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April 29, 1997

RECEIVED

APR 29 1997

Federal Communications Commission
Office of Secretary

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RE: Federal State Joint Board on Universal Service (CC Docket No. 96-45)

Dear Mr. Caton:

On Tuesday, April 29, 1997, I, on behalf of AirTouch Communications, sent the attached correspondence to Suzanne Toller, legal advisor to Commissioner Rachelle Chong. Please associate with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy

cc: Suzanne Toller

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4/29/97

Ms. Suzanne Toller
Legal Advisor to Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Federal Joint Board on Universal Service
CC Docket No. 96-45

Dear Suzanne:

As I mentioned yesterday, the Kansas Corporation Commission (KCC) issued an Order establishing and funding the Kansas Universal Service Fund. This decision results in a direct charge to wireless providers' revenues of 14.1%. Following the release of this decision, a group of wireless service providers filed with the U.S. District Court for the District of Kansas seeking a preliminary injunction preventing the implementation of the KCC Universal Service Order. The carriers argued that the KCC is preempted from issuing such an Order by Section 332 of the Communications Act.

The question of the scope of Section 332 was brought up in the Joint Board's recommended decision in CC Docket 96-45. Nine parties argued in comments that Section 332 preempted state universal service regulation of CMRS (American Personal Communications; AirTouch Communications, Inc., Bell Atlantic NYNEX Mobile, Inc., CTIA, CelPage, Inc., Nextel, Paging Network, Inc., PageMart, Inc., and PCIA) and no parties argued to the contrary. In addition, six parties argued in reply comments that Section 332 preempted state universal service regulation of CMRS (Arch Communications Group, AirTouch, CTIA, CelPage, Centennial Cellular, and Sprint Spectrum). One party, the California Public Utilities Commission, disagreed with this interpretation.

I am attaching copies of the briefs filed in Kansas for your review and a copy of a Georgia Statute that addresses how the state of Georgia interprets universal service funding obligations as applied to CMRS providers. AirTouch appreciates your reviewing this information.

If you have any questions, do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen".

Kathleen Q. Abernathy

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NO. CV-95-00512758

METRO MOBILE CTS OF FAIRFIELD COUNTY, INC., METRO MOBILE CTS OF HARTFORD, INC., METRO MOBILE CTS OF NEW HAVEN, INC., METRO MOBILE CTS OF NEW LONDON, INC., AND METRO MOBILE CTS OF WINDHAM INC.

: SUPERIOR COURT

V.

: JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

NO. CV-95-05560968

METRO MOBILE CTS OF FAIRFIELD COUNTY, INC., METRO MOBILE CTS OF HARTFORD, INC., METRO MOBILE CTS OF NEW HAVEN, INC., METRO MOBILE CTS OF NEW LONDON, INC., AND METRO MOBILE CTS OF WINDHAM, INC.

: SUPERIOR COURT

V.

: JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

: DECEMBER 9, 1996

MEMORANDUM OF DECISION

INTRODUCTION

The two captioned matters are appeals from decisions of the Department of Utility Control ("DUC"). Because they have the same parties and turn on the same issues, they have been consolidated for argument and decision, and this decision applies to both.

OFFICE OF THE CLERK
SUPERIOR COURT

Clerk

Each of the six plaintiff-appellants (one of whom was joined as a plaintiff-appellant after the filing of these appeals) is a cellular mobile telecommunications provider ("cellular provider") which is licensed to provide cellular telephone services by the Federal Communications Commission ("FCC") (the plaintiff-appellants are hereinafter referred to, collectively, as "Metro Mobile"). Pursuant to the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 86002, 107 Stat. 396 (1993) (the "Budget Act"), Congress has preempted the DPOC from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers. The DPOC has not challenged the authority of Congress, under the supremacy clause of the United States Constitution (Article VI), to preempt those aspects of state regulation of cellular telephone services.

