

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

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

JAN 12 2007

 Docket Room

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

**REPLY BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD**

COMES NOW the Citizens' Utility Ratepayer Board (CURB) and files its Reply Brief on the Commission's authority to impose billing standards on wireless eligible telecommunications carriers (ETCs). In support of its Reply Brief, CURB states as follows:

**I. PRELIMINARY ISSUES**

1. Initial briefs were filed by the following parties on December 29, 2006:

- Sprint Communications Company L.P. d/b/a Sprint PCS and Nextel West Corp. d/b/a Nextel (Sprint Nextel);
- RCC Minnesota, Inc., USCOC of Kansas/Nebraska LLC d/b/a U.S. Cellular, and Alltel Kansas Limited Partnership (RCC, et al.);
- United Telephone Company of Kansas d/b/a Embarq, United Telephone Company of Eastern Kansas d/b/a Embarq, United Telephone Company of Southcentral Kansas d/b/a Embarq, and Embarq Missouri, Inc. d/b/a Embarq (Embarq);
- Commission Staff (Staff); and
- CURB.

2. With the exception of CURB, each of the above parties make one or more arguments in their initial briefs based upon *proposed* billing standards that the Commission has not yet considered and parties have not yet fully addressed with comments, testimony, and/or evidence. Wireless carriers argue that no record has been presented to justify a need to change

the existing billing standards<sup>1</sup> and that specific *proposed* billing standards are inappropriate.<sup>2</sup> Staff argues that it is appropriate for the Commission to exercise its jurisdiction because of the existence of specified *proposed* billing standards.<sup>3</sup> These arguments go beyond the issues the Commission requested the parties to brief in its December 14, 2006 Order, and should not be considered by the Commission in determining whether it has authority to impose, or whether it should impose, billing standards on wireless ETCs.

3. The issues the Commission requested the parties to brief were:

A. Does the Commission have the authority to impose the billing standards on wireless ETCs?

1. Kansas statutory regulatory exemption for wireless carriers.
2. Federal preemption of state regulation of wireless carriers.

B. If the answer to A is ‘yes,’ is it appropriate for the Commission to exercise its authority?<sup>4</sup>

4. It should be noted that the revised *proposed* billing standards submitted by Staff on December 11, 2006, differ materially from previous proposed billing standards submitted by Staff, and in many instances are not agreed to by industry, Staff, and/or CURB. Because of this, CURB expects that the Commission will provide parties the due process opportunity to conduct discovery, submit further comments, and present testimony and evidence in support of their respective positions on these revised *proposed* billing standards. As a result, CURB will not reply to arguments for or against any specified *proposed* billing standards in this reply brief, but will instead reserve its right to address those issues when appropriate at a later date.

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<sup>1</sup> Pre-Hearing Brief of Sprint Nextel, p. 11; Joint Brief of RCC Minnesota, Inc., USCOC of Kansas/Nebraska LLC, and Alltel Kansas Limited Partnership on Proposed Billing Standards (RCC et al. Joint Brief), ¶ 37; Initial Brief of Embarq, p. 5 (Because Sprint Nextel and Embarq failed to number their paragraphs as required by K.A.R. 82-1-219(c), CURB will reference only the page number.).

<sup>2</sup> RCC et al. Joint Brief, ¶¶ 10-11.

<sup>3</sup> Staff Brief on the Commission’s Jurisdiction to Require the Applicability of the Telecommunications Billing Practices Standards to Wireless Eligible Telecommunications Carriers (Staff Brief), ¶¶ 12-15.

<sup>4</sup> Order Adopting Procedural Schedule, ¶ 3.

5. Likewise, CURB will not repeat each argument contained in its initial brief demonstrating the Commission's authority under federal and state law to impose billing standards on wireless ETCs, why the Commission should impose billing standards on wireless ETCs, and how CURB's position is consistent with prior Commission Orders. Instead, CURB will primarily reply to arguments and statements contained in the initial briefs of other parties.

