THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Kansas for the Limited Purpose of Offering Lifeline Services to Qualified Households.	)))))	Docket No. 17-TFWZ-237-ETC

ORDER ON TRACFONE'S PETITION FOR RECONSIDERATION

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, and being fully advised in the premises, the Commission finds and concludes as follows:

I. Background

1. On December 5, 2016, TracFone Wireless, Inc. (TracFone) filed an Application to expand its designation as an Eligible Telecommunications Carrier (ETC) and receive Kansas Universal Service Fund (KUSF) support for providing Lifeline service in Kansas.[1]

2. On December 14, 2016, Commission Staff (Staff) filed a Motion to Dismiss TracFone's Application, arguing that TracFone does not meet Kansas' statutory requirements for receiving KUSF support for its proposed Kansas Lifeline service.[2]

3. On December 23, 2016, TracFone filed a Reply to Staff's Motion to Dismiss (TracFone Reply), asking the Commission to deny Staff's Motion and to approve TracFone's Application.[3]

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[1] Application of TracFone Wireless, Inc. to Expand Designation as an Eligible Telecommunications Carrier to Receive Kansas Universal Service Fund Support for Lifeline Service, p. 1 (Dec. 5, 2016) (Application).
[2] Motion to Dismiss, ¶ 29 (Dec. 14, 2016).
[3] Reply of TracFone Wireless, Inc. to Motion to Dismiss, ¶ 13 (Dec. 23, 2016).

4. On December 23, 2016, Staff responded to TracFone's Reply (Staff's Response), again asking the Commission to dismiss TracFone's Application.[4]

5. On January 3, 2017, TracFone filed a Surreply to Staff's Response (TracFone Surreply), proposing an oral argument in this matter.[5]

6. On March 29, 2017, the Commission held oral argument.[6]

7. On May 11, 2017, the Commission issued its *Order Dismissing TracFone's ETC Application* (*Order*), finding that TracFone's failure to meet the requirements of K.S.A. 66-2008(b) warranted dismissal of its Application.[7]

8. On May 25, 2017, TracFone timely filed a Petition for Reconsideration (PFR) of the Commission's *Order*.[8]

II. Legal Standards

9. Kansas courts examine the validity of Commission orders pursuant to the Kansas Judicial Review Act (KJRA).[9] All actions of an administrative agency have a rebuttable presumption of validity.[10] As the party challenging the legality of the Commission's *Order*, TracFone bears the burden of proving the Commission's action was invalid.[11] The validity of the Commission's action is determined in accordance with the standards of judicial review provided in K.S.A. 77-621, as applied to the Commission's action at the time it issued its *Order*.[12] TracFone must prove one of the eight grounds under K.S.A. 77-621(c) in order to obtain relief.

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[4] Staff's Response to TracFone's Reply, p. 3 (Dec. 23, 2016).
[5] Surreply to Staff's Response and Request for Oral Argument, ¶ 15 (Jan. 3, 2017).
[6] Docket No. 17-TFWZ-237-ETC, Hearing Transcript, p. 1 (Mar. 29, 2017) (Tr.).
[7] *Order Dismissing TracFone's ETC Application*, Ordering Clause A (May 11, 2017).
[8] *See* Petition for Reconsideration (May 25, 2017).
[9] K.S.A. 77-621 *et seq. See Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n.*, 28 Kan. App. 2d 313, 315, 16 P.3d 319 (2000).
[10] *Trees Oil Co. v. State Corp. Comm'n*, 279 Kan. 209, 226, 105 P.3d 1269 (2005).
[11] K.S.A. 77-621(a)(1). *See Trees Oil Co.*, 279 Kan. at 226.
[12] K.S.A. 77-621(a)(2).