In 1994, the General Assembly adopted P.A. 96-83 which, in its amendments to 15-2476, C.G.S.:

- 1) Permits the DPOC, if necessary, to "establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the department, to ensure the universal availability of affordable, high quality basic telecommunications services to all residents and businesses throughout the state regardless of location" (the "Universal Service Program"); and.
- 2) Requires the DPOC to "establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the department, sufficient to provide low-income households or individuals with a level of communications service or package of

telecommunications services that supports participation in the economy and society of the state" (the "Lifeline Program").

Pursuant to the authority granted to it by P.A. 94-83 to establish a Universal Service Program, the DPUC, by its March 31, 1995 decision in its Docket No. 94-07-08 (the "Universal Decision"), determined that cellular providers will be required to make payments toward the funding of a Universal Service Program. Also pursuant to the authority granted to it in P.A. 94-83, the DPUC, by its May 3, 1994 decision in its Docket No. 94-07-09 (the "Lifeline Decision"), determined that cellular providers will be required to make payments toward the funding of a Lifeline Program. It is from those decisions that Metro Mobile has appealed.

P.A. 94-83 was adopted against the backdrop of the Budget Act, which provides, in relevant part:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephony exchange service for a substantial portion of the communications within such State) from requirements to insure the universal availability of telecommunications service at affordable rates.

47 U.S.C. §332(e)(3)(A) (the "Presumption Clause").

Subsequent to the taking of these appeals, Congress adopted, and the President signed, the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (the "1996 Act"), which provides, in relevant part:

Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

1996 Act, §254(f) (to be codified at 47 U.S.C. §254(f)).

The 1996 Act goes on to provide: "A State may adopt regulations not inconsistent with the (Federal Communications Commission's rules to preserve and advance universal service . . . "1996 Act, §254(f). The FCC has not yet adopted such rules, and therefore Connecticut has not yet adopted any such regulations.

It is found that Metro Mobile is aggrieved by each of the appealed decisions because of the financial impact each would have on it. If implemented, and it is held that Metro Mobile has standing to maintain these appeals.

ISSUES PRESENTED

Those appeals present the following issues:

- 1) Does the Budget Act preempt Connecticut from assessing Metro Mobile for Universal Service and Lifeline Programs?
- 2) Are the authorities granted to the DROC by P.A. 94-83 to assess telecommunications companies for Universal

Service and Lifeline Programs on an "equitable basis" delegations of legislative authority which violate Article Second (separation of powers provision) of The Connecticut Constitution?

3) Are the assessing authorities granted to the DPUC by P.A. 94-83 unconstitutionally vague in violation of due process requirements? and,

4) What effect, if any, does the 1996 Act have on the decisions appealed from?

PRESUMPTION

The DPUC acknowledges that the Budget Act presumps it from licensing, and from regulating the rates of, cellular providers. However, the DPUC contends that its assessments on cellular providers for the Universal Service and Lifeline Programs have been exempted from presumption by the following portion of the Presumption Clause: ". . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

Thus the presumption issue turns on whether assessments on cellular providers for Universal Service and Lifeline Programs are "other terms and conditions of commercial mobile services."

In support of its argument that these assessments are "other terms and conditions" of service, the DPUC cites the legislative history of the Budget Act, in particular the House

Report, which states:

It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or other such matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H. Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S. Code Cong. & Admin. News at 588.

Under the rules of statutory construction, legislative history may be reviewed to resolve an ambiguity in a statute, but it may not be relied on to create an ambiguity which is not apparent on the face of a statute. Therefore, the question is whether the Preemption Clause is facially ambiguous as to the authority of the states to assess cellular providers for programs such as the Universal Service and Lifeline Programs.

While the DPUC claims an ambiguity exists in that portion of the Preemption Clause which states:

. . . this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services

the court finds the following portion of the same sub-

paragraph more to the point:

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from regulations imposed by a state commissioner or all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

The rules of statutory construction require that no language in a statute be read to be redundant. Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.

