

carrier, including wireless telecommunications providers (also known as CMS Providers), to contribute to the KUSF. K.S.A. § 66-2008(b).

24. Also on July 1, 1996, the Corporation 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.

25. Sprint Spectrum, CMT Partners, Topeka Cellular and AirTouch participated in the August 12-15, 1996 Hearings.

26. During or after the August 12-15, 1996 hearing, no testimony or evidence was offered to support a finding that CMS is a substitute for any portion of land line telephone exchange services provided within the state of Kansas. The only testimony or evidence even relating to the subject was provided by Mr. Gerald Lammers, Managing Telecommunications Auditor/Analyst, of the Corporation Commission Staff during the hearing. He testified that there is no evidence that CMS is an equivalent substitute for any portion of land line services within Kansas.

27. On August 28, 1996, Mountain Solutions filed a Motion to Intervene in the Corporation Commission proceeding, which the Corporation Commission granted on September 12, 1996. Plaintiffs, Liberty Cellular, Mercury Cellular, Western Wireless, Dobson Cellular and DCC PSC did not participate in the Corporation Commission proceeding.

28. On September 16, 1996, Sprint Spectrum filed its post-hearing brief and argued that any ruling by the Corporation Commission requiring CMS providers to contribute to the

KUSF would violate the preemption mandate of the Communications Act, specifically 47 U.S.C. § 332(C)(3).

29. On September 16, 1996, CMT Partners, Topeka Cellular and AirTouch filed their post-hearing brief in which they argued that the Kansas Telecommunications Act impermissibly invades an activity of interstate commerce that has been fully occupied by the federal government through the Communications Act of 1934, as amended.

30. On December 27, 1996, the Corporation Commission issued an Order ("Corporation Commission Order") in which it made findings of fact and conclusions of law on all matters relating to the KUSF. A true and correct copy of the Order is attached hereto as Exhibit A.

31. In its December 27, 1996 Order, the Corporation Commission directed CMS providers, among other telecommunications providers, to contribute to the KUSF. The Corporation Commission found that neither the State Act nor the Corporation Commission's rulings were in violation of, or inconsistent with, the Federal Act. However, in so ruling, the Corporation Commission failed to make a finding required under the Federal Act, viz., that CMS providers are a substitute for a substantial portion of land line telephone exchange services within the State of Kansas. The Corporation Commission failed to address the issue altogether.

32. In Paragraph 187 of the December 27, 1996 Order, the Corporation Commission held that CMS providers must contribute up to 14.1% of their retail revenue to the KUSF in accordance with Paragraphs 109 and 110 and the operative paragraph appearing on page 77 of the Order. This mandate applies to both Cellular Service and Personal Communications Service providers, both of which are CMS providers..

33. But under the Communications Act, neither the State of Kansas nor the Corporation Commission can require Commercial Mobile Service providers to contribute to the Kansas Universal Service Fund in the absence of a finding that CMS is a substitute for a substantial portion of land line telephone exchange services within the State of Kansas .

34. The Corporation Commission's Order and the State Act completely ignore the preemption mandate in Section 332(c)(3) of the Communications Act. The Corporation Commission's failure to acknowledge and defer to federal preemption is in violation of the Supremacy Clause in Article VI, Cl. 2 of the Constitution of the United States and will cause Plaintiffs imminent and irreparable harm.

35. On January 14, 1997, Mountain Solutions, Sprint Spectrum, Mercury Cellular, CMT Partners, Topeka Cellular and AirTouch filed Petitions for Reconsideration requesting that the Corporation Commission reconsider its findings in Paragraph 187, in which it unlawfully imposed upon CMS providers an obligation to fund the KUSF. True and correct copies of those Petitions for Reconsideration are attached hereto, and incorporated herein, at Exhibit B.

36. On February 3, 1997, the Corporation Commission issued an Order on Reconsideration in which it denied Sprint Spectrum's, Mountain Solutions', CMT Partners', Topeka Cellular's and AirTouch's Petition for Reconsideration of its findings in Paragraph 187 and in paragraphs related thereto. The Corporation Commission refused to consider the Petition for Reconsideration filed by Mercury Cellular on the grounds that Mercury Cellular was not a formal party to the KUSF proceeding.

