

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Kansas Corporation Commission’s Petition for	)	WC Docket No. 08-55
Declaratory Ruling Affirming the Lawfulness	)	
of Its USF Certification Procedure	)	

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER  
ADVOCATES  
SUPPORTING THE KANSAS CORPORATION COMMISSION’S PETITION**

Pursuant to the Public Notice issued by the Federal Communications Commission (“Commission”),<sup>1</sup> the National Association of State Utility Consumer Advocates (“NASUCA”<sup>2</sup>) offers these brief comments on the Petition filed by the Kansas Corporation Commission (“KCC”) seeking a declaratory ruling from the Federal Communications Commission (“FCC”) that the KCC’s procedure for certifying Kansas carriers’ receipt of federal high-cost support (“USF”) is lawful under the Telecommunications Act of 1996 (“Act”), specifically 47 U.S.C. § 254(e). The Petition follows an order issued in a lawsuit in federal district court in Kansas, where two wireless carriers challenged the KCC’s procedure.<sup>3</sup> NASUCA, whose members represent both the

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<sup>1</sup> DA 08-1060 (rel. May 2, 2008).

<sup>2</sup> NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

<sup>3</sup> Petition at 5.

consumers who benefit from the USF as well as those who pay into it,<sup>4</sup> submits that the KCC's procedure is lawful, and that the wireless carriers' challenge is without merit.

The bottom line is that the procedure adopted by the KCC does not allow competitive eligible telecommunications carriers ("CETCs"), like the wireless carriers who brought the federal lawsuit, to use their costs incurred in study areas served by incumbent ETC Southwestern Bell ("SWB"),<sup>5</sup> which receives no federal high-cost model support, in order to justify their receipt of support in other companies' territories.<sup>6</sup> Under federal rules, the amount of support received in a rural ILEC's territory is based on the rural ILEC's embedded costs; CETCs receive support for each line they serve in the rural ILEC's territory. In non-rural carriers' territory, support is based on statewide average forward-looking costs for the non-rural ILECs, and if SWB received federal support, again the CETCs would receive per line the same amount of support SWB did. But SWB does not receive high-cost model support, so the CETCs operating in its territory also do not receive such support.

The KCC's rules merely require the CETCs to justify their support by showing that their costs justify the amount of support. Thus the issue here is whether the KCC can require CETCs to limit the costs considered in the certification for rural ILECs' territories to costs actually incurred in those territories.<sup>7</sup> Clearly, this does not actually deny any support to a CETC; rather it requires the CETC to show that the support was properly

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<sup>4</sup> The Kansas Citizens' Utility Ratepayer Board is a member of NASUCA.

<sup>5</sup> SWB is a subsidiary of AT&T Inc.

<sup>6</sup> Both the complaint and the Petition overlook the fact that SWB received \$500,000 in Interstate Access Support in 2007.

<sup>7</sup> As the KCC describes, there is "a reasonable degree of flexibility built into the system." Petition at 3. Indeed, carriers are permitted to include "costs incurred in a non-supported area that benefited a supported area...." Id. At 8.

spent to benefit the territory for which the support was received. As the KCC states, it “will not certify CETC expenditures that are made to benefit only SWB’s study areas.”<sup>8</sup>

The KCC describes the careful process that it engaged in to arrive at the rule.<sup>9</sup> In that proceeding, the KCC “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-area customers do not receive support for SWB-area customers.”<sup>10</sup> The KCC states that it “concluded that it had the authority to establish certification procedures under section 254(e) of the Act and section 54.313 of the [FCC’s] rules.”<sup>11</sup> NASUCA agrees on both counts.

The wireless carriers have two separate but interrelated arguments that the KCC’s orders are preempted. First, they argue that denying them the ability to use expenditures in SWB territory as the basis for their receipt of federal funds as CETCs in effect restricts their entry, in violation of 47 U.S.C. §332(c)(3)(A).<sup>12</sup> And second, they argue that imposing this requirement only on CETCs is not competitively neutral.<sup>13</sup> Neither argument holds water.

Much of the wireless carriers’ arguments require confusing the carriers’ entire service areas with the study areas that are used to govern universal service support. The

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<sup>8</sup> Id.

<sup>9</sup> Id. at 3-5.

<sup>10</sup> Id. at 4.

<sup>11</sup> Id. at 4-5.

