WC 08-55

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

APR 16 2008

Federal Communications Commission
Office of the Secretary

In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure	))))))	WC Docket No. ___

KANSAS CORPORATION COMMISSION'S PETITION FOR DECLARATORY RULING

I. Introduction

This matter has been referred to the Federal Communications Commission ("FCC") by the U.S. District Court for the District of Kansas.[1] Pursuant to the Court's order, the State Corporation Commission of Kansas ("KCC") hereby petitions the FCC under 47 CFR § 1.2 for a declaratory ruling regarding the lawfulness of its procedure for certifying Kansas carriers' receipt of federal universal service support under the Telecommunications Act of 1996 ("Act").[2] The FCC should declare that states are not preempted from adopting reasonable procedures for certifying Eligible Telecommunications Carriers' ("ETCs'")[3] receipt of funds from the federal Universal Service Fund ("USF"), and that the KCC's procedure is lawful because it is based on a permissible interpretation of Section 254(e) of the Act.[4]

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[1] *USCOC of Nebraska/Kansas, LLC, RCC Atlantic Inc. v. The Kansas Corporation Commission*, et al., *Memorandum and Order*, Case No. 07-2527-JAR (D. Kan. Jan. 29, 2008) ("*District Court Order*"). *See* Attachment I.

[2] 47 U.S.C. § 151 *et. seq.* (2006)

[3] Use of the term "ETCs" in this petition is intended to include all providers certified by the KCC as eligible for USF support. Use of the term "CETCs" includes only competitive ETCs.

[4] *See* 47 U.S.C. § 254(e) (2006).

II. Background

Kansas is a rural, high-cost state that is served by a number of incumbent "rural" telephone companies and one incumbent "non-rural" telephone company, Southwestern Bell ("SWB"). All Kansas rural telephone companies receive USF support under the FCC's rules. However, although it serves many areas that are unquestionably rural in character, SWB is not eligible under the FCC's regulations for USF support. Under the FCC's rules, SWB's costs per line must be averaged over both its rural and urban areas. On a statewide average basis, SWB's costs do not exceed the FCC's benchmark for support. Certain competitive ETCs ("CETCs") in Kansas provide service in both rural telephone company study areas as well as SWB study areas. While CETCs are eligible for USF support in areas served by rural telephone companies, neither CETCs nor SWB receive USF support for providing service in the non-rural SWB study areas.

The KCC addressed a potential competitive imbalance between SWB and Kansas CETCs when amending its certification procedure for USF support. The KCC adopted a new certification form, USF Certification Instructions for Cost Reporting, in an order that followed a collaborative review of the certification process.[5] On the form, all ETCs assign costs for provisioning, upgrading and maintaining services and facilities for universal service to specific study areas.[6] CETCs may allocate costs between supported and non supported study areas for services or facilities (e.g., cell towers) that serve both areas.[7] In particular, the KCC will certify costs for services and facilities outside a supported study area as long as those services and

[5] In the Matter of Certification of Compliance with Section 254(e) of the Federal Telecommunications Act of 1996, and Non-Rural Carrier Certification of Urban/Rural Rate Comparability, *Order,* Docket No. 05-GIMT-112-GIT, (rel. July 21, 2005).

[6] *See* Attachment II.

[7] "Supported" areas are study areas where incumbent rural telephone carriers receive USF support, and "non-supported" areas are study areas served by SWB which does not receive USF support.

facilities are used for service inside a supported study area. In the end, ETCs must demonstrate to the KCC that their investments and expenses for supported areas justify the level of USF support that they are entitled to receive. The KCC will not certify CETC expenditures that are made to benefit only SWB's study areas.

There is a reasonable degree of flexibility built into the system. For example, the KCC allows ETCs to carry forward investments and expenses for service in supported areas when they expend more than they are entitled to receive in a given year. In this way, the KCC encourages ETCs to invest in high-cost areas and does not penalize them if their expenses are a little under, or over, their USF support level for the year. The KCC's allocation method also encourages rural investment by permitting ETCs to allocate a portion of expenses from an unsupported area for USF support certification if those expenses benefit a supported area. To date, the KCC has certified every funding request in its entirety since establishing this certification procedure.[8]

On July 27, 2006, the KCC opened a new docket requiring ETCs to provide all required information so that it could certify support for the following year.[9] AllTel filed a Petition for Reconsideration opposing the certification procedure, claiming that the KCC could not exclude CETC expenditures for SWB's study areas from the certification process.[10] The KCC denied AllTel's petition,[11] but subsequently, opened a docket to reexamine the certification procedure.[12]

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[8] In September 2004, prior to the expanded certification procedure, the KCC declined to certify one rural LEC, Cass County Telephone. The one page self-certification affidavit in use at the time was signed by Kenneth Matzdorff who was under investigation by the FBI, the FCC, and the KCC for allegedly defrauding the USF.