37. Prior to the Corporation Commission Orders of December 27, 1996 and February 3, 1997, and pursuant to K.S.A. § 66-1143(b), the Corporation Commission had no jurisdiction over Plaintiffs and had not exercised jurisdiction over them.

38. On February 14, 1997, NECA sent Plaintiffs a KUSF packet. In the packet, NECA directs Plaintiffs to pay a 9% assessment on all intrastate retail revenues beginning in the month of March, 1997. On April 15, Plaintiffs are required to 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 proceeding month. In 1998, the assessment will rise to 12.13% and in 1999, to 13.68%.

39. NECA's directions were made pursuant to the December 27, 1996 Order of the Corporation Commission.

40. On February 19, 1997, the Corporation issued an order authorizing NECA to assess late payment fees for any delinquent KUSF payment.

#### **COUNT I - PRELIMINARY AND PERMANENT INJUNCTION**

41. Plaintiffs incorporate by this reference the allegations of paragraphs 1 through 40 as though fully set forth herein.

42. Plaintiffs Liberty Cellular, CMT Partners, Topeka Cellular, AirTouch, Western Wireless, Dobson Cellular and Mercury Cellular (sometimes referred to as the "Cellular Plaintiffs") currently provide cellular services throughout the State of Kansas. If the Cellular Plaintiffs choose not to charge customers the KUSF assessment, the contribution paid by the Cellular Plaintiffs will be a substantial portion of their future pre-tax income. This will have a severe impact on the Cellular Plaintiffs' future business plans and marketing opportunities. If the Cellular Plaintiffs choose to pass the KUSF assessment through to their customers, which they believe they will be forced to do, the Cellular Plaintiffs risk losing a substantial number of their customers and usage of service, with a concomitant loss of substantial revenue.

43. Plaintiffs Mountain Solutions, Sprint Spectrum and DCC PSC (the "PCS Plaintiffs") are in the process of building facilities from which they will offer services within the State of Kansas in the near future. An additional 9% to 13.68% cost of entry into the Kansas market would severely inhibit the offering of Personal Communications Services within the state of Kansas. Should the PCS Plaintiffs choose to charge these assessments to their future customers, the market effect in terms of customers and usage of service would be substantial and potentially devastating.

44. Additionally, the local calling areas for Cellular Services and Personal Communications Services are not defined by state lines and extend beyond Kansas into Nebraska, Missouri and Oklahoma. Therefore, an additional sophisticated billing system to separate revenues derived from purely intrastate calls would be required under the Corporation Commission's Order of December 26, 1997.

45. If the Corporation Commission Order and the State Act are not declared invalid by this Court, and if their enforcement is not immediately enjoined, the Cellular Plaintiffs will suffer irreparable injury in that the increase in the retail revenue that Cellular Plaintiffs will have to contribute to the KUSF will have a dramatic impact on their future business and jeopardize a substantial portion of their customer base. The damage that will arise from such an impact on Cellular Plaintiffs' future revenue and customers base cannot be recovered from the Defendants; therefore, there is no adequate remedy at law.

46. If the Corporation Commission Order and the State Act are not declared invalid by this Court, and if their enforcement is not immediately enjoined, the PCS Plaintiffs will suffer irreparable injury in that they would be required to expend a considerable amount of non-recoverable up-front cost to comply with the Corporation Commission Order. Additionally, the

increased cost of providing service within the State of Kansas resulting from the KUSF assessment will severely inhibit the PCS Plaintiffs' ability to enter and compete in the Personal Communication Service market. The damages that will arise from the KUSF assessment required under the Corporation Commission's Order cannot be recovered from the Defendants; therefore, there is no adequate remedy at law.