10. TracFone's PFR variously asserted that the Commission's *Order* "contains errors of fact and law."[13] Although TracFone does not cite to any of the eight grounds for judicial relief under K.S.A. 77-621(c), its PFR implicates K.S.A. 77-621(c)(4).[14] Regarding alleged factual errors, TracFone's PFR makes no suggestion that the Commission's *Order* is based on determinations of fact lacking substantial, competent evidence, pursuant to K.S.A. 77-621(c)(7).[15] As far as the Commission can discern, the only factual error alleged by TracFone is the Commission's finding that federal and state Lifeline programs have distinct eligibility criteria.[16] Therefore, the Commission will address this allegation below.

III. Discussion

11. TracFone alleged the Commission erred in finding that K.S.A. 66-2008(b)'s inclusion of 47 U.S.C. 214(e)(1) requires a telecommunications carrier receiving KUSF support for Kansas Lifeline service to provide that service using its own facilities.[17] TracFone argued that "any reference to 'facilities' or any explicit requirement that a provider must have 'facilities'" is "[c]onspicuously absent from" K.S.A. 66-2008(b).[18] TracFone argued that the Kansas legislature "easily could have enacted an explicit 'facilities' requirement into law,"[19] and having ostensibly failed to do so, "the Commission read such a non-existent requirement into the statute *sub silentio.*"[20]

[13] PFR, p. 1, fn. 1; ¶¶ 1, 3, 11 and 16.
[14] K.S.A. 77-621(c)(4) states that a Kansas "court shall grant relief only if it determines . . . the agency has erroneously interpreted or applied the law."
[15] K.S.A. 77-621(c)(7) states that a Kansas "court shall grant relief only if it determines . . . the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole."
[16] *See* PFR, p. 7, fn. 13.
[17] PFR, ¶ 3.
[18] PFR, ¶ 4.
[19] PFR, ¶ 4.
[20] PFR, ¶ 5. Black's Law Dictionary (10th ed. 2014) defines *sub silentio* as "under silence; without notice being taken; without being expressly mentioned."

12. TracFone makes no new argument here, having previously alleged that K.S.A. 66-2008(b) contains no explicit facilities requirement.[21] Thus, the Commission reiterates its *Order's* finding to the contrary.[22] Moreover, the Commission finds TracFone's concession "that Section 214(e)(1)(A) of the federal act requires that a carrier offer services supported by the federal USF 'either using its own facilities or a combination of its own facilities and resale of another carrier's services'"[23] contradicts its argument that the Commission has read the "own facilities" requirement into K.S.A. 66-2008(b) from silence. K.S.A. 66-2008(b) explicitly includes an eligibility requirement under Section 214(e)(1) of the federal act, and Section 214(e)(1) of the federal act, by TracFone's own admission, explicitly includes an "own facilities" requirement. Therefore, K.S.A. 66-2008(b) explicitly includes an "own facilities" requirement.

13. TracFone's PFR then veered away from its "no 'own facilities'" argument mid-stream by claiming that, although Section 214(e)(1)(A) of the federal act does indeed contain a facilities requirement, "Section 66-2008(b) does not state either explicitly or implicitly that a recipient of KUSF support ***must meet*** the facilities requirement of Section 214(e)(1)(A)."[24]

14. In arguing that a recipient of Kansas Lifeline support need not meet the facilities requirement of Section 214(e)(1)(A), TracFone focuses on the "deemed eligible" language of K.S.A. 66-2008(b).[25] TracFone stated there is a "critical difference between having facilities as required by Section 214(e)(1) and being 'deemed eligible' under that section."[26] TracFone then attempted to support this assertion by returning to its understanding of K.S.A. 66-2008(b)'s

[21] *See* TracFone's Surreply, ¶¶ 1-2; *see also* Tr., p. 8, lines 4-5.
[22] *See Order*, ¶¶ 38-39.
[23] PFR, ¶ 5.
[24] PFR, ¶ 5 (emphasis added).
[25] PFR, ¶ 5.
[26] PFR, ¶ 6.

introductory phrase, "pursuant to the federal act,"[27] claiming that the phrase "means the entire federal Act," which would include Section 10, and "not just Section 214(e)(1)(A)."[28]