[9] In the Matter of USF Certification for the Year 2007 in Compliance with Section 254(e) of the Federal Telecommunications Act of 1996, and Non-Rural Carrier Certificate of Urban/Rural Rate Comparability, *Order Opening Docket*, Docket No. 07-GIMT-025-GIT (rel. July 27, 2006).

[10] *Petition for Reconsideration*, Docket No. 07-GIMT-025-GIT (filed Aug. 28, 2007).

[11] *Order Addressing AllTel's Petition for Reconsideration*, Docket No. 07-GIMT-025-GIT (rel. Sept. 28, 2006).

Based on the record in that docket, including evidence and legal briefs, the KCC upheld the certification procedures and requirements in their entirety.[13] The KCC reviewed several FCC rulings on USF support, including the *First Report & Order*,[14] *Seventh Report & Order*,[15] *2005 ETC Order*,[16] and the *Western Wireless Declaratory Ruling*.[17] The KCC concluded that its certification rules were consistent with the goals of universal service and key principles of competitive neutrality. The KCC also found that a CETC should not be permitted to utilize expenses for SWB study areas to support a finding that the company had utilized USF appropriately, because SWB and CETCs competing for customers in SWB study areas do not receive support for SWB-area customers.[18] The KCC also concluded that it had the authority to

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[12] In the Matter of a Review of the Commission's Federal USF Certification Requirement to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal USF Support, *Order Opening Docket*, Docket No. 07-GIMT-498-GIT (rel. Nov. 21, 2006).

[13] *See* In the Matter of a Review of the Commission's Federal USF Certification Requirement to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal USF Support, *Order*, Docket No. 07-GIMT-498-GIT (rel. Aug. 9, 2007) ("*KCC Order*"). (Attachment III).

[14] *KCC Order* at ¶ 23 (*citing* In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997) ("*First Report & Order*")).

[15] *Id.* at ¶ 24 (*citing* In the Matter of Federal-State Joint Board on Universal Service, *Seventh Report & Order*, CC Docket No. 96-45, FCC 00-119 (rel. May 28, 1999) ("*Seventh Report & Order*")).

[16] *Id.* at ¶ 26 (*citing* In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 05-46 (rel. March 17, 2005) ("*2005 ETC Order*")).

[17] *Id.* at ¶ 24 (*citing* In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, *Declaratory Ruling*, CC Docket No. 96-45, FCC 00-248 (rel. Aug. 10, 2000) ("*Western Wireless Declaratory Ruling*")).

[18] *Id.* at ¶¶ 23-29.

establish certification procedures under section 254(e) of the Act and section 54.313 of the Commission's rules.[19]

On October 29, 2007, USCOC of Nebraska/Kansas, LLC ("US Cellular") and RCC Atlantic, Inc. ("RCC"), wireless CETCs that provide service in Kansas, challenged the KCC procedure in the U.S. District Court for the District of Kansas.[20] Appellants claimed that the KCC was preempted from adopting a rule prohibiting CETCs from using USF for SWB exchange areas. The KCC asked the District Court to stay the case and refer the matter to the FCC on primary jurisdiction grounds.[21] On January 29, 2008, the Court agreed to refer the matter to the FCC, concluding that the preemption issue had "broad policy implications" and was "better suited for determination by the FCC."[22]

III. Discussion

A. States Have the Power to Develop Reasonable Procedures, Consistent with the Act, for Certifying Compliance with Section 254(e)

In Section 254(e) of the Act, Congress required ETCs to use USF support for specific purposes: for the provision, maintenance and upgrading of services and facilities for universal service.[23] The FCC adopted rules requiring states to certify annually that each ETC in the state will use support for these intended purposes.[24] To carry out this responsibility, states have the authority to adopt reasonable procedures, consistent with Section 254(e), for certifying compliance.

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[19] *Id.* at ¶¶ 31-36, 51 (*citing* 47 U.S.C. §254(e) and 47 C.F.R. § 54.313).