47. The threatened injury to Plaintiffs outweighs any injury to Defendants.

48. An injunction will further the public interest in that it will ensure that the State of Kansas and the Corporation Commission do not continue to violate the Supremacy Clause in Article VI, Cl. 2 of the Constitution of the United States, because the actions of the Defendants enumerated herein interfere with, and are preempted by, Section 332(c) of the Communications Act.

49. There exists a substantial likelihood that Plaintiffs will prevail on the merits of their complaint by demonstrating that the State Act and the Corporation Commission's Orders of December 27, 1996 and February 3, 1997, are contrary to the Supremacy Clause in Article VI, Cl. 2 of the Constitution of the United States because they interfere with, and are preempted by, Section 332(c) of the Communications Act..

WHEREFORE, Plaintiffs request that this Court:

(i) Issue a Preliminary Injunction pursuant to Fed R. Civ. Pr. 65 ordering Defendants, The State of Kansas and The State Corporation Commission of the State of Kansas, the National Exchange Carrier Association, Inc., and all those in active concert or participation with them, to refrain from implementing Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service

providers, including the Plaintiffs, are required to contribute to the Kansas Universal Service Fund;

(ii) Issue a Permanent Injunction perpetually enjoining and restraining defendants, The State of Kansas, The State Corporation Commission of the State of Kansas, The National Exchange Carriers Association, Inc., and all those acting in active concert or participation with them, from implementing Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service providers, including the Plaintiffs, are required to contribute to the Kansas Universal Service Fund; and

(iii) Issue an order granting such other and further relief as this Court deems just and proper.

### **COUNT II - DECLARATORY JUDGMENT**

50. Plaintiffs incorporate by this reference the allegations in paragraphs 1 through 49 as though fully set forth herein.

51. The State Act is invalid as it is contrary to the Supremacy Clause in Article IV, Cl. 2 of the United States Constitution because it interferes with, and is preempted by, Section 332(C) of the Communications Act.

52. The Corporation Commission Order of December 27, 1996 is invalid as it is contrary to Supremacy Clause in Article VI, Cl. 2 of the United States Constitution because it interferes with, and is preempted by, Section 332(c) of the Communications Act.

53. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that K.S.A. § 66-2008(b) of the State Act and the Corporation Commission's December 27, 1996 and February 3, 1997 Orders, as they pertain to the dispute outlined herein, are invalid.

54. A judicial determination is necessary and appropriate at this time under all of the circumstances so that Plaintiffs may determine their duties and obligations under federal and state law, and any rules duly adopted by the Corporation Commission.

55. A judicial determination is further necessary and appropriate at this time in order to avoid substantial potentially unnecessary, unrecoverable and devastating costs associated with participating and entering the Commercial Mobile Services industry within the State of Kansas.

WHEREFORE, Plaintiffs request that this Court:

(i) Issue an order declaring that K.S.A. § 66-2008(b) of the State Act invalid and preempted by Section 332(C) of the Communications Act;

(ii) Issue an order declaring that Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service providers are ordered to contribute to the Kansas Universal Service Fund is preempted by Section 332(c) of the Communications Act;

(iii) Issue an order declaring that Plaintiffs are not required to submit Kansas Universal Service Fund payments to the National Exchange Carrier Association, Inc. until such time as the FCC finds that Commercial Mobile Services are a substitute for a substantial portion of land line telephone exchange services in Kansas;

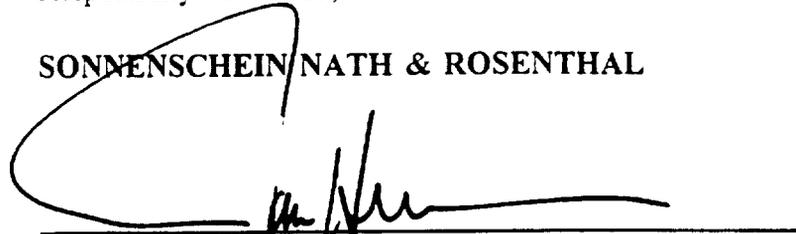
(iv) Issue an order declaring that Plaintiffs are not required to account for intrastate revenue received within the State of Kansas for the purpose of contributions to the Kansas Universal Service Fund until such time as the FCC finds that Commercial Mobile Services are a substitute for a substantial portion of land line telephone exchange services in Kansas; and