## **II. THE COMMISSION HAS THE AUTHORITY TO IMPOSE BILLING STANDARDS ON WIRELESS ETCs.**

### **A. Kansas Statutes Do Not Effect The Commission's Authority To Impose Billing Standards On Wireless ETCs.**

6. All parties filing briefs agree that the Commission does not have jurisdiction to regulate wireless carriers generally under K.S.A. 66-104a(c) and 66-1,143(b). However, Embarq, Staff, and CURB agree that the Commission is authorized to establish eligibility criteria for wireless ETCs under K.S.A. 66-2008(b),<sup>5</sup> which provides:

*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)*

7. Sprint Nextel and RCC et al. argue that Kansas law prohibits the Commission from imposing billing standards on wireless ETCs.<sup>6</sup> Interestingly, Sprint Nextel fails to provide any analysis of K.S.A. 66-2008(b) but only mentions it in passing during its discussion of *Citizens' Utility Ratepayer Board v. Kansas Corporation Commission*, 264 Kan. 363, 393, 956 P.2d 685 (1998).<sup>7</sup> RCC et al. fails to even mention K.S.A. 66-2008(b) in their brief.

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<sup>5</sup> Initial Brief of Embarq, pp. 2-3; Staff Brief on the Commission's Jurisdiction to Require the Applicability of the Telecommunications Billing Practices Standards to Wireless Eligible Telecommunications Carriers (Staff Brief), ¶¶ 8-11; Brief of the Citizens' Utility Ratepayer Board, ¶¶ 4-9.

<sup>6</sup> Pre-Hearing Brief of Sprint Nextel, pp. 2-6; RCC et al. Joint Brief, ¶¶ 5-8.

<sup>7</sup> Pre-Hearing Brief of Sprint Nextel, p. 2.

8. 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. This plain reading of K.S.A. 66-2008(b) is consistent with the Commission’s findings in Docket No. 00-GIMT-584-GIT, 05-GIMT-187-GIT, and 06-GIMT-466-GIT.<sup>8</sup>

9. Sprint Nextel and RCC et al. rely upon *Citizens’ Utility Ratepayer Board v. Kansas Corporation Commission*, 264 Kan. 363, 393, 956 P.2d 685 (1998), in support of their conclusion that “Kansas law prohibits the application of the proposed billing rules to any wireless carriers, including those that are ETCs.”<sup>9</sup> However, the language they rely upon was unnecessary to the ultimate determination by the Supreme Court.

10. The Supreme Court held that “[d]etermining precisely how these terms [jurisdiction, regulation, supervision, or control] should be interpreted within K.S.A. 66-1,143 is not necessary. The more relevant question is whether a KUSF assessment by the KCC might fall within the general definition of the terms.” 264 Kan. at 392. Answering that question, the Supreme Court determined:

The definition of a KUSF assessment does not match the definitions of any of the KCC acts prohibited by K.S.A. 66-1,143. See *Mountain Solutions*, 966 F. Supp. At 1048 (“The mandatory KUSF contributions that the KCC has imposed on all telecommunications providers in the state do not constitute a regulation of rates or market entry. The assessments simply constitute an additional cost of doing business that the companies either may absorb themselves or pass on to their customers.”).

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<sup>8</sup> Order 3: Addressing Jurisdiction, Docket No. 00-GIMT-584-GIT, ¶ 24; Order on Motions of Sprint, SWBT, and Cox, 05-GIMT-187-GIT, ¶ 13; and Order Addressing Petitions For Reconsideration, Docket No. 06-GIMT-466-GIT, ¶¶ 11-12.

<sup>9</sup> Pre-Hearing Brief of Sprint Nextel, pp. 2-3.