By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the DPC from

assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

ARTICLE SECOND STANDARDS FOR DELEGATION

Article Second of the Constitution of Connecticut, as amended by Article XVIII of its Amendments, provides:

The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

The leading Connecticut case in which a delegation of authority by the legislature to the executive branch was voided for lack of sufficient standards is State v. Stoddard, 126 Conn. 623 (1940). In Stoddard, the court found that the challenged statute did not contain sufficiently definite standards for the exercise of the delegated authority, with the result that the executive branch was exercising an essentially legislative function in violation of Article Second. Stoddard dealt with a statute which authorized the state's milk administrator "to establish, from time to time, a minimum price for the different milk areas of the state for each class and grade of milk or milk products . . ." The

statute in issue contained only the following standard to guide the exercise of the delegated authority: "In establishing minimum prices for milk under the provisions of [the statute in issue], the milk administrator shall take into consideration the type of container used and other cost factors which should influence the determination of such prices." The court said that, in order to comply with the provisions of Article Second, a statute which delegates authority must establish "primary standards" for the exercise of that authority. Finding no such standards in the milk price act, the Court held it unconstitutional.

Our courts have decided a number of cases sustaining legislative delegations to the executive branch, of which the following are examples:

Big v. Liquor Control Commission, 133 Conn. 586 (1947), in which the court found unconstitutionally definite the standards in a statute which authorized the Liquor Control Commission to refuse to grant a liquor permit if the commission:

has reasonable cause to believe . . . that the number of permit premises in the locality is such that the granting of a permit is detrimental to public interest; and, in reaching a conclusion in this respect, the commission may consider the character of, the population of, the number of like permits and number of all permits existent in, the particular town and the immediate neighborhood concerned, the effect which a new permit may have on such town or neighborhood or on like permits existent in such town or neighborhood)

Id., 711; and,

Ross v. Conn. Industrial Building Com.
 150 Conn. 333 (1963), in which the court found sufficiently definite, for constitutional purposes, the standards governing the making of mortgage loans by a commission of the executive branch to private sector borrowers, which the court paraphrased as follows:

The commission . . . has . . . to decide that the mortgage (1) is one made and held by an approved mortgagee, responsible and able to service the mortgage properly; (2) involves a principal obligation not in excess of \$5,000,000 for any one project and not exceeding 90 percent of the cost of the project; (3) has a maturity within three-quarters of the remaining useful life of the property but not more than twenty-five years; (4) contains complete amortization provisions requiring periodic payments within the ability of the mortgagor to pay; and (5) contains essential provisions as to property insurance, repairs, taxes, default and similar matters.

Id., 344; and.

University of Connecticut Chapter, AAUP v. Governor, 200 Conn. 386 (1986), in which the court upheld a statute authorizing the governor to reduce budgetary allotments, in the court's words:

if (1) due to a change in circumstances since the budget was adopted certain reductions should be made in various allotments of appropriations, or (2) the estimated budget resources during such fiscal year will be insufficient to pay all appropriations in full . . .

Id., 398.

The Connecticut case which, on its facts, is closest to these appeals is Fallens v. Brown, 163 Conn. 478 (1972), which concerned a statute creating a tax on dividend income and authorizing the tax commissioner to adopt regulations for

the operation and enforcement of that tax. The authority of the commissioner to adopt regulations was challenged on Article Second grounds, and the court noted that:

The power granted to an administrative board or official may include, but is not limited to, the establishment of filing requirements, the hearing of administrative appeals, the finding of facts, and the determination of when an opposed to how a tax may be imposed.

Id., 499.

In *Kellom* the court went on to describe the separate legislative and administrative functions under the statute at issue, as follows:

The General Assembly specifically levied the tax, the rate prescribed and defined the income subject to taxation as well as the persons who are required to pay. 12-505, 12-506. It then authorized the tax commissioner to (1) prescribe the information required of the taxpayer, (2) to design forms for returns, (3) to require the submission of copies of federal income tax returns and supporting records, (4) to extend time limitations, and (5) to promulgate regulations for enforcement of the act and collection of the prescribed tax.

Id., 500.