(v) Issue an order declaring that Plaintiffs are not subject to late payment fees under the February 19, 1997 Order of the Corporation Commission

(vi) Issue an order granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

**SONNENSCHN NATH & ROSENTHAL**



Mark P. Johnson  
Jan P. Helder, Jr. KS #14440  
Lisa C. Creighton KS #14847  
4520 Main Street, Suite 1100  
Kansas City, Missouri 64111  
Telephone: (816) 932-4400  
Facsimile: (816) 531-7545

ATTORNEYS FOR PLAINTIFFS MOUNTAIN SOLUTIONS, INC., SPRINT SPECTRUM, L.P., LIBERTY CELLULAR, INC., MERCURY CELLULAR OF KANSAS, INC., WESTERN WIRELESS CORPORATION, DCC PCS, INC., and DOBSON CELLULAR OF KANSAS/MISSOURI, INC.

-and-

**MORRISON & HECKER, L.L.P.**



Marc E. Elkins KS #11517  
2600 Grand Avenue  
Kansas City, Missouri 64108  
Telephone: (816) 691-2600  
Facsimile: (816) 474-4208

ATTORNEY FOR PLAINTIFFS  
AIRTOUCH CELLULAR OF KANSAS, INC.,  
TOPEKA CELLULAR TELEPHONE COMPANY, INC.  
and CMT PARTNERS

STATE OF KANSAS     )  
                                  ) SS:  
COUNTY OF JOHNSON )

**VERIFICATION**

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, manager of Topeka Cellular Telephone Company, Inc., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

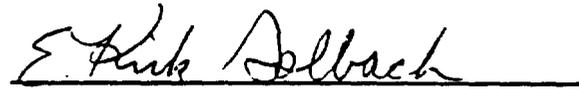
October 27, 1999

TERESA C. HAMBLIN  
NOTARY PUBLIC  
STATE OF KANSAS  
My Appt. Expires 10/27/1999

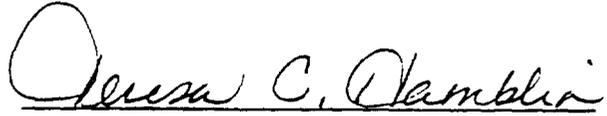
STATE OF KANSAS     )  
                                  ) SS:  
COUNTY OF JOHNSON )

**VERIFICATION**

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

  
E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

  
Notary Public

My Commission Expires:

October 27, 1999

TERESA C. HAMBLIN  
NOTARY PUBLIC  
STATE OF KANSAS  
My Commission Expires 10/27/99

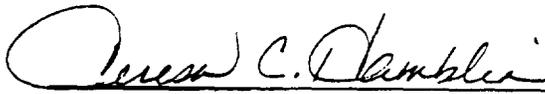
STATE OF KANSAS     )  
                                  ) SS:  
COUNTY OF JOHNSON )

VERIFICATION

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, manager of AirTouch Cellular of Kansas, Inc., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

October 27, 1999

TERESA C. HAMBLIN  
NOTARY PUBLIC  
STATE OF KANSAS  
My Appt. Expires 10/27/99

STATE OF WASHINGTON )  
 ) SS:  
COUNTY OF KING )

VERIFICATION

Gene DeJordy, Director of Regulatory Affairs of Western Wireless Corporation, being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

  
Gene DeJordy

Subscribed and sworn to before me this 3 day of March, 1997.

**ANGELA R. SCHWAB  
STATE OF WASHINGTON  
NOTARY --- PUBLIC  
MY COMMISSION EXPIRES 10-25-99**

  
Notary Public

My Commission Expires:

STATE OF Missouri )  
 ) SS:  
COUNTY OF Jackson )

**VERIFICATION**

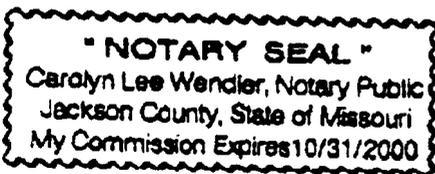
Charles McKee, Attorney of Sprint Spectrum, L.P., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

  
CHARLES MCKEE

Subscribed and sworn to before me this 4th day of March, 1997.