15. At the outset, the Commission finds TracFone's "entire federal Act" argument proves too much, as it were, because it is tantamount to saying that K.S.A. 66-2008(b) essentially adopts wholesale "the federal act" by reference, in which case there would be no need for the statute to reference specific portions of the federal act. Thus, on TracFone's reading, the Kansas legislature superfluously inserted 47 U.S.C. 214(e)(1) into K.S.A. 66-2008(b) alongside the words "pursuant to the federal act." However, the Kansas Supreme Court has held that "a statute should be so construed . . . that no clause or part of it shall be treated as superfluous,"[29] and "we presume the legislature does not intend to enact useless or meaningless legislation."[30] Therefore, the Commission finds that K.S.A. 66-2008(b)'s introductory language is only intended to draw the reader's attention to the auspices or authorization of the federal act, under which Section 214(e)(1) specifically applies.

16. Nevertheless, were the Commission to concede TracFone's argument that "pursuant to the federal act" means Section 10 (47 U.S.C. 160(e)) must also be applied, it does not advance TracFone's case, because 47 U.S.C. 160(e) (Section 160(e)), properly understood, does not require states to forbear from applying Section 214(e)(1)'s facilities requirement to carriers seeking to provide state Lifeline service.

17. TracFone argued that Section 160(e) does not limit forbearance of the facilities requirement to federal Lifeline support,[31] and accused the Commission of adding the words "*with respect to federal USF support*" to Section 160(e) in its finding that Section 160(e)'s forbearance

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[27] PFR, ¶ 6. *See* TracFone's Surreply, ¶¶ 2-3.
[28] PFR, ¶ 6.
[29] *Driscoll v. Hershberger*, 172 Kan. 145, 150, 238 P.2d 493 (1951).
[30] *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013).
[31] PFR, ¶ 7.

rule is indeed limited to federal Lifeline support.[32] TracFone thus accused the Commission while engaging in the pretense that somehow its own interpretation of Section 160(e) does not necessarily read words into the statute.

18. Section 160(e) states: "A state commission may not continue to apply or enforce any provision of this chapter that the [Federal Communications] Commission has determined to forbear from applying under subsection (a) of this section." The question, unacknowledged by TracFone, but analyzed in the *Order*,[33] is what program or programs - state or federal or both - are explicitly named in Section 160(e) regarding which a state commission may no longer continue to apply or enforce any provision of Chapter 5 of the federal Act? The Commission rightly found that Section 160(e) contains no explicit reference to any particular program requiring forbearance.[34] Because state commissions have authority to determine ETC status for a carrier's receipt of *both* federal and state Lifeline subsidies,[35] the reader must determine whether Section 160(e)'s forbearance obligations apply only to receipt of federal Lifeline subsidies, only to receipt of state Lifeline subsidies, or to receipt of both.

19. TracFone and the Commission do not dispute that Section 160(e)'s forbearance requirement applies to federal Lifeline subsidies. However, TracFone argued that the forbearance requirement applies to *state* Lifeline subsidies as well.[36] TracFone sought to support this view by asserting that Section 160(e) imposes "what could at most be called an *implicit* state requirement."[37] This means, as found in the *Order*, that TracFone necessarily reads Section 160(e) as though it says, "[a] State commission may not continue to apply or enforce any

[32] PFR, p. 4, fn. 6. *See Order*, ¶¶ 43-46.
[33] *See Order*, ¶ 44.
[34] *See Order*, ¶ 44.
[35] *See Order*, ¶ 45; *see also* 47 U.S.C. 214(e)(2).
[36] PFR, ¶ 7.
[37] PFR, ¶ 7. (Italics added).

provision of this chapter *with respect to state USF support* that the [Federal Communications] Commission has determined to forbear from applying under subsection (a)." TracFone may have never put these italicized words into print, but they are required in order for TracFone's "implicit state requirement" argument to work. Thus, both the Commission and TracFone must assume or imply certain words not found explicitly in the text in their respective interpretations of Section 160(e). The Commission simply made its assumed words clear by italicizing them in paragraph 44 of its *Order*. TracFone's claim that Section 160(e) contains an "implicit" requirement is not a pass allowing it to escape the charge that it too assumes or adds words not found in the text itself in its interpretation of Section 160(e).

