 any unfulfilled requests for service from potential customers within its ETC service area, ALECA
18 requested that Western Wireless be required to report any unfulfilled requests for service to the
19 Commission within 30 days after making such a determination.

20 As an ETC, Western Wireless will be required to provide the supported services throughout
21 its designated service area. While the Commission may request such information at any time,
22 Staff finds that an annual report of all unfulfilled requests for service is the most effective tool to
23 address any potential concerns with respect to the Company's obligation to serve its designated
24 ETC service area.

25 **C. Condition 6.**

26 ALECA expressed concern that customers of Western Wireless have a mechanism to
27 address consumer complaints. ALECA requested that the revised Condition 6 from the
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⁶ ALECA's Response to the Supplemental Staff Report. Page 4. May 13, 2005.

1 Supplemental Staff Report be replaced by the language from Condition 6 in the original Staff
2 Report. ALECA states, “by submitting consumer complaints to the Commission, consumers will
3 have an effective enforcement mechanism to address deficiencies in service and billing.”⁷

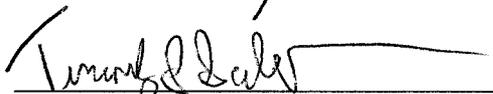
4 Staff notes that Condition 6 of the Supplemental Staff Report requires Western Wireless to
5 comply with the Commission’s applicable customer service rules, certify that it is in compliance
6 with the CTIA Consumer Code, report annual consumer complaints per 1,000 handsets, and
7 include the Commission’s contact information on customers’ bill. Staff finds that an annual report
8 of consumer complaints per 1,000 handsets will allow it to monitor Western Wireless’ customer
9 service record. Consumers will also have the option to contact the Commission with complaints or
10 questions. Staff finds that Condition 6 provides ample opportunity for consumers and the
11 Commission to address any deficiencies in service and billing that may arise in Western Wireless’
12 designated ETC service area.

13 **IV. CONCLUSION.**

14 Staff has reviewed the Responses to the Supplemental Staff Report filed by Western
15 Wireless and ALECA in this docket. After careful consideration of the comments and proposals
16 therein, Staff stands by the majority of the analysis and recommendations presented in the
17 Supplemental Staff Report. Staff has clarified several issues related to Conditions 1, 5, and 6 and
18 recommends that the word “including” be omitted from Condition 6 as requested by Western
19 Wireless.

20 Staff continues to recommend that Western Wireless be required to file its five-year
21 network improvement plan prior to a decision or hearing in this docket.

22 RESPECTFULLY SUBMITTED this 27th day of May 2005.

23
24 
25 Timothy J. Sabo
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27 Arizona Corporation Commission
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⁷ ALECA’s Response to the Supplemental Staff Report. Page 5. May 13, 2005.

1 The original and thirteen (13) copies
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2 27th day of May 2005 with:

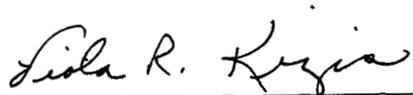
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