  
Notary Public

My Commission Expires:



Attention: LISA CREIGHTON

State of California )  
County of San Francisco )

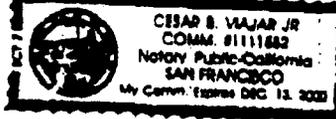
On 3/4/97 before me, Cesar B. Viajar, Jr., notary public  
personally appeared E. CLARKE GARNETT

( ) personally known to me  
(  ) proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cesar B. Viajar Jr.  
Cesar B. Viajar, Jr., Notary Public

COMMISSION #1111882 COMMISSION EXP. DEC. 13, 2000



**CAPACITY CLAIMED BY SIGNER:**

- ( ) Individual : (  ) Corporate PRESIDENT officer/title \_\_\_\_\_ officer/title
- ( ) Partner(s) ( ) Limited ( ) General
- ( ) Attorney-in-Fact 2 ( ) Trustee(s) ( ) Guardian/Conservator
- ( ) Other Signer is representing: (Name of person(s) or entity(ies)) \_\_\_\_\_

Title or type of document AFFIDAVIT

No. of pages 1 Date of document 3/4/97 Signer(s) other than named above NONE

**VERIFICATION**

STATE OF CALIFORNIA)

) ss:  
COUNTY OF SAN FRANCISCO

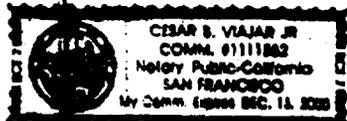
E. Clarke Garnett, being of lawful age, being first duly sworn, on oath deposes and states:  
That he is the President of Liberty Cellular, Inc., a Kansas corporation, d/b/a Kansas Cellular, the  
plaintiff in the above-captioned action; that he is authorized to make this verification on behalf of  
said corporation; that he has read the above and foregoing Affidavit; knows and understands the  
contents thereof, and states that the statements and allegations contained therein are true and  
correct, according to his knowledge, information, and belief.

E. Clarke Garnett  
E. Clarke Garnett  
President

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 4<sup>TH</sup> day  
of March, 1997.

Cesar B. Viajar Jr.  
Notary Public

My Appointment Expires: 12-13-2000



IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
CIVIL COURT DIVISION

CMT PARTNERS, a Delaware general partnership, )  
)  
TOPEKA CELLULAR TELEPHONE )  
COMPANY, INC., a Kansas corporation, )  
)  
and )  
)  
AIRTOUCH CELLULAR OF )  
KANSAS, INC., a Kansas Corporation, )  
)  
Petitioners, )  
)  
v. )  
)  
THE STATE CORPORATION COMMISSION )  
OF THE STATE OF KANSAS )  
)  
SERVE: Judith McConnell, Executive Director )  
1500 S. W. Arrowhead Blvd. )  
Topeka, KS 66604-4027 )  
)  
Defendants )

Case No. \_\_\_\_\_  
Chapter 77

**PETITION FOR JUDICIAL REVIEW**

Petitioners CMT Partners, AirTouch Cellular of Kansas, Inc. and Topeka Cellular Telephone Company, Inc. (collectively, "CMT Partners"), hereby file this Petition for judicial review from the State Corporation Commission's (the "Commission") Order dated December 27, 1996, as amended in part and affirmed in part by the Commission's Order on Reconsideration dated February 3, 1997, in the General Investigation Docket No. 190,492-U, 94-GIMT-478-GIT and entitled "*In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas*," pursuant to the Act for

Judicial Review and Civil Enforcement of Agency Actions, K.S.A. § 77-601 *et seq.* In support of its Petition for Judicial Review, CMT Partners state and allege as follows:

1. CMT Partners is a general partnership organized and existing under the laws of the State of Delaware with its principal place of business at 10895 Lowell, Overland Park, Kansas 66210, which does business as Cellular One and is a radio common carrier as that term is defined by K.S.A. § 66-1,143. CMT Partners provides telecommunications services in Kansas and is a wireless telecommunications provider for purposes of K.S.A. § 66-2008(b).

