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FCC Designates Western Wireless as Eligible Telecommunications Carrier for Pine Ridge

The Federal Communications Commission (FCC) recently designated Western Wireless as an eligible telecommunications carrier (ETC) for Oglala Sioux tribal members living on the Pine Ridge Indian Reservation, thus making the company able to receive federal universal service support for providing telephone service to tribal members living on the Reservation.

In an order released on October 9, the FCC concluded that it has the authority to make the ETC designation for tribal members on the Reservation, but that the SD PUC should retain jurisdiction for provision of service to non-tribal members living on the Reservation. In a companion order, the FCC designated Western Wireless to be an ETC for the purpose of serving the tribal population on the Reservation.

While the designation of Western Wireless as an ETC is a positive step in terms of providing telephone service to tribal consumers, it is important to note that, in reaching its decision, the FCC relied on *Montana v. U.S.*¹ and subsequent Supreme Court decisions that strictly limited the authority of tribal governments to regulate the non-Indians living within their jurisdictional boundaries. This FCC order raises continuing concerns about tribal jurisdictional issues stemming from the *Montana* line of cases, and should be a topic of continued analysis and discussion by tribal leaders.

Designation as an eligible telecommunications carrier is necessary to receive federal funds to support four universal service programs. The high-cost program provides support for telephone service in high-cost areas of the county. The low-income program provides support to enable low-income consumers to obtain and retain telephone service. The schools and libraries program helps schools and libraries to buy telecommunications and information services, and the rural health care program provides similar assistance support to rural health care providers.

The Telecommunications Act of 1996, as amended, authorizes the FCC to make an ETC designation in cases where a carrier is not subject to state jurisdiction. Under the Universal Service Twelfth Report and Order, carriers serving tribal lands may petition the FCC for a determination whether the state lacks jurisdiction. The FCC first determines whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission or to tribal authority, given the tribal interests involved. If the FCC finds that the carrier is not subject to state jurisdiction, then it considers the merits of the carrier's request to be designated as an ETC.

In August 2000, Western Wireless and the Oglala Sioux Tribe signed the Tate Woglaka Service Agreement for the provision of telephone service on the Reservation. The agreement

¹ 450 U.S. 544 (1981)

provides that the Tribe has the right to participate extensively in and administer the service plan for the Reservation. It also subjects Western Wireless to the Tribe's regulatory authority and requires that disputes under the agreement be resolved through an arbitration process that is enforceable by the Tribal court.

In January 2001, Western Wireless filed a petition under the Twelfth Report and Order requesting ETC designation for the entire geographic area of the Pine Ridge Reservation. In its petition, supported by the Oglala Sioux Tribe, Western Wireless stated that it intends to provide supported services to both tribal and non-tribal members living on the Reservation if granted ETC status. The SD PUC opposed the petition, arguing, among other things, that Western Wireless is subject to its general regulatory authority under state law.

In performing its analysis, the FCC relied on the Supreme Court's decision in *Montana v. United States*, in which the Supreme Court found that tribes generally lack regulatory authority over non-tribal members living on a reservation, with two exceptions. First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."² Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."³

The FCC concluded that the first *Montana* exception is satisfied under the provisions of the service agreement and further found that the Tribe's sovereignty interests in Western Wireless' service to tribal members outweigh the State's regulatory interests.

However, the FCC concluded that it would not support the extension of tribal jurisdiction to non-tribal members on the Reservation. This finding was based on the second *Montana* exception, which has been narrowly construed in Supreme Court decisions to include only those activities that are "necessary to protect tribal self-government or to control internal relations."⁴

FCC Commissioner Kevin J. Martin filed a dissenting statement, asserting that the FCC does not have the experience, skill, or authority to make decisions involving state and tribal jurisdictional claims. He states that "While Indian tribes may have legitimate claims of sovereignty in these situations, both they and the States deserve a better forum than this one to resolve their claims. I am convinced that the parties would be far better served by resolving such claims in the courts . . ."⁵

Both orders are available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-284A1.pdf and http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-283A1.pdf.

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² 450 U.S. 544, 565 (1981)

³ 450 U.S. 544, 566 (1981)

⁴ STRATE V. A-1 CONTRACTORS, 520 U.S. 438, 459 (1997) (quoting MONTANA V. UNITED STATES, 450 U.S. 544, 564 (1980))

⁵ Dissenting Statement of Commissioner Kevin J. Martin, FCC 01-284, page 2