20. Moreover, TracFone provided nothing other than bald assertion for its claim that Section 160(e) contains "an implicit state requirement" of forbearance of Section 214(e)(1)'s "own facilities" requirement. Nothing in Section 160(e) hints at such a requirement, and the Commission's *Order* provides ample reasons for finding there is no such implicit state requirement and that Section 160(e) only prohibits the Commission from applying the facilities requirement when considering *federal* Lifeline ETC designations,[38] as it is currently doing.[39]

21. TracFone then appealed to the FCC's 2012 Lifeline Reform Order, arguing that "[n]othing in that FCC forbearance analysis indicates or even suggests that the analysis and resulting conclusions are applicable only to federal Lifeline and would not be applicable [to] state Lifeline programs as well."[40] This is truly an argument from silence, amounting to the proposition that when the FCC says nothing to indicate or suggest that its orders are inapplicable to the states, then by default they *are* applicable to the states. Yet TracFone provides no basis for its assumption that FCC directives are binding on the states unless demonstrated otherwise.

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[38] *See Order*, ¶¶ 44-46.
[39] *See Order*, ¶ 42.
[40] PFR, ¶ 8.

22. What TracFone must produce, and has not thus far, is an FCC order positively asserting that its Lifeline "own facilities" forbearance policy means that state commissions must also forbear from applying the "own facilities" requirement when administering and subsidizing their own state Lifeline programs. In the absence of such a positive requirement, as the *Order* finds, the Commission presumes that a federal telecommunications statute only applies to federal telecommunications programs.[41] Otherwise, having separate state telecommunications programs would be unnecessary. Such programs would simply have to adopt everything dictated by the federal Act, as interpreted by the FCC. This is not the case, as demonstrated by 47 U.S.C. 254(b)(5)'s provision that "[t]here should be specific, predictable and sufficient Federal *and State* mechanisms to preserve and advance universal service"[42] and by the FCC's 2016 Lifeline and Link Up Reform and Modernization Order's rule that "a state maintaining its own Lifeline fund will still be free to adopt any eligibility requirements it deems necessary."[43]

23. In addition, a review of the FCC's 2012 Lifeline Reform Order positively refutes TracFone's claim that nothing in the Order indicates or suggests that it applies only to the federal Lifeline program. The FCC stated: "We forbear, on our own motion, from applying the Act's facilities requirement of section 214(e)(1)(A) to all telecommunications carriers that seek limited ETC designation to participate in the Lifeline program, subject to certain conditions noted below."[44] The FCC did not say it forbore from applying the Act's facilities requirement to all carriers seeking ETC designation to participate "in Lifeline *programs*" (i.e., federal and state) or "in *a* Lifeline program." "***The*** Lifeline program" can only be referring to one specific program,

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[41] *See Order*, ¶ 44.
[42] Italics added.
[43] *See* Staff's Response, ¶ 5.
[44] *In the Matter of Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, 27 F.C.C. Rcd. 6656, 6813, ¶ 368 (2012).

namely, the federal program. Moreover, the FCC's Order does not trouble itself anywhere to state that the above forbearance holding also applies to state Lifeline programs and state USF Lifeline subsidies. It could easily have done so. In fact, the FCC's 2012 Order did not shy away from ruling on what states may and may not do. In paragraph 375 of the Order, the FCC found: "States, however, have a right to impose a state-specific obligation on each existing Lifeline-only ETC to obtain either a certification from each PSAP where the company plans to offer service, or a self-certification."[45] Thus, the Commission finds that TracFone's view provides a recipe for improperly imposing all manner of preferred federal requirements on the states, while neutering states' jurisdiction over their own state Lifeline programs and support subsidies.