2. Topeka Cellular Telephone Company, Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business at 10895 Lowell, Overland Park, Kansas 66210, which does business as Cellular One and is a radio common carrier as that term is defined by K.S.A. § 66-1,143. Topeka Cellular Telephone Company, Inc. provides telecommunications services in Kansas and is a wireless telecommunications service provider for purposes of K.S.A. § 66-2008(b).

3. AirTouch Cellular of Kansas, Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business at 10895 Lowell, Overland Park, Kansas, which does business as Cellular One and is a radio common carrier as that term is defined by K.S.A. § 66-1,143. AirTouch Cellular of Kansas, Inc. provides telecommunications services in Kansas and is a wireless telecommunications service provider for purposes of K.S.A. § 66-2008(b).

4. Defendant The State Corporation Commission of the State of Kansas ("Commission"), is a state agency organized and existing pursuant to K.S.A. § 66-101 *et seq.* with its address at 1500 S.W. Arrowhead Road, Topeka, KS 66604-4027. Pursuant to

K.S.A. § 77-615, Judith McConnell, Executive Director of the Commission is designated to receive service of process on behalf of the Commission as the agency head.

5. The Order appealed from is the Commission's Order of December 27, 1996, a copy of which is attached hereto as Exhibit A, as amended in part and affirmed in part by the Commission's Order on Reconsideration of February 3, 1997, a copy of which is attached hereto as Exhibit B, in the General Investigation Docket No. 190,492-U; 94-GIMT-478-GIT (together, the "Order"), relating to the establishment and funding of the Kansas Universal Service Fund ("KUSF").

6. In addition to CMT Partners, the other persons or entities who are known to be parties to the Commission's action appealed herein are as follows: Southwestern Bell Telephone Company; Independent Telecommunications Group; Columbus, et al.; State Independent Telephone Alliance; Sprint Communications Co. L.P.; United Telephone Company of Kansas; AT&T Communications of the Southwest; MCI Telecommunications Corporation; Comptel of Kansas; Kansas Cable Telecommunications Association; Citizens' Utility Ratepayers Board; Kansas City Fiber Network, L.P.; Multimedia Hyperion Telecommunications, Inc.; Sprint Spectrum L.P.; KIN Network of Salina; and Mountain Solutions, Inc.;

#### **PROCEDURAL HISTORY AND BASIS FOR REVIEW**

7. A docket was opened by the Commission in 1994 pursuant to Senate Concurrent Resolution 1627 which called for a generic investigation into the status of local competition within the telecommunications industry. That docket was opened as No.

190,492-U; 94-GIMT-478-GIT and entitled "*In the Matter of a General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas.*"

8. On May 5, 1995, the Commission issued its Order in which the Commission found, *inter alia*, local competition to be generally in the public interest.

9. On February 8, 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 143 (the "Federal Act"), *to be codified at* 47 U.S.C. §§ 151 *et seq.*, which established a procompetitive, deregulatory policy framework for telecommunications.

10. On April 4, 1996, the Commission issued its Order concerning universal telecommunications service in Kansas. That Order, however, left a number of issues concerning universal service unresolved.

11. On April 4, 1996, the Commission created the Kansas Universal Service Fund ("KUSF") and issued its Phase II Procedural Order establishing a schedule for filing direct testimony and conducting a technical hearing on unresolved universal service issues.

12. On May 17, 1996, the Senate Substitute for Substitute for House Bill 2728 amending certain portions of the Kansas Telecommunications Act was enacted into law and *codified at* K.S.A. § 66-2001 *et. seq.* (the "1996 Amendments"). The 1996 Amendments called for the implementation of competition in compliance with the new Federal Act and directed the Commission to establish and fund the KUSF.