[20] Complaint for Declaratory and Injunctive Relief, filed by USCOC of Nebraska/Kansas, LLC and RCC Atlantic, Inc., in the U.S. District Court, District of Kansas (filed Oct. 29, 2007).

[21] *Defendant's Motion to Strike*, (filed Jan. 14, 2008).

[22] *District Court Order* at pp. 4-5.

[23] *See* 47 U.S.C. § 254(e) (2006)

[24] *See* 47 C.F.R. §§ 54.313(a) and 54.314(a) (2006).

Both Congress and the FCC anticipated that federal and state governments would work together in administering the universal service program. Congress gave states specific power under Sections 253(b) and 254(f) of the Act to adopt universal service rules consistent with certain legal requirements. Also, the FCC depended on the states to monitor ETCs' expenditures of USF support in their jurisdictions to ensure compliance with Section 254(e).

The Commission gave states this power and responsibility to ensure the integrity of the USF.[25] As part of this process, the FCC afforded states discretion to define uses of USF support permitted under Section 254(e).[26] It explained: "[a]s long as the uses prescribed by the state are consistent with Section 254(e), we believe that states should have the flexibility to decide how carriers use support provided by the federal mechanism."[27]

The FCC further anticipated that states would adopt procedures for evaluating ETCs' use of USF support:

> ...we anticipate that states will take the appropriate steps to account for the receipt of federal high-cost support and ensure that the federal support is being applied in a manner consistent with section 254, and then certify to the

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[25] *See e.g.*, In the Matter of Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration*, CC Docket No. 96-45 and *Report and Order*, CC Docket No. 00-256, FCC 01-157, 16 FCC Rcd. 11244 (rel. May 24, 2001) ("*Fourteenth Report & Order*").

[26] *See* In the Matter of Federal-State Joint Board on Universal Service, *Ninth Report and Order and Eighteenth Order on Reconsideration*, CC Docket No. 96-45, FCC 99-306, 14 FCC Rcd 20432 (rel. Nov. 2, 1999), at ¶¶ 95-96, ("Ninth Report and Order"); *see also*, In the Matter of Federal State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 15 FCC Rcd 12208 at ¶ 93 (rel. June 30, 2000) ("*Twelfth Report and Order*").

[27] *Ninth Report and Order* at ¶¶ 95-96; *see also*, In the Matter of Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up, *Order*, CC Docket 96-45, CC Docket 02-06, WC Docket 02-60, WC Docket 03-109, FCC 05-178 (Oct. 14, 2005) ("*Katrina Order*").

> Commission that federal high-cost support received by non-rural carriers in their states is being used appropriately.[28]

States could adopt procedures to account for costs and expenditures related to universal service so that they could certify compliance. Thus, states' adoption of certification procedures is consistent with the Act, and FCC Orders.

Courts have upheld states' power to impose similar requirements on ETCs' receipt of USF support. In *Texas Office of Public Utility Counsel v. FCC* ("TOPUC"), the 5th Circuit Court of Appeals held that states may apply additional eligibility requirements for designating carriers as ETCs so that they may qualify for USF support.[29] The KCC's USF certification procedure serves a similar function. Specifically, it adds another "hoop" that Kansas ETCs must jump through in order to receive USF support. The FCC should affirm states' rights to establish reasonable procedures to certify ETCs' use of USF support consistent with the Act.

B. The KCC Certification Procedure Is Based on a Permissible Interpretation of Section 254(e)

The FCC should declare that the KCC's certification procedure is lawful because it is based on a permissible interpretation of Section 254(e). The KCC only certifies carrier expenditures for the study areas that are eligible to receive USF support under the FCC's federal high-cost support mechanisms.

The federal high-cost support mechanisms provide USF support to achieve Congress's goals in Section 254(b)(1) and (3) - to ensure rates in high-cost rural areas are affordable and reasonably comparable to rates in urban areas.[30] Both the rural and non-rural high-cost mechanisms provide funds only where carriers' costs exceed certain national cost averages. As the FCC explained, high-cost support is intended to be "an explicit subsidy that flows to areas

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[28] *Ninth Report & Order* at ¶ 54.

[29] *See Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393, 417-419 (5th Cir. 1999).

[30] *See First Report & Order* at ¶ 2; *Ninth Report & Order* at ¶ 5.

with demonstrated levels of costs above various national averages."[31] The federal mechanisms direct USF support to study areas with costs above the national average, as defined by specific formulas and methods in its rules.