24. Returning to the "deemed eligible" language of K.S.A. 66-2008(b), TracFone contended that, once the FCC decided to forbear from enforcement of the facilities requirement on Lifeline-only ETCs because the requirement did not advance the low-income program's statutory goal, "all Lifeline providers, including resale providers, who met the FCC-imposed forbearance conditions were 'deemed eligible' under Section 214(e)(1) of the federal act to provide Lifeline service."[46] However, this again misconstrues K.S.A. 66-2008(b).

25. A carrier without its own facilities that receives FUSF support for federal Lifeline service is not "deemed eligible" to do so under Section 214(e)(1), because under Section 214(e)(1) a carrier must have its own facilities. Indeed, the FCC's 2012 Lifeline Order holds that "[t]o be eligible for federal universal service support, ***the Act provides*** that an ETC ***must*** offer the services supported by federal universal service support mechanisms throughout a service area 'either using its own facilities or a combination of its own facilities and resale of another

[45] *In the Matter of Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, 27 F.C.C. Rcd. 6656, 6815, ¶ 375 (2012).
[46] PFR, ¶ 8.

carrier's services.'"[47] Thus, a carrier without its own facilities is "deemed eligible" not under Section 214(e)(1), but rather, under Section 160(e)'s forbearance of Section 214(e)(1). That is, the carrier is "deemed eligible" by the FCC's willingness to *not enforce* the requirements of Section 214(e)(1). Forbearance does not mean the requirements of Section 214(e)(1) have changed. The FCC has merely decided not to enforce those requirements for *federal* Lifeline support, and states are likewise prohibited from enforcing them when determining ETC status for carriers that seek to provide *federal* Lifeline service supported by the FUSF.

26. Under the plain reading of K.S.A. 66-2008(b), Section 214(e)(1)'s requirements must be applied to anyone seeking to be "deemed eligible" for KUSF support by this Commission. K.S.A. 66-2008(b) does not say, "deemed eligible both under *the FCC's forbearance of* subsection (e)(1) of section 214 of the federal act and by the commission." TracFone errs in making such an interpolation.

27. TracFone also argued that the federal Act and the Kansas Telecommunications Act (KTA) have remarkably similar and consistent goals,[48] and that the Commission "strain[ed] credulity" by basing "its determination in this matter on the unsupported and unsupportable supposition that there are differences between the universal service goals of the federal act and those of the Kansas telecommunications Act."[49]

28. The Commission finds that, while the goals may be consistent, it does not follow that Kansas must adhere entirely to the FCC's preferred method of achieving those goals. Simply put, the Kansas legislature enacted both K.S.A. 66-2001, which codifies Kansas' telecommunications public policy, and K.S.A. 66-2008, which contains a facilities requirement.

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[47] *In the Matter of Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, 27 F.C.C. Rcd. 6656, 6810, ¶ 361 (2012) (emphasis added).
[48] PFR, ¶¶ 9-10.
[49] PFR, ¶ 10.

When these two statutes are read together in harmony, as they must be,[50] they mean the Kansas legislature believed K.S.A. 66-2001's policy goals could be met while also enforcing K.S.A. 66-2008(b)'s facilities requirement.

29. Moreover, the Commission's *Order* did not base its determination in this matter on any perceived differences between the federal Act's universal service goals and those of the KTA. The *Order* is based on a proper reading of K.S.A. 66-2001 and K.S.A. 66-2008(b). In addition, the Commission reiterates its finding that TracFone's policy arguments are more properly directed to the Kansas legislature.[51]

30. TracFone further alleged that the Federal and Kansas Lifeline programs are not "separate and unrelated programs."[52] This is particularly true, said TracFone, because Lifeline consumers perceive the federal and Kansas programs as a single program.[53] However, what customers perceive as distinct or unified is irrelevant to the proper statutory interpretation at issue in this proceeding and does not negate the obvious distinctions between the federal and Kansas Lifeline programs. TracFone's admission that the two programs "are funded by separate funding sources"[54] by itself overthrows its argument.