13. K.S.A. § 66-2008(b) directs the Commission to require every telecommunications carrier, telecommunications public utility and wireless

telecommunications service provider that provides intrastate telecommunications services to contribute to the KUSF on an equitable and nondiscriminatory basis.

14. On May 30, 1996, the Commission issued an Order Modifying the Phase II Procedural Schedule. (Commission's Order dated April 14, 1996). This Order again set forth issues to be determined regarding the regulation and funding mechanism for the KUSF and established a schedule for filing direct testimony and conducting a technical hearing on unresolved universal service issues.

15. Although copies of the Orders described above were served by the Commission's staff on those telecommunications service providers who previously had participated in the Commission's competition docket, no formal notice of the proceedings in that docket was attempted on any wireless telecommunications service providers including CMT Partners.

16. On August 12-15, 1996, this Commission conducted a Technical Hearing pursuant to the Commission's April 4, 1996 Phase II Procedural Order.

17. On August 12, 1996, the Commission granted CMT Partners' Petition to intervene in those proceedings.

18. On August 12, 1996, CMT Partners objected to notice of the Technical Hearing on the grounds that they had not received sufficient notice of the hearing to timely file direct testimony or to adequately prepare to cross examine the witnesses who had filed direct testimony.

19. The Commission found that all parties including the CMT Partners intervenors were presumed to know the law, found that notice was adequate to proceed, and overruled CMT Partner's objection. (Trans. of Proceedings, August 12, 1996, p. 1765).

20. On December 27, 1996, the Commission issued its Order which established and provided for funding of the KUSF. The Commission's Order directed wireless telecommunications service providers, including CMT Partners, to contribute to the KUSF through payment of a surcharge on revenues from the provision of intrastate telecommunications services. Through Paragraphs 111, 112 and 187 of its Order, the Commission held that wireless telecommunications service providers must pay a surcharge of up to 14.1% of their revenue from the provision of intrastate telecommunications services to support the KUSF. The Commission's Order did not assess a surcharge on local exchange carriers to support the KUSF.

21. On January 14, 1996, CMT Partners filed with the Commission a timely Petition for Reconsideration of the Commission's Order dated December 27, 1996.

22. On February 3, 1997, the Commission issued its Order on Reconsideration which granted in part and denied in part CMT Partners' Petition for Reconsideration.

23. On February 17, 1996, CMT Partners filed with the Commission a timely Petition for Reconsideration of the Commission's Order on Reconsideration dated February 3, 1997.

24. CMT Partners were parties to the Commission's proceedings that resulted in the Commission's Order.

25. Pursuant to the Commission's Order, CMT Partners are required to pay up to a 14.1% monthly surcharge on revenues from the provision of intrastate telecommunications services in Kansas. (Commission's Order, ¶¶ 111, 187 December 27, 1996).

26. Purporting to act under the authority of the Commission's Order, the KUSF Administrator has informed CMT Partners that they are required to pay a 9% surcharge on revenues from the provision of intrastate telecommunications services in Kansas during the month of March 1997 on or before April 15, 1997. Thereafter, CMT Partners are required to pay a 9% monthly surcharge on revenues from the provision of intrastate telecommunications services in Kansas. The KUSF Administrator also has informed CMT Partners that the KUSF surcharge will increase to 12.13% in 1998 and 13.68% in 1999. (Letter from National Exchange Carrier Association dated February 18, 1997, and attached hereto as Exhibit C.)

27. CMT Partners have exhausted all administrative remedies available as required by K.S.A. §§ 77-607 and 77-612.

## REASONS FOR JUDICIAL REVIEW

### COUNT I

For Count I of their Petition against the Commission, CMT Partners state as follows:

28. CMT Partners adopt and incorporate by reference as though fully set forth herein Paragraphs 1 through 27 of their Petition.

29. K.S.A. § 66-2008, as applied to wireless telecommunications service providers, violates the United States and Kansas Constitutions.