The KCC adopted its procedure to define proper uses of USF support in compliance with Section 254(e). By requiring carriers to identify expenses and expenditures separately for supported areas, including costs incurred in a non-supported area that benefited a supported area, the KCC ensured that it would certify support for the carriers' study areas the FCC had deemed eligible. Thus, the KCC procedure furthered affordable, reasonably comparable rates and universal service in the specific study areas that the FCC had targeted for support.

The KCC's interpretation of Section 254(e) is consistent with the FCC's application of that statute in its *Katrina Order*.[32] In the *Katrina Order*, the FCC approved the use of USF support to assist with hurricane reconstruction efforts in areas that had not previously been eligible for high-cost support.[33] The FCC explained that Hurricane Katrina had transformed much of the Gulf Coast region into "an area like a high-cost area."[34] It described the action as a "clarification of the use restrictions in our rules" and explained that the order would "provide high-cost carriers with the flexibility to use some of their support to assist disaster restoration."[35] Thus, in the *Katrina Order*, the FCC expected support normally to flow only to carriers' study areas eligible for support, and felt it necessary to grant a waiver to permit support to be used in other areas.

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[31] *2005 ETC Order* at ¶ 55.

[32] *Katrina Order*, *supra*, at n. 26.

[33] *Katrina Order* at ¶ 1.

[34] *Id.* at ¶ 55.

[35] *Id.*

C. The KCC's Decision Adopting the Procedure was a Lawful Exercise of State Authority under the Act

The KCC's decision to adopt its USF certification procedure was a lawful exercise of state authority under the Act. The KCC properly carried out the FCC's intent in directing states to certify USF support for ETCs in their jurisdiction. The KCC's procedure meets the standards of both Sections 253(b) and 254(f) of the Act.

States have authority under two key sections of the Act to adopt USF support requirements. In Section 253(b), Congress gave states the power to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service.[36] Also, in Section 254(f), Congress gave states the power to adopt universal service regulations, not inconsistent with the FCC's rules, to preserve and advance universal service.[37] Under these sections, states have ample authority to adopt universal service procedures to carry out their FCC-authorized certification responsibilities.

The KCC's procedure is a lawful exercise of authority under Section 253(b) because it is a competitively neutral requirement that advances universal service. Indeed, the KCC adopted its procedure to make distribution of USF support in Kansas more competitively neutral. The KCC's intent was to "level the competitive playing field" between SWB and the CETCs competing in SWB study areas. As the KCC said:

> In reaching its decision, the Commission finds it significant that no high-cost USF support is available to SWBT or a CETC serving a SWBT service area, regardless of the rural nature of the area served. Applying the principles adopted by the FCC, the Commission finds it would be inconsistent with the principle of competitive neutrality to allow a CETC to use USF support received for serving a supported area to justify investments and other expenditures in non-supported service areas. As a result, this Commission concludes that, even in SWBT areas that otherwise appear to be rural, the concept of competitive neutrality does not

[36] *See* 47 U.S.C § 253(b) (2006).

[37] *See* 47 U.S.C § 254(f) (2006).

allow the Commission to certify that USF high-cost support expended in a SWBT study area is an appropriate use of USF high-cost support.[38]

In its purpose and intent, the KCC procedure was consistent with the FCC's competitive neutrality principle – that USF support mechanisms and rules must neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[39]

The procedure meets the second prong of Section 253(b) as well - it advances universal service goals consistent with Section 254. By certifying support for study areas identified as high-cost under the FCC's mechanisms, the certification procedure encourages carriers to make universal service-related investments and expenditures for areas that the FCC has found most need subsidy. As such, the procedure promotes affordable and reasonably comparable rates in those areas consistent with Sections 254(b)(1) and (3).[40]

In a similar manner, the procedure meets the standards of Section 254(f). Since the KCC procedure certifies costs and expenditures for study areas deemed eligible under the FCC's high-cost support rules, it is certainly consistent with the FCC's universal service regulatory structure. The KCC certification procedure also furthers the FCC's efforts to limit unnecessary or inappropriate growth of the USF. More rigorous certification processes by states improve the long-term sustainability of the Fund. Certainly, states' thorough review of ETCs' expenses and investments should help control unnecessary growth of the Fund.

IV. Conclusion

For these reasons, the Commission should issue a declaratory ruling upholding the KCC procedure as a lawful and permissible interpretation of Section 254(e).

