BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian Moline, Chair
Robert E. Krehbiel, Commissioner
Michael C. Moffet, Commissioner

In the Matter of a General Investigation into The Commission's Telephone Billing Practices Standards	)))	Docket No. 06-GIMT-187-GIT

RESPONSE OF THE
CITIZENS' UTILITY RATEPAYER BOARD
TO PETITIONS FOR RECONSIDERATION

COMES NOW the Citizens' Utility Ratepayer Board (CURB) and files its Response to the Petitions for Reconsideration of the Commission's March 13, 2007 Order (March 13th Order) filed by Sprint Communications Company, L.P., Sprint Spectrum, L.P., and Nextel West Corp. (collectively Sprint) and RCC Minnesota, Inc. and USCOC of Nebraska/Kansas, LLC (collectively RCC). For the reasons set forth below, the Commission should deny the Petitions for Reconsideration filed by Sprint and RCC on all issues but the request by RCC to designate the Commission's order on reconsideration as a non-final agency action.

I. The Commission Did Not Err In Concluding That State Law Authorizes The Commission To Impose Billing Standards On Wireless ETCs.

1. The arguments made by Sprint and RCC that State law does not authorize the Commission to impose the billing standards on wireless ETCs are misplaced. RCC argues the

Commission has failed to explain how the specific provisions of K.S.A. 66-2008 conflict with the general provisions of K.S.A. 66-1,143, and asserts that "nothing in K.S.A. 66-2008 conflicts with the limits on the Commission's regulatory authority set forth in K.S.A. 66-1,143(b)."[1] Similarly, Sprint argues that there is "no basis for the Commission's conclusion that K.S.A. 66-2008(b) is more specific than – and, therefore, trumps – K.S.A. 66-1,104a(c) and 66-1,143(b)."[2]

2. To the contrary, the Commission clearly stated that it found K.S.A. 66-2008 to be "a much more specific statute giving the Commission the authority contained therein."[3] The authority "contained therein" referenced by the Commission was fully described in the preceding paragraphs of the Commission March 13th Order,[4] including the following:

> 48. K.S.A. 2006 Supp. 66-2008 provides the authority – both for State USF and Federal USF purposes – to designate a carrier as an ETC:
>
> "Pursuant to the federal act, distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers, that are deemed eligible both under subsection (e)(1) of section 214 of the federal act and by the commission."
>
> The Commission finds that the determination of eligibility as contemplated in the above subsection implies criteria, as succinctly argued by CURB:
>
> "K.S.A. 66-2008(b) authorizes the Commission to make distributions from the KUSF to 'qualified' wireless telecommunications providers who are 'deemed eligible' *both* under the federal act *and* 'by the commission.' By utilizing the words and phrases, 'qualified,' 'deemed eligible' and 'by the commission,' the legislature conferred upon the Commission the authority to establish qualifying eligibility criteria for ETCs in Kansas." (citation to CURB's Initial and Reply Brief omitted).[5]

3. RCC and Sprint's argument that the Commission wrongly characterized the provisions of K.S.A. 66-1,143(b) as "general" and the provisions of K.S.A. 66-2008 as "specific"

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[1] Joint Petition for Reconsideration of RCC Minnesota, Inc. and USCOC of Nebraska/Kansas, LLC (RCC PFR), ¶ 10.
[2] Petition for Reconsideration of Sprint Communications Company, L.P., Sprint Spectrum L.P., and Nextel West Corp. (Sprint PFR), ¶ 11.
[3] March 13th Order, ¶ 49.
[4] *Id.*, ¶¶ 47-48.
[5] March 13th Order, ¶ 48.

is misplaced. Contrary to their arguments, K.S.A. 66-2008(b) is not "silent,"[6] nor does the Commission's March 13th Order "assume some hidden intent in K.S.A. 66-2008 to authorize the Commission to regulate wireless providers."[7] To the contrary, the Commission's March 13th Order recognizes the authority of the Commission under K.S.A. 66-2008(b) to designate as ETCs "qualified" wireless telecommunications providers who are "*deemed eligible* under subsection (e)(1) of section 214 of the federal act and *by the commission.*" The Commission specifically determined that "K.S.A. 66-2008 provides the authority – both for State USF and Federal USF purposes – to designate a carrier as an ETC... The Commission finds that the determination of eligibility as contemplated in the above subsection implies criteria..."[8]