30. Congress has preempted the Kansas Legislature's authorization to the Commission to require wireless telecommunications service providers including CMT Partners, to contribute to the KUSF through the Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993 and the federal Telecommunications Act of 1996, 47 USC § 332(c). Pursuant to 47 U.S.C. § 332(c), Congress has specifically directed that no state or local government shall impose requirements upon wireless telecommunications service providers to support the universal availability of telecommunications services absent a specific finding by the Federal Communications Commission that wireless telecommunications service providers are a substitute for landline telephone service for a substantial portion of the communications within Kansas. No such finding has been made. K.S.A. § 66-2008, therefore, violates the Supremacy Clause of the United States Constitution and is unlawful. U.S.C.A. Const. Art. 1, § 8, cl. 3.

31. The Kansas Legislature's authorization to the Commission to determine the appropriate level of funding and regulation of the KUSF and the appropriate contribution to the KUSF from telecommunications providers pursuant to K.S.A. §§ 66-2002 and 66-2008 constitutes an improper and unconstitutional delegation of legislative power to an administrative agency and is unlawful. K.S.A. Const. Art. 2 §1.

32. K.S.A. §§ 2002 and 2008 are void for vagueness because they violate CMT Partners' rights to due process in violation of the 5th and 14th Amendments to the United States Constitution and are, therefore, unlawful. U.S.C.A. Const. Amds. 5, 14.

WHEREFORE, CMT Partners pray for declaratory judgment against the Commission that the provisions of K.S.A. §§ 66-2002 and 66-2008 violate the United States and Kansas Constitutions and, therefore, be set aside and vacated as void. CMT Partners pray further for the Court's declaratory judgment that the Commission's Order of December 27, 1996 and Order on Reconsideration of February 3, 1997 are similarly void and the Commission be enjoined from taking any action to enforce said Orders, and for such further and additional relief as the Court deems just and proper.

## COUNT II

For Count II of their Petition against the Commission, CMT Partners state as follows:

33. CMT Partners adopt and incorporate by reference as though fully set forth herein paragraphs 1 through 32 of their Petition.

34. The Commission's Order is based upon an erroneous interpretation of K.S.A. § 66-2001 *et. seq.* and is, therefore, unlawful.

35. The Commission's Order defining "Intrastate Retail Revenues" is unconstitutional on its face, is void for vagueness in violation of CMT Partners' rights to due process in violation of the 5th and 14th Amendments to the United States Constitution and is unlawful. U.S.C.A. Const. Amd. 5, 14.

36. The definition of "Intrastate Retail Revenues" in the Commission's Order conflicts with the K.S.A. § 66-2008 because the Order on Reconsideration classifies all "local service" as "intrastate" regardless of the geographical realities. Such classification is not

authorized by, K.S.A. § 66-2008, is in violation of K.S.A. § 66-2008 and is, therefore, unlawful.

37. The Commission's Order violates K.S.A. § 66-2008(a) because it mis-defines the KUSF and fails to require that all telecommunications service providers pay a surcharge to support the KUSF and is, therefore, unlawful.

38. The Commission's Order inequitably discriminates against wireless telecommunications service providers, including CMT Partners, and their customers in violation of the Communications Act of 1934, as amended, and K.S.A. § 66-2008(a) and is unlawful and unreasonable.

39. The Commission's Order requires wireless telecommunications service providers, including CMT Partners, to subsidize local exchange carriers in providing local telephone service through permitting local exchange carriers to charge their customers less than the cost of providing local telephone service. The subsidization mandated by the Commission's Order is a barrier to market entry for competitive service providers and technology and violates K.S.A. §§ 66-2000 *et al.*, and the federal Communications Act as amended by the federal Telecommunications Act of 1996. The Commission's Order is, therefore, unlawful.

40. The Commission's Order constitutes an exercise by the Commission of jurisdiction, regulation, supervision and control over radio common carriers including CMT Partners in violation of the provisions of K.S.A. § 66-1.143 and is, therefore, unlawful.

41. The Commission's Order is otherwise unreasonable arbitrary or capricious as it relates to the KUSF.