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[38] *KCC Order* at ¶ 29.

[39] *First Report and Order*, ¶¶ 47-48 (establishing the principle of competitive neutrality).

[40] *See* 47 U.S.C. §254(b)(1) and (3) (2006).

DATED this 16th day of April, 2008.

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CERTIFICATE OF SERVICE

I, Linda Street, secretary, hereby certify that a copy of the foregoing was served this 16th day of April, 2008 via U.S. first class mail, postage prepaid, upon the following:

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In the Matter of Kansas Corporation Commission's Petition for Declaratory Ruling Affirming the Lawfulness of Its USF Certification Procedure	)	WC Docket No. ___

KANSAS CORPORATION COMMISSION'S PETITION FOR DECLARATORY RULING

ATTACHMENT I

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

USCOC OF NEBRASKA/KANSAS, LLC, RCC ATLANTIC, INC., Plaintiffs,	)	
vs.	)	Case No. 07-2527-JAR
THE KANSAS CORPORATION COMMISSION, THOMAS E. WRIGHT, MICHAEL C. MOFFET, and JOSEPH F. HARKINS, Defendants.	)	

MEMORANDUM AND ORDER

The Court now considers defendants the Kansas Corporation Commission ("KCC"), Thomas E. Wright, Michael C. Moffet, and Joseph F. Harkins' Motion to Dismiss (Doc. 7). Defendants asserts that plaintiffs have failed to state a claim for relief, or alternatively, the issues should be referred to the Federal Communications Commission ("FCC") to be resolved. For the reasons set forth below, the Court grants defendants' motion to refer the case to the FCC, and denies the motion to dismiss.

Background

Plaintiffs USCOC of Nebraska/Kansas, LLC ("USCOC") and RCC Atlantic, Inc. ("RCC") are wireless telephone companies that provide wireless telephone service to rural areas of the country. Under the Communications Act of 1934 ("Act"), RCC and USCOC are eligible telecommunications carriers ("ETC"), meaning that they qualify under 47 U.S.C. § 214(e) for high-cost support from the Federal Universal Service Fund ("FUSF"). FUSF is provided to ETCs that serve rural areas of the country, and is used to supplement monies associated with the maintenance and upgrading of such services in rural areas. Under the Act, ETCs must meet certain guidelines and are assessed by the KCC in that regard. The KCC is empowered to designate telecommunication carriers as ETCs for certain areas, and are under an obligation to ensure that ETCs continue to meet those standards.

On July 27, 2006, the KCC approved a new form to be used by ETCs in submitting their accrued spending on services in rural areas. Essentially, the KCC approved a new reimbursement form used by ETCs to get money from the FUSF. One amendment to the form is a new restriction on the use of FUSF. According to the restriction, ETCs can no longer use FUSF for areas in which there are Southwestern Bell ("SWB") exchanges; namely, ETCs would receive no high-cost support for expenditures in rural areas where SWB also provides service. USCOC and RCC challenged the rule, claiming that it frustrates the intent of Congress in creating FUSF, and that the KCC's action is preempted by federal law. Specifically, USCOC and RCC claim that the KCC is preempted from passing such a rule by 47 U.S.C. §§ 332, 254, 253, and that the KCC's action violates K.S.A. § 66-1,143. They seek declaratory and injunctive relief declaring the regulation invalid and prohibiting the KCC from enforcing the regulation. In response, the KCC filed the instant motion to dismiss asserting that plaintiffs have failed to state a claim, or in the alternative, that the case should be stayed pending resolution by the FCC.

Motion to Strike

Defendants assert that because plaintiffs failed to timely respond to the motion to dismiss, their response should be stricken in its entirety. Defendants filed their motion to dismiss on November 26, 2007. According to D. Kan. R. 6.1(d)(2), plaintiffs had twenty-three days to respond. Nearing the deadline, plaintiffs and defendants agreed to an extension, and the

Court granted the motion on December 17, 2007, extending the deadline from December 19, 2007, to December 20, 2007. Plaintiffs, however, did not file their response until December 27, 2007, a week after the agreed deadline. Defendants now seek to strike plaintiffs' entire response.