264 Kan. at 393.

11. As a result, the Supreme Court merely determined the issue presented in that case:

The cost of supporting the wire line infrastructure is not a new one; it is simply paid by a different method under 66-2008(b). Such cost used to be paid directly to the local exchange carriers by wireless and other telecommunications providers through high access rates. Now, access rates have been mandatorily reduced, and the expense of supporting the wire line infrastructure is paid to the KUSF through an assessment on the intrastate revenues of wireless and other telecommunication providers.

...

Since the KCC previously set the access rates properly changeable to CMT, it makes sense that the KCC may set a KUSF surcharge for CMT to pay, pursuant to 66-2008(b), in order to cover the same cost of supporting the wire line infrastructure, without constituting an exercise of jurisdiction or control over CMT and violating K.S.A. 1,143(b). As such, the statutes do not conflict and neither one needs to be struck down.

264 Kan. at 393-394.

12. The question presented in this docket is clearly distinguishable from the question before the Supreme Court in *CURB v. KCC*, and *will* require the two statutes to be reconciled. CURB submits that a plain reading of K.S.A. 66-2008(b) in the context before the Commission in this docket would lead the Supreme Court to reach a different result by finding K.S.A. 66-2008(b) authorizes the Commission to establish qualifying eligibility criteria for ETCs in Kansas.

**B. Federal Law Does Not Preempt The Commission's Authority To Impose Billing Standards On Wireless ETCs.**

13. Embarq, Staff, and CURB all agree that the Commission is authorized to establish eligibility criteria for wireless ETCs under federal law as well.<sup>10</sup> As noted by Embarq and CURB, the Eleventh Circuit Court of Appeals recently determined the states have the authority

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<sup>10</sup> Initial Brief of Embarq, pp.3-4; Staff Brief, ¶¶ 5-7; Brief of the Citizens' Utility Ratepayer Board, ¶¶ 10-12.

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. *National Association of State Utility Consumer Advocates v. F.C.C. (NASUCA)*, 457 F.3d 1238 (11<sup>th</sup> Cir. 2006).

14. Sprint Nextel’s brief fails to even acknowledge the Eleventh Circuit *NASUCA* decision. The RCC et al. Joint Brief acknowledges the *NASUCA* decision, but unsuccessfully attempts to distinguish the billing standards to be considered by this Commission from the “billing practice” determined to be “regulable” in *NASUCA*.<sup>11</sup> The RCC et al. Joint Brief erroneously states, “[c]ertain provisions in the Billing Standards regulate the amount of specific charges, which goes (sic) far beyond how charges are presented in a bill” and references a *proposed* billing practice (advance payment) to be considered by the Commission in this docket.<sup>12</sup> CURB disagrees with the premise asserted by RCC et al. - that the advance payment *proposed* billing standard constitutes rate regulation. However, if the Commission ultimately adopts this particular *proposed* standard as a billing standard, a wireless ETC may file for a waiver if it can persuade the Commission the standard actually constitutes rate regulation proscribed by federal law. This would be much more reasonable than the RCC et al. 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 et al. alleges one isolated *proposed* standard constitutes rate regulation.

15. RCC et al. also erroneously represents the *NASUCA* decision as “appeal pending.”<sup>13</sup> To CURB’s knowledge, no appeal of the Eleventh Circuit decision in *NASUCA* has

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<sup>11</sup> *National Association of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d at 1242 (“This *billing practice* is a matter of “other terms and conditions” that Congress intended to be regulable by the states.”).

<sup>12</sup> RCC et al. Joint Brief, ¶¶ 10-11.

<sup>13</sup> RCC et al. Joint Brief, ¶ 10, fn. 5.

been filed at this time, and the requests for rehearing have been denied. *National Association of State Utility Consumer Advocates v. FCC*, 468 F.3d 1272. As a result, current existing law on this issue is 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.