In holding the above-described statutory standards insufficiently definite, the *Kellom* court observed that:

As long as revenue legislation sets out with specificity the rate of the tax, the instances where it is to be imposed and those who will be liable to pay it, there is no impermissible delegation of legislative power merely because the details of regulation and enforcement are left to administrative action.

Id., 501.

While *Kellom* concerned a tax statute, the analysis

employed by the Kellum court is the same as that which appears in the other decisions cited above. Accordingly, the court concludes that Kellum is another in the line of well-established Article Second delegation cases, and that Kellum is not a separate genre of tax case which deals, incidentally, with delegation issues. Therefore, it is not necessary for the court to decide whether, in a technical sense, assessments for the Universal Service and Lifeline Programs would constitute cases in order to determine whether the Kellum analysis applies to these appeals.

The view that it does not matter, for Article Second purposes, whether payments made pursuant to P.A. 94-83 are denominated taxes or assessments is confirmed by an analysis of the elements of those types of imposition. Each involves a taking by government of money from a party in order to fund expenditures which have a presumed public purpose. (Since the constitutionality of the disbursement by the DPUC, outside of the legislative appropriation process, of monies raised by its assessments has not been raised in these appeals, and since a determination of the constitutionality of those disbursements is not necessary to a decision in these appeals, that issue is not addressed here.) In a constitutional sense, it makes no difference whether the authority for such a taking is characterized as a tax, an assessment or otherwise, because the consequence is the same; a lighter purse. One has a right to know that such a fiscal invasion is authorized by a

constitutionally sufficient legislative directive. Accordingly, the standards laid out in *Kellam* apply to the delegation provisions of P.A. 94-83.

The authority for the DPUC, under P.A. 94-83, to establish and fund the Universal Service Program is as follows:

The [DPUC] may, if necessary, establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the [DPUC]

§16-247e(b), C.G.S.

The authority for the DPUC, under P.A. 94-83, to establish and fund the Lifeline Program is as follows:

. . . The [DPUC] shall . . . establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the [DPUC]

§16-247e(a), C.G.S.

The narrow issue before the court is whether the language "on an equitable basis, as determined by the [DPUC]," as used in the legislative delegation of authority to the DPUC to fund the Universal Service and the Lifeline Programs, "sets out with specificity the rate of the [assessment], the instances where it is to be imposed and those who will be liable to pay it . . .", as required by *Kellam*. Id., 501.

The determination of what is "equitable" is subjective, and therefore one person may find equitable what another finds distinctly inequitable. Because "equitable" is subject to

many interpretations, it is the DPOC, in determining what is equitable, which "sets out with specificity the rate of the [assessment], " which determines "the instances where it is to be imposed" and which determines "those who will be liable to pay it." Because, according to KELLOGG, those determinations can only be made by the legislature, the grant of funding authority to the DPOC in P.A. 94-83 does not pass KELLOGG muster. Further, the single word "equitable" does not meet the criteria for primary standards developed by STODDARD, JR and ROSEN. Accordingly, the funding mechanisms established by P.A. 94-83 violate Article Second.

The grant of authority to the DPOC, in P.A. 94-83, to establish the Universal Service Program "if necessary" raises a similar Article Second issue. However, that issue has not been raised by the parties, and its determination is not necessary to a decision in these appeals. Accordingly, that issue is not addressed here.

VOID FOR VAGUENESS DUE PROCESS STANDARDS

In SEAFS MEME, ASSN. of Connecticut, Inc. v. O'Reilly, 204 Conn. 746 (1987), a statute was challenged on due process vagueness grounds. The Court upheld the challenged statute and noted:

Courts have derived the void for vagueness doctrine from the constitutional guarantee of due process. Civil statutes must be definite in their meaning and application, but may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes. Due process of law requires that statutes must be sufficiently definite and

precise to enable a person to know what conduct is permitted and what is prohibited. An imprecise statute, however, may be sufficiently definite if it provides reasonably distinct boundaries for its fair administration.

Id., 757-58. (Citations and quotation marks omitted.)