Under Federal Rule of Civil Procedure 12(f)(2), a court "may strike from a pleading an insufficient defense or any other redundant, immaterial, impertinent, or scandalous matter [upon a] motion made by a party." Whether to grant a motion to strike is within the court's discretion and is generally disfavored unless clearly warranted.[1] The Court should "usually deny a motion to strike unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties."[2] While the Court does not condone dilatory filing practices, such a motion is not clearly warranted. And, in light of the Court's disposition of the defendants' motion in their favor and their failure to show any prejudice to the late filing, defendants' motion to strike is denied.

Primary Jurisdiction Doctrine

As a threshold matter, the Court will now consider defendants' motion to invoke the doctrine of primary jurisdiction and refer this matter to the FCC. The purpose of the doctrine of primary jurisdiction is to create a proper balance between the courts and administrative agencies.[3] The doctrine is invoked where claims that are properly before the court are better suited for the expertise and depth of knowledge of the applicable agency.[4] "It is 'designed to

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[1] *Resolution Trust Corp. v. Scaletty*, 810 F. Supp. 1505, 1515 (D. Kan. 1992).

[2] *Nwakpuda v. Falley's, Inc.*, 14 F. Supp. 2d 1213, 1215 (D. Kan. 1998).

[3] *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996).

[4] *Ton Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238 (10th Cir. 2007).

allow an agency to pass on issues within its particular area of expertise before returning jurisdiction to the federal district court for final resolution of the case.'"[5]

In determining whether to invoke the doctrine, courts in this Circuit "consider whether the issues of fact in the case: (1) are not within the conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency."[6] Each case is decided on its own facts by looking to the purposes of the doctrine and whether those purposes are served.[7] If a court does find that the doctrine is applicable, the issues are referred to the appropriate agency and the case may either be stayed or dismissed without prejudice pending the agency's resolution.[8]

In this case, there are few issues of fact; the essential claim by plaintiffs is one of interpretation of law, an area prime for this Court. Plaintiff makes claims that the KCC's actions are preempted by federal law. In their argument, plaintiffs point to three sections within the Act, which they assert preempt any state law that would work the contrary intent of Congress. Even so, this case should be referred to the FCC for resolution prior to this Court ruling because of the broad policy implications associated with this issue.[9] Moreover, allowing the FCC to rule on the issue would promote uniformity in the interpretation of the law and would likely end the debate,

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[5]*Id.* (quoting *Williams Pipe Line Co.*, 76 F.3d at 1496).

[6]*Id.* at 1239.

[7]*Id.*

[8]*Id.*

[9]*See Am. Auto. Mfrs. Ass'n v. Mass. Dept. of Envtl.. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998) (explaining that when the matter is primarily one of statutory interpretation, referral to agency may be generally advisable).

if any on this issue. And, finally, both parties agree that the issue presented is one better suited for determination by the FCC.[10] As such, this case shall be referred to the FCC for determination of the claims. Because the Court grants referral and stay of proceedings, there is no need to address defendants' motion to dismiss.

IT IS THEREFORE ORDERED THAT Defendants' Motion to Dismiss is **DENIED**; Defendants' Motion to Stay Case Pending Resolution before the Federal Communications Commission (Doc. 7) is **GRANTED.**

IT IS SO ORDERED.

Dated this 29th day of January 2008.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

[10]Plaintiffs request that the KCC suspend its ruling until the FCC resolves the dispute. The Court notes that plaintiffs have not filed a motion for a temporary restraining order ("TRO") under Rule 65(b). Therefore, without meeting the heavy burden for a TRO, this Court cannot prevent the KCC from enforcing the new regulation.

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KANSAS CORPORATION COMMISSION'S PETITION FOR DECLARATORY RULING

ATTACHMENT II

Kansas Corporation Commission

USF Certification Instructions for Cost Reporting
(Attachments 2 through 6)

Every Eligible Telecommunications Carrier (ETC) is required to complete the forms described in these instruction as part of the annual certification process by the Kansas Corporation Commission that the carrier is eligible to receive federal high-cost loop, local switching, ICLS, safety net, and safety valve support pursuant to 47 C.F.R. 54.313 and 47 C.F.R. 54.314. Please attach additional pages if necessary. If you have any questions, please call the Telecommunications Division at 785-271-3142. Please provide the following information on or before August 24, 2007 for the certification for 2008:

1. Line Counts for Federal Universal Service Fund (USF) Supported Services

Provide the line counts by incumbent local exchange carrier (ILEC) study area or wire center by submitting the line counts as reported to National Exchange Carriers Association (NECA) or Universal Service Administrative Company (USAC) for the same year as the cost data is reported.