31. As mentioned in paragraph 10 of this Order above, TracFone charged that "[t]he Dismissal Order's statement that the federal and state Lifeline programs have distinct eligibility criteria . . . is refuted by the Commission's own decision to revise the Kansas Lifeline eligibility criteria so as to conform to the federal eligibility criteria."[55] TracFone's allegation would only be true if the *Order* was referring to *customer* eligibility criteria to receive Lifeline service, rather

[50] *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 195, 239 P.3d 66 (2010) (holding that "[a]ppellate courts also must consider various provisions of an act *in pari materia* to reconcile and bring the provisions into workable harmony if possible").
[51] *See Order*, ¶ 56.
[52] PFR, ¶ 11.
[53] PFR, ¶¶ 11-12.
[54] PFR, ¶ 11.
[55] PFR, p. 7, fn. 13.

than *carrier* eligibility criteria to receive KUSF subsidies for providing Lifeline service. Thus, the Commission clarifies, and the record reflects, that the two Lifeline programs are distinct with regard to *carrier* eligibility.[56]

32. Additionally, TracFone argued that no state commissions have denied TracFone state Lifeline funding due to the "own facilities" requirement.[57] TracFone noted that, out of the 40 states where it provides Lifeline service, "relatively few have their own Lifeline programs."[58] The Commission takes TracFone's point that no other states to date have denied TracFone's receipt of state Lifeline support due to a facilities requirement, but this misunderstands the *Order's* finding, namely, that there is no example of any state public utilities commission (PUC) proceeding where the state PUC followed TracFone's legal logic claiming that forbearance of the facilities requirement is binding on state Lifeline support determinations. This absence of any such proceeding may simply be due to a paucity of state Lifeline programs, as TracFone noted, or to differences in state statutory requirements. Either way, the *Order's* finding that no *state* commission, compelled by any binding nature of the FCC's forbearance requirement on the states, has determined to forbear from applying the 'own facilities' requirement when approving *state* USF support for its *state* Lifeline program,[59] drives home the fact that: (1) there is no evidence the FCC's forbearance requirement is binding on state Lifeline programs; and (2) TracFone is asking the Commission to diverge from its historical and consistent interpretation of K.S.A. 66-2008(b) in favor of an interpretation with no evident parallel. The Commission finds such a divergence unwarranted.

[56] *See* Tr., p. 33, lines 17-25.
[57] PFR, p. 8 and ¶ 13.
[58] PFR, ¶ 13.
[59] *See Order*, ¶ 42.

33. TracFone also faulted the *Order's* finding that "[t]he FCC has never explicitly ordered that state enforcement of 47 U.S.C. 214(e)'s 'own facilities' requirement in the state's Lifeline program is 'inconsistent with' the FCC's rules" regarding universal service.[60] TracFone based this alleged fault on its assertion that "[r]equests by Lifeline providers for state fund support would not have been made to the FCC,"[61] and "the applicability of the FCC's exercise of its forbearance responsibilities to a state Lifeline fund in a state whose laws include an implicit 'facilities' requirement would be questions for state commissions, not for the FCC."[62]

34. TracFone's contention is again misguided. The Commission agrees that Lifeline providers seeking state USF support would properly direct their requests to state commissions and that the FCC forbearance policy's applicability to a state Lifeline program with a facilities requirement is not a question for the FCC. Yet this contradicts TracFone's entire argument, based as it is on the supposition that the FCC has taken the facilities requirement out of state hands by making the FCC's forbearance of that requirement binding on state commissions.[63] The *Order's* finding here simply pointed out that the FCC has never taken such a step in any of its orders. It has never ordered a state to forbear from applying Section 214(e)(1)'s facilities requirement to the state's Lifeline program because applying the requirement would somehow be "inconsistent with" its rules on universal service.[64]

35. Finally, TracFone claimed the *Order's* preemption analysis is flawed because it supposedly relies on a single case which, according to TracFone, is "wholly irrelevant to the issue" at hand.[65] TracFone's argument fails because, although the *Order* cited solely to the

[60] PFR, ¶ 14. *See Order*, ¶ 47.
[61] PFR, ¶ 14.
[62] PFR, ¶ 14.
[63] *See* PFR, ¶ 7.
[64] *See Order*, ¶ 47.
[65] PFR, ¶ 15.