4. Sprint argues, "[a]t best, K.S.A. 66-2008(b) provides the Commission authority to determine which 'qualified' telecommunications carriers will be 'deemed eligible' to receive KUSF support. In other words, the statute authorizes the Commission to evaluate whether a carrier satisfies the requirements set forth in Section 214(e) of the Federal Act."[9] Sprint's argument misreads and ignores the plain language contained in the statute. The statute provides that:

> Pursuant to the federal act, *distributions from the KUSF shall be made in a competitively neutral manner to qualified* telecommunications public utilities, telecommunications carriers and *wireless telecommunications providers, that are deemed eligible both under* subsection (e)(1) of section 214 of the federal act *and by the commission.* (emphasis added)

Sprint's argument completely ignores the phrase "and by the commission", which expressly authorizes *the commission* to determine under what conditions (outside the federal requirements) qualified wireless telecommunications carriers should be "deemed eligible."

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[6] Sprint PFR, ¶ 9.
[7] RCC PFR, ¶ 13.
[8] March 13th Order, ¶ 48.
[9] Sprint PFR, ¶ 11.

5. The authorization under K.S.A. 66-2008(b) for the Commission to determine under what conditions (beyond the federal requirements) qualified wireless carriers should be "deemed eligible" is consistent with the Eleventh Circuit Court of Appeals decision in *National Association of State Utility Consumer Advocates v. F.C.C. (NASUCA),* 457 F.3d 1238 (11th Cir. 2006). The *NASUCA* decision determined that states have the authority to impose billing standards on wireless carriers, including the ability to require or prohibit the use of line items on bills, as a matter of "other items and conditions" that Congress intended to be "regulable" by the states. *Id.* at 1242.

II. The Commission Did Not Err In Concluding That Federal Law Does Not Preempt The Commission's Authority To Impose Billing Standards On Wireless ETCs.

6. RCC's argument that the 11th Circuit Court of Appeals *NASUCA* decision is "of little or no value as precedent for purposes of this docket"[10] is without merit. RCC supports this argument with the fact that a federal *district court* has disagreed with the 11th Circuit *NASUCA* decision. Federal district court decisions do not invalidate or trump federal circuit court decisions, whether or not a petition for certiorari has been filed with respect to the circuit court opinion. As a result, the highest court that has considered this issue has held that states are not preempted from imposing billing standards on wireless carriers, including the ability to require or prohibit the use of line items on bills. This Commission is therefore not preempted from imposing billing standards on wireless ETCs under federal law.

7. As to RCC's argument that individual billing standards may constitute proscribing a rate for wireless ETCs, this issue can and will be addressed when individual billing standards are addressed by the Commission. Wireless ETCs may seek an exemption or request a waiver

[10] RCC PFR, ¶ 18.

for any particular *proposed* standard that a wireless ETC believes constitutes rate regulation, provided they can persuade the Commission the proposed standard actually constitutes rate regulation proscribed by federal law. This would be much more reasonable than RCC's proposal - to throw the baby out with the bath water - by arguing none of the billing standards should apply to wireless ETCs simply because RCC alleges one isolated *proposed* standard constitutes rate regulation. However, until we actually address the proposed billing standards, this argument is premature.

8. Likewise, RCC's argument that the Commission should defer action until the FCC renders a final determination is disingenuous and ignores the fact that the highest court in the nation that has considered this issue, the 11th Circuit Court of Appeals, has determined that states have the ability to require or prohibit the use of line items on bills, as a matter of "other items and conditions" that Congress intended to be "regulable" by the states. *National Association of State Utility Consumer Advocates v. F.C.C. (NASUCA)*, 457 F.3d 1238 (11th Cir. 2006).

III. The Commission Should Grant Reconsideration On The Issue of Designating The March 13th Order As A Non-Final Agency Action.

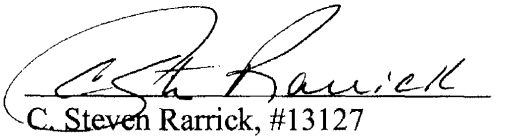
9. CURB does not oppose RCC's request that the Commission designate its order on reconsideration to be a non-final agency action. CURB agrees that this will avoid requiring the parties to seek judicial review on a piecemeal basis.

IV. Conclusion

10. On behalf of Kansas small business and residential ratepayers, CURB respectfully urges the Commission to deny the Petitions for Reconsideration filed by Sprint and RCC on all

issues but the request by RCC to designate the Commission's order on reconsideration as a non-final agency action.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 16th day of April, 2007.

Notary of Public

My Commission expires:

SHONDA D. TITSWORTH
Notary Public - State of Kansas
My Appt. Expires August 3, 2009

CERTIFICATE OF SERVICE

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I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 16th day of April, 2007, to the following:

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