2. Attachment 2 and 3 - Report on the Use of USF Support Funding

a. Incumbent ETC Report Format

Attachment 2a, entitled "Test for USF Certification," is used by ILECs to report the use of USF funds for the prior year. The prior year data is being provided to evaluate past certifications provided by the companies. The report is a modified version of the cost information submitted to NECA for high cost support. Amounts reported should reflect the amounts actually used to provide universal service in the supported areas for which the support was paid.[1] Universal Service Support should be segregated by type of USF support received. The Kansas Universal Service Fund (KUSF) amount is shown even though the ETC certification is not currently applicable to KUSF. However, data is being gathered for informational purposes since KUSF is similar to Federal USF and its support must also be used to provide and maintain universal service. Attachment 2b is an example showing how to complete the form.

b. Competitive ETC (CETC) Report Format

Attachment 3a, entitled "CETC Test for USF Certification," is used by CETCs to report the use of USF funds for the prior year. The prior year data is being provided to evaluate past certifications provided by the companies.[2] Amounts reported should reflect the amounts actually used to provide universal service in the supported areas for which the support was paid.[3] If no USF support was received for the prior year, the company need

[1] Per 47 C.F.R. § 54.314, federal USF support, "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." If investments or expenses are for service areas larger than the supported service areas, then allocations of the expenditures is required. See 2c Allocation Methods.

[2] If the company is a new ETC and did not provide self-certification for the prior year, data reports are not required though the company may find it helpful to provide that information to help substantiate the prior build out that it has made into the supported areas.

[3] Per 47 C.F.R. § 54.314, federal USF support, "will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." If investments or expenses are for service areas larger than the supported service areas, then allocations of the expenditures is required. See 2c Allocation Methods.

only file a statement to that effect. Cost information is split by new investment expenditures and expenses. This is compared to the amount of Universal Service Fund support received. The Kansas Universal Service Fund (KUSF) amount is shown even though the ETC certification is not currently applicable to KUSF. However, data is being gathered for informational purposes since KUSF is similar to Federal USF and its support must also be used to provide and maintain universal service. Attachment 3b is an example showing how to complete the form.

The CETC Report on the Test for USF Certification includes a note that the company should exclude the cost of transport between switches. This makes the reporting consistent with the costs submitted by the Incumbent ETCs. Once a call leaves the local switch, it is on the interoffice network and costs for those facilities are not included. The switch is the devise that provides dial tone and/or switching the call to the proper location for termination. This can be a smart remote with stand-alone capability[4] or stand-alone/host switch.

c. Allocation Methods

The cost reports are trying to capture the cost to provide universal service. Certain types of investments and expenses should be excluded. The FCC has deregulated some services so costs for voice messaging and inside wire should be excluded. Universal service does not include facilities only for data transmission, such as the DSLAM for Digital Service Lines (DSL). Also lines or services that only provide data service do not qualify as universal service and expenditures for those services should be excluded.

The allocation of new investments and expenses may play an important role to properly identify the costs associated with the USF supported areas. Incumbent ILECs utilize a series of allocation rules in the Separations process that are specific and documented. However, even Incumbent ETCs may encounter situations where only a portion of their territory receives USF support.

CETCs, especially, may serve exchanges that are USF supported as well as areas that are not USF supported. Some costs may be specific to the USF supported area, while others may involve both areas. A number of valid methods are available to make these allocations. Below is a list of examples that will normally be acceptable in making allocations:
For outside plant (OSP) projects –the supported areas' allocations can be determined as follow:

1. Identify the specific costs in supported areas and assign it as a qualified cost.
2. Determine the number of lines in the supported area versus the total lines served by the facilities.
3. Determine the geographic area in the supported area versus the total area served (this method is especially applicable to cellular towers).

[4] A smart remote with stand-alone capability is one that can still provide local calling even if its link to the host switch is severed.

4. Calculate the percent of miles on a cable that serves a supported areas versus the total miles to all the areas.
5. Calculate the percent of fiber strands or cable pair that go to a supported area versus the total strands in service.

Expenses may be allocated based on the allocation determined for investment.
Expenses may be allocated based on a percent of lines or customers in the supported areas.
Maintenance expense may be allocated based on the number of items being maintained that are in the supported areas.

Switching may be allocated using the following methods:

1. Calculate the percent of Minutes of Use (MOU) for the lines in the supported area versus all minutes.
2. Calculate the percent of lines in the supported area versus all lines served by the switch.
3. Similar allocations could apply to circuit equipment used for switched access.