### **III. IT IS APPROPRIATE FOR THE COMMISSION TO EXERCISE ITS AUTHORITY TO IMPOSE BILLING STANDARDS ON WIRELESS ETCs.**

16. Embarq, Staff, and CURB agree (again) on whether it is appropriate for the Commission to exercise its authority to impose billing standards on wireless ETCs.<sup>14</sup>

17. RCC et al. argues the Commission should refrain from exercising its authority to impose billing standards on wireless ETCs because “[t]here is no factual record developed in Kansas that would lead to a conclusion that Billing Standard rules need to be adopted for *only ETCs*.”<sup>15</sup> First, this docket was not opened to propose billing standards for “only ETCs,” but for “all jurisdictional telecommunications public utilities and Eligible Telecommunications Carriers (ETC).”<sup>16</sup> Second, and more importantly, to date there has been no opportunity to develop a factual record in this docket. CURB anticipates the Commission will provide the parties an opportunity to develop a factual record in further proceedings in this docket.

18. Arguments made by RCC et al. and Sprint Nextel that the Commission should not impose billing standards on wireless ETCs for “parity’s sake” ignore the reality that billing practices impact the universal service being provided to Kansas customers. Vague, misleading,

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<sup>14</sup> Initial Brief of Embarq, pp.4, 6-7; Staff Brief, ¶¶ 12-15; Brief of the Citizens’ Utility Ratepayer Board, ¶¶ 13-19.

<sup>15</sup> RCC et al. Joint Brief, ¶ 3 (emphasis added).

<sup>16</sup> Order Opening Docket and Scheduling Comments, Appendix A, p. 1. Staff’s Proposed Revised Billing Practices Standards, filed December 11, 2006, subsequently amended the language to state, “The following standards are applicable to all telecommunications public utilities, telecommunications carriers and local exchange carriers, as defined in K.S.A. 66-1,187 and to all entities designated as Eligible Telecommunications Carriers (ETCs).”

and/or deceptive billing practices by wireline or wireless carriers prevent ratepayers from accurately assessing: (1) what they are being billed for; (2) whether the amounts charged conform to the price charged for the service; (3) when and why their service may be suspended or disconnected; (4) when and how late payment penalties may be assessed; (5) when their payments are due or delinquent; and (6) when service or rates will be changed. These are vital consumer protections for Kansas ratepayers whose universal service can be affected by the billing practices of wireless ETCs carriers receiving federal and state universal service support.

19. Consistency in the application of billing practices is required for consumers to make informed choices among all competitive providers. Unequal application of these items between wireless ETCs and other ETCs creates an uneven playing field and fails to adequately ensure competitive neutrality, as required by K.S.A. 66-2008(b). This also violates the KCC's obligations under K.S.A. 66-2001 to "ensure that consumers throughout the state realize the benefits of competition," "promote consumer access to a full range of telecommunications services," and "protect consumers of telecommunications services from fraudulent business practices."

20. The argument made by Sprint Nextel that wireless competition is enough to forestall the need for billing standards was rejected by the FCC:

We disagree with those commenters that argue that CMRS providers should be exempted from this requirement because they operate in a competitive marketplace. The Commission specifically rejected this argument in the *Truth-in-Billing Order* noting that, as competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace. Although we agree that a robustly competitive marketplace provides the best incentive for carriers to meet the needs of their customers and affords dissatisfied customers with an opportunity to change carriers, we also recognize that some providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry. As the Commission emphasized in the *Truth-in-Billing Order*, one of the fundamental goals of the truth in billing principles is to provide consumers with clear, well-organized, and non-misleading



information so that they will be able to reap the advantages of competitive markets.<sup>17</sup>

In fact, the FCC rescinded earlier exemptions for CMRS providers stating, “we conclude the CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b)’s requirement that billing descriptions be brief, clear, non-misleading and in plain language.”<sup>18</sup>

21. It is in the public interest to impose Kansas billing standards on wireless ETCs who are receiving FUSF and/or KUSF support to provide universal service. Without the protection of these billing standards, Kansas ratepayers subscribing to universal service from wireless ETCs will not be afforded the same necessary consumer protections the Commission requires of other ETCs, and the Commission will have failed to ensure competitive neutrality.