<sup>12</sup> *USCOC of Nebraska/Kansas, LLC and RCC Atlantic, Inc. v. Kansas Corporation Comm’n, et al.*, U.S. District Court Kansas Case No. 07-2577-JAR, Complaint (filed October 29, 2007) (“Complaint”) at 12-14, 18-20.

<sup>13</sup> Id. at 14-18.

Kansas rural ILECs provide service in the rural ILECs' study areas (where they receive support), and SWB provides service in its study area, where it receives no federal support. Under § 214 of the Act, SWB's certification as an ETC is separate from the rural ILECs' certification as ETCs; SWB does not operate in the rural ILECs' territories, nor do the rural ILECs operate in SWB territory.<sup>14</sup>

The cellular Complaint states, "As ETCs, US Cellular and RCC each receive high-cost support from the FUSF for purposes of providing wireless service to consumers in rural and high-cost areas of Kansas."<sup>15</sup> The wireless carriers do not recognize that their ETC designation for SWB territory is separate from their designation in the rural ILECs' territories, just as the calculation of support in each area is separate, and just as the purpose of the support in each area is separate. The wireless carriers' certification as CETCs in the rural ILECs' territories is separate from their certification as CETCs in SWB's territory.<sup>16</sup> The wireless carriers need not have sought certification in either SWB's or the rural ILECs' territories; the fact that they did so in both was their choice. And if the wireless carriers want to avoid the ETC obligations in SWB territory,<sup>17</sup> all they have to do is to withdraw their request for certification.<sup>18</sup> SWB cannot do so.

The fact that the wireless carriers do not receive support for their operations in SWB territory has little to do with their entry there. It is safe to assume that the wireless

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<sup>14</sup> Although at the time the Act was passed it was hoped that adjacent ILECs would compete against each other, that has not occurred in most areas.

<sup>15</sup> Complaint at 7. Indeed, § 214 of the Act provides a level of proof for ETC certification that is different in rural carrier areas versus all other (i.e., non-rural) carriers' territories.

<sup>16</sup> Under § 214 of the Act, certification in rural carriers' territories and all other territories are subject to different standards.

<sup>17</sup> See Complaint at 10-11.

<sup>18</sup> 47 C.F.R. § 54.205(a).

carriers entered into SWB's territory before they were certified as CETCs -- just as many wireless carriers provide service throughout the country without even seeking CETC certification.<sup>19</sup> And it is safe to say that the wireless carriers that filed the federal lawsuit are continuing to provide service in SWB territory, like the other wireless carriers that have not sought CETC designation. And it is also safe to say that if these wireless carriers decide not to continue operating in SWB territory if they can no longer receive federal support for those operations, there will still be wireless service available from wireless carriers that do not need to feed at the federal trough.

Whether a wireless carrier is able to obtain federal universal service support has little to do with the carriers' entry decisions. That was one of the lessons the FCC took to heart in its recent decision to cap high-cost USF payments to CETCs.<sup>20</sup>

The wireless carriers alleged in federal court that denying them the ability to use funds obtained as the result of their certification in the rural carriers' service territories to invest in SWB territory would have a "significant adverse impact" on Kansas consumers.<sup>21</sup> This is untrue: Clearly, it will not affect the rates consumers pay to these wireless carriers. One doubts whether it will have any real impact on the carriers' investments in SWB territory. And it could be argued that allowing support dollars to be invested in SWB territory will result in a diversion of funds that should have been invested in the rural ILECs' territories.

As for competitive neutrality, the wireless carriers assert that the reporting

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<sup>19</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, et al., ITTA Comments at 34, citing Criterion study.

<sup>20</sup> *Id.*, Order, FCC 08-122 (rel. May 1, 2008).

<sup>21</sup> Complaint at 10.

requirements unfairly place a burden on them that is not placed on the ILECs.<sup>22</sup> But all CETCs wanting support are required to report their costs; the rural ILECs report the costs of service in their territories to justify their support, and SWB is not required to report its costs because it does not receive any support. Rural ILECs are not allowed to report costs incurred in SWB territory, and neither are the wireless ETCs. The rule, in fact, is more competitively neutral than the situation would be without such a rule.<sup>23</sup>

The Kansas rule is an appropriate use of state authority to ensure the proper use of federal universal service funds. The KCC's Petition should be granted.

Respectfully submitted,

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<sup>22</sup> Id. at 16-17.

<sup>23</sup> Indeed, other state commissions should consider similar rules for wireless ETCs that serve in both rural and non-rural ILECs' territories.