In Bottone v. Westport, 209 Conn. 682 (1989), the court, after citing State Management Assn., refined the due process standard to be applied to void for vagueness challenges, as follows:

Specifically, the standard is whether the statute afford[s] a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited.

Id., 667. (Citations and quotation marks omitted.)

Void for vagueness challenges on due process grounds are raised most frequently against criminal statutes, and therefore the test of whether a statute allows one to discern what is permitted or prohibited is framed for analysis of a criminal statute. However, the concept underpinning the standard, that is, whether a statute is drafted with the clarity or specificity needed to allow one to know to what it applies, can be applied as readily to challenges to legislative delegations as it can to legislative declarations of forbidden behavior.

Applying this due process test to P.L. 94-83, the question is whether the language "on an equitable basis, as determined by the [DFUC]" affords a person of ordinary intelligence a reasonable opportunity to know against whom assessments for the Universal Service and Lifeline Programs

can be levied, and in what amounts. Those questions are answered in the negative, and it is held that the funding mechanism for the Universal Service and Lifeline Programs contained in P.L. 94-83 are void for vagueness under the due process clause of the Connecticut Constitution, Article First, Section 8, as amended by Article XVII of its Amendments.

EFFECT OF THE 1996 ACT

As noted above, the 1996 Act provides: "A state may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." As the parties stipulated at argument, the FCC has not yet adopted any such rules, and Connecticut has not adopted any such regulations. Accordingly, neither the 1996 Act, nor anything done by Connecticut pursuant to it, negates the Budget Act's presumption of Connecticut's ability to finance Metro Mobile for the Universal Service and Lifeline Programs.

CONCLUSION

It is held that:

- 1) Substantial rights of Metro Mobile have been prejudiced by the DPUC decisions appealed from;
- 2) The DPUC's declared intent to assess Metro Mobile for the Universal Service and Lifeline Programs violates the Budget Act; and,

3) The funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83, on which the decisions appealed from are based, violate Article Second and the due process clause of The Connecticut Constitution.

These appeals are sustained.



George Levine,
Judge

46-5-167

PUBLIC UTILITIES AND TRANSPORTATION

46-5-167

switched access rates to their corresponding interstate levels and shall allow adjustment of other rates, including those of basic local exchange services or universal service funds, as may be necessary to recover those revenues lost through the concurrent reduction of the intrastate switched access rates. In no event shall such adjustments exceed the revenues associated with intrastate to interstate access parity as of July 1, 1995. In addition, if access revenues have dropped below July 1, 1995, levels in subsequent years, the adjustment in those years will be based on the reduced balance. Any intrastate to interstate switched access adjustments resulting in increased local rates that have been capped under subsection (b) of this Code section will be allowed and a new cap will be established pursuant to this Code section. In the event that the rates for switched access cannot be negotiated in good faith between the parties, the commission shall determine the reasonable rates for switched access in accordance with the procedures provided in paragraph (1) of this subsection.

(g) In accordance with rules to be promulgated by the commission, any electing company shall file tariffs with the commission for basic local exchange services and other local exchange services that state the terms and conditions of such services and the rates as established pursuant to this Code section. (Code 1981, § 46-5-166, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-167. Universal Access Fund.

(a) The commission shall create a Universal Access Fund to assure the provision of reasonably priced access to basic local exchange services throughout Georgia. The fund shall be administered by the commission under rules to be promulgated by the commission as needed to assure that the fund operates in a competitively neutral manner between competing telecommunications providers.

(b) The commission shall require all telecommunications companies providing telecommunications services within Georgia to contribute quarterly to the fund in a proportionate amount to their gross revenues from sale to end users of such telecommunications services as determined by rules to be promulgated by the commission.

(c) The commission may also require any telecommunications company to contribute to the fund if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio based local exchange services in this state that compete with a telecommunications service provided in this state for which a contribution to the fund is required under this Code section.