#### **IV. HOW DOES CURB’S POSITION ON THE ABOVE ISSUES COMPORT WITH THE COMMISSION’S REASONING REGARDING JURISDICTION OVER WIRELESS ETC’S IN PRIOR ORDERS?**

22. The briefs of Embarq, Staff, and CURB demonstrate that the Commission has consistently recognized its authority over wireless ETCs in prior orders issued in Docket Nos. 00-GIMT-584-GIT, 05-GIMT-187-GIT, and 06-GIMT-466-GIT.<sup>19</sup>

23. The briefs filed by Sprint Nextel and RCC et al. fail to demonstrate that the Commission’s prior Orders support their positions.

24. The Commission exercised its jurisdiction over wireless ETCs in Docket No. 06-GIMT-446-GIT by imposing specific requirements on wireless ETCs, including requiring certain

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<sup>17</sup> Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking (Truth-In-Billing Order), *In the Matter of Truth-In-Billing and Billing Format*, 20 F.C.C.R. 6448, 6456-57, 20 FCC Rcd. 6448, 35 Communications Reg. (P&F) 1008 (March 18, 2005).

<sup>18</sup> *Id.*, 20 F.C.C.R. at 6456.

<sup>19</sup> *See*, Order 3: Addressing Jurisdiction, Docket No. 00-GIMT-584-GIT, ¶ 24; Order on Motions of Sprint, SWBT, and Cox, 05-GIMT-187-GIT, ¶ 13; and Order Addressing Petitions For Reconsideration, Docket No. 06-GIMT-466-GIT, ¶¶ 11-12.

advertising requirements, allowing Lifeline customers to select their plan of choice, and requiring two-year quality improvement plans.<sup>20</sup>

25. Further, while the Commission decided not to exercise its jurisdiction to impose quality of service standards on wireless ETCs in Docket No. 05-GIMT-187-GIT, the Commission expressly stated that it did not intend to limit its jurisdiction to evaluate wireless carriers service quality offerings in the context of their requests for ETC status.<sup>21</sup>

26. Finally, the arguments made by wireless ETCs and cited by the Commission in support of its decision not to impose quality of service standards on wireless ETCs in Docket No. 05-GIMT-187-GIT, do not support a decision not to impose billing standards on wireless ETCs in this docket. Billing standards provide vital consumer protections for Kansas ratepayers whose universal service can be affected by the billing practices of wireless ETCs carriers receiving federal and state universal service support.

27. Consistency in the application of billing practices is also critical for consumers to make informed choices among all competitive providers. Unequal application of these items between wireless ETCs and other ETCs creates an uneven playing field and fails to adequately ensure competitive neutrality, as required by K.S.A. 66-2008(b). This also violates the KCC's obligations in K.S.A. 66-2001 to "ensure that consumers throughout the state realize the benefits of competition," "promote consumer access to a full range of telecommunications services," and "protect consumers of telecommunications services from fraudulent business practices."

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<sup>20</sup> Order Addressing Petitions For Reconsideration, Docket No. 06-GIMT-466-GIT, ¶¶ 25, 47, 50, 55, 58.

<sup>21</sup> Order on Motions of Sprint, SWBT, and Cox, Docket No. 05-GIMT-187-GIT, ¶ 20.

**V. CONCLUSION**

28. On behalf of Kansas small business and residential ratepayers, CURB urges the Commission to exercise its authority under state and federal law to impose billing standards on wireless ETCs in Kansas.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Steven Rarrick", written over a horizontal line.


C. Steven Rarrick, #13127  
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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:

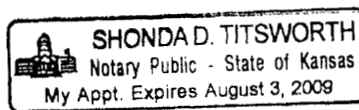
That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

  
C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of January, 2007.

  
Notary of Public

My Commission expires: 8-03-09



**CERTIFICATE OF SERVICE**

06-GIMT-187-GIT

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 12th day of January, 2007, to the following:

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