General rules to follow when deciding on the allocation method:

1. Allocations may be calculated by individual investment location, by region or for the whole state.
2. Companies may decide which methods work best based on the accounting and network information they have available.
3. Methods can vary for different types of investment or expense.
4. The method is one that is appropriate for the item being allocated (i.e. MOU would be appropriate for a switch allocation but not for a loop).
5. The allocation is based on measurable data.
6. The method captures a reasonable cost of the investment and/or expense.
7. The company should maintain consistency in the allocation methods used from year to year when providing data to the Commission. This will avoid gaming the system and provide the ability to make comparisons from year to year.
8. When a company changes an allocation method, it should be noted in the data submission, complete with rationale explaining why this new method is more appropriate. Also the company should provide a calculation of what effect the new allocation would have on the prior year's report.

3. Attachment 4 - New Investments Utilizing USF Support in Supported Areas

<u>a. Report Format</u>

For the prior year, usually a twelve-month period from January 1 - December 31, please provide a description of the new investments in supported areas where the federal USF support was used. Please use a format similar to the "Narrative for New Investment" Report. The first example is for a wireless ETC and second example is for a wireline ETC. It is acceptable to submit a mechanized report if it contains the essential information. Any projects over the threshold should be listed separately. Those projects less than the threshold should be combined into one or more line items. See 3b below for the threshold.

EXAMPLE of Narrative for New Investment Report

EXAMPLE of a WIRELESS COMPANY

Town or Exchange	Description of Improvement	Cash Investment	Allocation %	Notes	Amount Used in the USF Supported Areas
A	B	C	D	E	F=CxD
20 miles West of Oakley serving USF areas: Levant, Winona, and Russell Sprgs.	*New tower and fiber trunking.*	*$300,000*	*70%*	*[1]*	*$210,000*
Wichita - Serves all customers in Kansas.	*Switch Software Upgrade.*	*$250,000*	*25%*	*[2]*	*$50,000*
TOTAL		*$550,000*			*$260,000*

NOTES

[1] Percent of the service area that is USF supported on geography served.
[2] Percent of switch that is USF supported based on lines served.

EXAMPLE of a WIRELINE COMPANY

Town or Exchange	Description of Improvement	Cash Investment	Allocation %	Notes	Amount Used in the USF Supported Areas
A	B	C	D	E	F=CxD
Buffalo, Quincy Toronto	*Replaced OSP with digital line carrier and fiber feeder*	*$1,250,000*	*100%*	*[1]*	*$1,250,000*
Eureka thru Hamilton, Quincy, Yates Cntr, Chanute, Fredonia, Fall River & serves USF areas: Buffalo, Toronto, Altoona, Benedict, and Coyville.	*Fiber ring from remote terminals to remote switch in Eureka.*	*$800,000*	*50%*	*[2]*	*$400,000*
TOTAL		*$2,050,000*			*$1,650,000*

NOTES

[1] All the exchanges in this project are USF supported.
[2] Percent of lines served by the fiber ring in the USF supported exchanges.

Kansas Corporation Commission

USF Certification Instructions for Cost Reporting
(Attachments 2 through 6)

The objective of this report is to identify that new investment is being spent to benefit those in USF supported areas. Listing individual exchanges that will benefit will help meet this purpose.

b. Threshold - For companies spending less than $10M in new projects in Kansas, use $200,000 as the project threshold. For companies spending $10M or more, use $500,000 as the project threshold. It is acceptable to provide more detail than the threshold requires if it helps identify which supported areas are receiving benefit.

4. Attachment 5 - Report on the Use of KUSF Support Funding in SWBT Exchanges

The information and instructions for Attachment 5 is the same as Attachment 4 except that the purpose is to describe the use of KUSF Support in SWBT exchanges. ETCs that receive KUSF for SWBT exchanges should complete this report.

Additional questions on the allocation process may be referred to the KCC Staff, see number at the top of these instructions.

5. Attachment 6 – Annual Certification of Requirements Imposed by the Commission in Docket Number 06-GIMT-446-GIT

Provide the information as requested on the attachment and attach additional pages, as necessary.

For question 5, wireline carriers need to certify compliance with the Commission's quality of service requirements and wireless carriers need to certify compliance with the CTIA Code. ILECs do not need to complete questions 1 and 7.