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ATTORNEYS FOR WWC HOLDING  
CO., INC. d/b/a CELLULARONE®

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

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In the Matter of the Application of **WWC** )  
**HOLDING CO., INC. d/b/a CELLULAR-** )  
**ONE®** Seeking Designation as an Eligible )  
Telecommunications Carrier that may receive )  
Federal Universal Service Support )  
)

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Case No. WST-T-05-01

**WWC HOLDING CO., INC.'S  
RESPONSE TO MOTION TO  
DISMISS**

COMES NOW, WWC Holding Co., Inc. d/b/a Cellular-One ("Western Wireless") and files this Answer to Idaho Telephone Association's ("ITA") Motion to Dismiss, pursuant to Rule 57 of the IPUC Rules of Procedure, IDAPA 31.01.01.057, in the above-referenced action. As discussed below, new standards for ETC designation contained in the recent Federal Communications Commission ("FCC") 2005 *Report and Order*<sup>1</sup> apply only to ETC applications filed with the FCC after the effective date of the new rules, and new reporting requirements apply to all federally-designated ETCs beginning in 2006. As a result, the new standards do not

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<sup>1</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46 (rel. Mar. 17, 2005) ("*2005 Report and Order*").

apply and cannot be applied to Western Wireless' pending Application. Therefore, the ITA's Motion to Dismiss should be denied.

### **ARGUMENT**

On February 17, 2005, Western Wireless filed an Application for Designation as an Eligible Telecommunications Carrier ("ETC") with the Idaho Public Utilities Commission ("Commission"). It is undisputed that, at the time Western Wireless filed its Application, applicants were required to meet the standards set forth in 47 U.S.C. § 214(e)(1)-(2) and 47 C.F.R. § 54.101 in order to be designated as an ETC in Idaho. ITA Motion, p. 3. In its Application, Western Wireless demonstrated that it meets the requirements set forth in 47 U.S.C § 214(e)(1)-(2) and 47 C.F.R. § 54.101 and, as such, should be designated as an ETC.

On March 17, 2005, the FCC issued the *2005 Report and Order*, setting forth new, additional requirements for ETC applications filed with the FCC pursuant to Section 214(e)(6). The ITA argues that Western Wireless' Application is insufficient because it does not comply with the regulatory requirements for ETC applications adopted by the FCC in the *2005 Report and Order*. However, the new requirements set forth in the *2005 Report and Order* apply only to applications filed with the FCC after the effective date of the newly adopted rules. As a result, the ITA's argument is without merit, and the new rules adopted by the FCC do not apply to Western Wireless' Application.

#### **I. STANDARD OF REVIEW**

The ITA moves for the dismissal on the basis that the Application fails to state a claim upon which relief can be granted. ITA faces a difficult standard – under Idaho law – for a complaint to be dismissed for failure to state a claim, "it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Wackerli v. Martindale*, 82 Idaho 400 405, 353 P.2d 782, 787 (1960). The objective of the law is

to obtain a determination of the merits of a claim, not to have a case dismissed on technicalities. *Id.* at 404, 353 P.2d at 786. As a result, the Commission should err on the side of denying this motion and allow Western Wireless to present its case on the merits. *Idaho Commission on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973); *Ernst v. Hemenway and Moser Co.*, 120 Idaho 941 (1991).

**II. THE 2005 REPORT AND ORDER ESTABLISHES NEW ETC DESIGNATION STANDARDS ONLY FOR FEDERAL ETC DESIGNATIONS UNDER U.S.C. § 214(E)(6) FILED AFTER THE EFFECTIVE DATE OF THE NEW RULES**

The FCC's *2005 Report and Order* does not change any existing rules or standards for ETC applications in Idaho. Rather, it establishes ETC designation requirements only for applications filed with the FCC after the effective date of the newly adopted rules. Accordingly, the new standards do not apply to applications filed with a state commission and do not apply to applications that are currently pending.

The FCC's new Rule 47 C.F.R. § 54.202 will read:

§ 54.202 Additional requirements for Commission designation of eligible telecommunications carriers.