Bluestem case for its recitation of the rules of law on preemption, *Bluestem* culled those rules from the United States Supreme Court,[66] the Kansas Federal District Court[67] and the Kansas Supreme Court.[68] Thus, the *Order's* preemption analysis is not based solely on *Bluestem.* Moreover, although *Bluestem* decided a different telecommunications issue, preemption was a central question in that case,[69] and TracFone made it a central question in this case.[70] Thus, the Commission properly relied on *Bluestem* for its preemption analysis.

36. TracFone's PFR claimed the Commission's *Order* promulgated a factual error in finding that federal and state Lifeline programs have distinct eligibility criteria. However, the Commission has properly clarified the *Order* on this point,[71] and thus, TracFone's allegation lacks merit. Moreover, TracFone did not contend that any portion of the *Order* lacks substantial competent evidence, pursuant to K.S.A. 77-621(c)(7). Regarding the claim of legal error, the *Order* found that K.S.A. 66-2008(b) requires a carrier providing Kansas Lifeline service to meet Section 214(e)(1)'s facilities requirement. TracFone's PFR did not advance any substantially new arguments beyond those of previous pleadings which would convince the Commission to overturn that finding. Hence, TracFone's PFR has not demonstrated that the *Order* erroneously interpreted or applied K.S.A. 66-2008(b), pursuant to K.S.A. 77-621(c)(4). Therefore, based on a

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[66] *See Bluestem Tel. Co. v. Kansas Corp. Comm'n*, 52 Kan. App. 2d 96, 109, 363 P.3d 1115 (2015) (holding that "conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"' *California v. ARC America Corp.*, 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)").

[67] *See Bluestem Tel. Co.*, 52 Kan. App. 2d at 109 (relying on an express preemption rule from *Graham v. Wyeth Laboratories*, 666 F.Supp. 1483, 1489 (D.Kan.1987)).

[68] *See Bluestem Tel. Co.*, 52 Kan. App. 2d at 109 (holding that "[o]ur Supreme Court has stated that '[i]n the absence of express preemption, there is a strong presumption that Congress did not intend to displace state law.' *Doty v. Frontier Communications, Inc.*, 272 Kan. 880, 891, 36 P.3d 250 (2001) (quoting *Graham v. Wyeth Laboratories*, 666 F.Supp. 1483, 1489 [D.Kan.1987])"). *Bluestem* also relies on the Kansas Supreme Court for its holding that "the conflict between the two laws must be positive and direct in order to make the coexistence of the two laws an impossibility. It is necessary that the state law in its application to the same field contravene federal public policy or cause a different result or consequence. 272 Kan. at 891, 36 P.3d 250." *See Bluestem Tel. Co.*, 52 Kan. App. 2d at 109.

[69] *See Bluestem Tel. Co.*, 52 Kan. App. 2d at 109-10.

[70] *See Order*, ¶ 48.

[71] *See* ¶ 31 of this *Order, supra.*

review of the pleadings and record evidence, the Commission finds and concludes that TracFone's PFR should be denied in its entirety, as it fails to establish a sufficient basis for the Commission to alter its May 11, 2017, *Order*.

THEREFORE, THE COMMISSION ORDERS:

A. TracFone's Petition for Reconsideration is denied.

B. This Order constitutes final agency action as defined by K.S.A. 77-607(b)(1). Lynn M. Retz, Secretary to the Commission, is the agency officer designated to receive service of a petition for judicial review on behalf of the agency.[72]

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: JUN 13 2017

Lynn M. Retz
Secretary to the Commission

MJD

EMAILED

JUN 13 2017

[72] K.S.A. 77-613(e).

CERTIFICATE OF SERVICE

17-TFWZ-237-ETC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of Electronic Service on JUN 13 2017.

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