(d) Contributions to the fund shall be determined by the commission based upon estimates as to the difference in the reasonable actual costs of basic local exchange services throughout Georgia and the amounts estab-

46-5-168

TELEPHONE AND TELEGRAPH SERVICE

46-5-168

lished by law or regulations of the commission as to the maximum amounts that may be charged for such services.

(e) Moneys in the fund shall be distributed quarterly to all providers of basic local exchange services upon application and demonstration that the reasonable costs as determined by the commission to provide basic local exchange services exceed the maximum fixed price permitted for such basic local exchange services. The commission may take into account the possibility that a competing local exchange company is providing or could provide lower cost basic local exchange services. Competitive providers shall be entitled to obtain a similar subsidy from the fund to the extent that they provide basic local exchange services; provided, however, that such subsidy shall not exceed 90 percent of the per line amount provided the incumbent local exchange company for existing basic local exchange service or 100 percent of new basic local exchange service.

(f) The commission shall require any local exchange company seeking reimbursement from the fund to file the information reasonably necessary to determine the actual and reasonable costs of providing basic local exchange services.

(g) The commission shall have the authority to make adjustments to the contribution or distribution levels based on yearly reconciliations and to order further contributions or distributions as needed between companies to equalize reasonably the burdens of providing basic local exchange service throughout Georgia.

(h) A local exchange company or other company shall not establish a surcharge on customers' bills to collect from customers' contributions required under this Code section. (Code 1981, § 46-5-167, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-168. Jurisdiction and authority of commission.

(a) The jurisdiction of the commission under this article shall be construed to include the authority necessary to implement and administer the express provisions of this article through rule-making proceedings and orders in specific cases.

(b) The commission's jurisdiction shall include the authority to:

(1) Adopt reasonable rules governing certification of local exchange companies;

(2) Grant, modify, impose conditions upon, or revoke a certificate;

(3) Establish and administer the Universal Access Fund including modifications to the maximum allowable charge for basic local exchange service;

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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BY _____ SECURITY
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Case No.: 07-2116-KHV

MOUNTAIN SOLUTIONS, INC., et al.)
)
)
 Plaintiffs,)
)
 v.)
)
 THE STATE CORPORATION COMMISSION)
 OF THE STATE OF KANSAS, et al.)
)
 Defendants.)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
THEIR APPLICATION FOR PRELIMINARY INJUNCTION**

The Kansas Corporation Commission (the "Commission") has entered orders requiring Commercial Mobile Service providers ("CMS providers"), including the Plaintiffs, to contribute to the Kansas Universal Service Fund ("KUSF"). These orders directly contradict federal law.

Section 332(c) of the federal Communications Act of 1934, as amended, (the "Federal Act"), 47 U.S.C. § 332(c)(3)(A), expressly prohibits the Commission from assessing CMS providers for payments to the KUSF, unless it finds that Commercial Mobile Service is a "substitute for land line telephone exchange service for a substantial portion of the communications within" Kansas. 47 U.S.C. § 332(c)(3)(A) (the "Preemption Clause"). Not only did the Corporation Commission fail to make such a finding, it made no attempt to find that CMS is a substitute for land line service as required by the Preemption Clause.

As CMS providers, Plaintiffs will suffer imminent irreparable harm if the order is enforced. Hence, Plaintiffs have filed this motion for preliminary injunction, asking this Court to enjoin enforcement of the Commission's orders.

I.

FACTUAL BACKGROUND

This Motion seeks an order enjoining the enforcement of the Corporation Commission's Orders of December 27, 1996 and February 3, 1997 ("the Corporation Commission's Orders"). In Paragraph 187 of the December 27 Order, the Commission determined that providers of Commercial Mobile Services must contribute to the KUSF under Kan. Stat. Ann. § 66-2008(b) (Supp. 1996). In its February 3 Order, the Commission denied the Petition for Reconsideration of Mountain Solutions, Sprint Spectrum, CMT Partners, Topeka Cellular and AirTouch.

Plaintiffs are Commercial Mobile Service providers in Kansas. Commercial Mobile Services are mobile wireless telecommunications services, including digital and cellular telephone service. The Corporation Commission's Orders affect all of the Plaintiffs by requiring them to contribute to the KUSF in contravention of federal law.