(a) On or after the effective date of these rules, in order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application must...<sup>2</sup>

The FCC made clear in the *2005 Report and Order* that these new standards do not automatically apply to state proceedings initiated under 47 U.S.C. § 214(e)(2): "In addition, as recommended by the Joint Board, we encourage states that exercise jurisdiction over ETC designations pursuant to section 214(e)(2) of the Act, to adopt these requirements..."<sup>3</sup> Until a state acts to

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<sup>2</sup> 47 C.F.R. § 54.202 (emphasis added).

<sup>3</sup> *2005 Report and Order*, ¶ 1.

consider and adopt these new standards, they do not apply in that state. As a result, these new designation requirements do not apply to Western Wireless' pending application.

Moreover, these new requirements would apply at the federal level only to applications filed "on or after the effective date" of the new rules:

(b) Any common carrier that has been designated under section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of these rules must submit the information required by paragraph (a) of this section no later than October 1, 2006, as part of its annual reporting requirements under section 54.209.<sup>4</sup>

The new rules are in accord with the fundamental principal of administrative law that an application must be considered based on the rules in effect when it was filed. Therefore, even if these rules did apply to state proceedings, they would not apply to Western Wireless' pending Application.

As a result, the Commission should find that the new FCC standards do not apply to this Application and do not apply to any application filed before the effective date of the new rules.

### **III. THE NEW REPORTING STANDARDS APPLY TO FEDERALLY DESIGNATED ETCs AND DO NOT AUTOMATICALLY APPLY IN IDAHO**

As noted above, new FCC Rule 54.202(b) establishes designation standards, and FCC Rule 54.209 establishes new annual reporting requirements. These new reporting obligations apply only to ETCs designated by the FCC under Section 214(e)(6), were adopted by the FCC by rule, and apply to all ETCs under the FCC's jurisdiction. As a result, these new reporting obligations will apply in Idaho only if the Commission adopts such requirements by adopting a rule that applies to Idaho ETCs.

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<sup>4</sup> 47 C.F.R. § 54.202(b) (emphasis added).

Rule 54.209 on its terms establishes reporting requirements for: "A common carrier designated under section 214(e)(6) as an eligible telecommunications carrier." 47 C.F.R. § 54.209. The FCC did not extend these reporting requirements to state-designated ETCs, and instead encouraged states to adopt their own reporting standards:

Similar to the ETC designation requirements adopted above, the Commission, in this Report and Order, encourages states to require these reports to be filed by all ETCs over which they possess jurisdiction.<sup>5</sup>

The FCC also directed that any such reporting requirements should be generally applicable to all ETCs, and not just imposed on recently-designated competitors:

We do not believe that different ETCs should be subject to different obligations, going forward, because of when they happened to first obtain ETC designation from the Commission or the state. These are responsibilities associated with receiving universal service support that apply to all ETCs, regardless of the date of initial designation.<sup>6</sup>

The Commission would violate this directive and principles of competitive neutrality if it were to impose these new reporting standards on a single carrier in a designation proceeding. *See also Arasco v. State*, 138 Idaho 719, 69 P.3d 139 (2003) (rulemaking is required). The Commission should direct that while these new reporting standards may be imposed in a separate rulemaking docket, they are not automatically applicable to Western Wireless.

#### **IV. THE "NEW" PUBLIC INTEREST STANDARD IS NOT NEW**

ITA argues that the case should not proceed on modified procedure based on a "new public interest test" contained in Rule 54.202(c). ITA Motion, p. 5. As explained in Western Wireless' Comments, this new rule codifies the kind of analysis done by many state commissions, and contemplates factors that are addressed in Western Wireless' Application and

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<sup>5</sup> 2005 Report and Order, ¶ 5.

<sup>6</sup> 2005 Report and Order, ¶ 20.

Comments. This "new" public interest standard does not require a dismissal of the Application, and does not require the case to go to hearing.

**CONCLUSION**

Western Wireless respectfully requests that the Commission deny ITA's Motion to Dismiss. The new rules and standards referenced by ITA do not apply to this docket and cannot be a basis for denying the Application.

Respectfully submitted,

Dated: April 28, 2005

**WWC HOLDING CO., INC.**  
**d/b/a Cellular One®**

By  \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I certify that the original and seven copies of the foregoing Application of Western Wireless were filed on April 28, 2005 with:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
P.O. Box 83720  
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and true and correct copies were forwarded on April 28, 2005, via the method(s) indicated below, to the following:

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