The following chronological statement of events places the Corporation Commission's Orders in context. On April 4, 1996, the Commission created the KUSF to administer the collection and distribution of universal service support payments. The purported purpose of the KUSF was to ensure the universal availability of telecommunications service in Kansas.

On July 1, 1996, the Kansas Telecommunications Act (the "State Act") became effective. The State Act directs the Commission to require every telecommunications carrier, including wireless telecommunications providers (also known as Commercial Mobile Service providers), to contribute to the KUSF. K.S.A. 66-2008(b). Also on July 1, 1996, the Commission decided to consider guidelines regarding universal service in Docket Nos. 190, 492-U and 94-GIMT-478-GIT, entitled *In the Matter of A General Investigation into Competition Within the Telecommunications Industry in the State of Kansas*.

A hearing was held for all issues relating to the KUSF on August 12-15, 1996. No testimony or evidence was submitted before, during or after the August 12-15, 1996 hearing to support a finding that Commercial Mobile Services are a substitute for any portion of land line telephone exchange services provided within the state of Kansas. Such a finding was necessary under the Federal Act to support assessment against CMS providers for universal service funds.

Nevertheless, in Paragraphs 111 and 187 of its December 27 Order, the Commission found that CMS providers must contribute up to 14.1% of their retail revenue to KUSF (December 27 Order, ¶¶ 111, 187). The Commission further found that neither the State Act nor the Corporation Commission's rulings were in violation of, or inconsistent with the Federal Act. And the Commission failed to make a finding, as required by the Federal Act, that CMS providers are a substitute for land line telephone exchange services within the state of Kansas. Indeed, the Commission failed to even address the issue.

On January 14, 1997, Mountain Solutions, Sprint Spectrum, Mercury Cellular, CMT Partners, Topeka Cellular and AirTouch filed Petitions for Reconsideration requesting that the Commission reconsider its findings in Paragraphs 111 and 187. On February 3, 1997, the Commission entered an order that denied the motions filed by Mountain Solutions, Sprint Spectrum, CMT Partners, Topeka Cellular and AirTouch.¹ The Commission erroneously determined that K.S.A. 66-2208(b)'s requirement that all telecommunications carriers contribute to the KUSF was in accordance with federal law. (February 3 Order, ¶ 49-50).

Pursuant to the December 27, 1996 Order, on February 14, 1997, the National Exchange Carrier Association (NECA), the administrator of the KUSF, sent Plaintiffs a KUSF packet.

¹ The Commission refused to consider Mercury Cellular's motion for reconsideration, on the grounds that Mercury Cellular was not a formal party to the KUSF proceeding.

In the packet, NECA directed Plaintiffs to pay a 9% assessment on all intrastate retail revenues beginning in March, 1997. On April 15, Plaintiffs must make KUSF payments to NECA based on March 1997 revenues. Payments are to be made on the 15th day of each following month based on revenues from the preceding month. In 1998, the assessment will rise to 12.13% and in 1999, to 13.68%.

The Corporation Commission's Orders and K.S.A. 66-2208(b), to the extent they require CMS providers to contribute to KUSF, violate the express preemption clause of 47 U.S.C. § 32(c) and the Supremacy Clause of the United States Constitution, art. VI, cl. 2. Accordingly, the Court should enjoin the Commission from enforcing its December 27 and February 3 Orders as those Orders apply to CMS providers' contribution to the KUSF.

II.

ANALYSIS

A. STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

An applicant for a preliminary injunction bears the burden of establishing that the relief requested is justified. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

The moving party must show that:

(1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.

Id. at 1198; *SAC and Fox Nation of Missouri v. LaFaver*, 905 F.Supp. 904, 907 (D.Kan. 1995).

If the movant successfully establishes the first three elements, courts will apply a more lenient standard for the last element. *LaFaver*, 905 F.Supp. at 907. The movant must show only that