BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2015-290-C

In the Matter of the Petition of the South Carolina Telephone Coalition for a Determination that Wireless Carriers are Providing Radio-Based Local Exchange Services in South Carolina that Compete with Local Telecommunications Services Provided in the State	)))))))	**POST-HEARING BRIEF OF CTIA**

CTIA – The Wireless Association ® ("CTIA") submits this brief in opposition to the Petition filed by the South Carolina Telephone Coalition ("SCTC").[1]

I. INTRODUCTION

This case concerns a 1996 law that addressed what were then major changes to the telecommunications landscape – the advent of local wireline competition and the emergence of wireless carriers. The new law recognized that as local competition developed, traditional regulation could be relaxed as local exchange carriers ("LECs") began to compete with other carriers on a level playing field. Accordingly, if a LEC could demonstrate that it was subject to a certain level of competition, it would be entitled to decreased regulation, but only in areas where that competition existed. S.C. Code Ann. § 58-9-280(G)(1)("Subsection (G)(1)"). Deregulation thus would be implemented incrementally, at the same pace and to the same extent that competition spread across the state. The General Assembly took exactly the same approach to addressing whether wireless carriers would be required to contribute to the South Carolina

[1] CTIA does so without waiving its contention that the Commission must dismiss this case for failure to state a claim upon which relief can be granted. CTIA makes reference to the arguments made in its previously filed Motion to Dismiss and related documents already on file with the Commission.

Universal Service Fund ("USF"). A wireless carrier would have to contribute only to the extent the Commission determined it competed with LECs, applying exactly the same test used for determining whether LEC services could be deregulated. S.C. Code Ann. § 58-9-280(E)(3)("Subsection (E)(3)"); Subsection (G)(1). A wireless carrier thus could be required to contribute to the USF to the extent it was competing with the local telecommunications services offered by LECs, but only where it was demonstrated that such competition was taking place. Since 1996, the Legislature has confirmed through statutory revisions that it intended for this local competition test to apply when the Commission is called upon to determine whether and to what extent wireless carriers must contribute to the USF. *See* S.C. Code Ann. § 58-9-576(A)(3).

The local competition test requires that before a wireless carrier can be required to contribute to the USF, the Commission must determine that the wireless carrier's services compete with particular local telecommunications services. S.C. Code Ann. § 58-9-280(E)(3)("Subsection (E)(3)"). The following criteria must be met to establish such competition in a certain geographic area:

- A particular local telecommunications service with which the wireless carrier's services are competing;
- A class or group of customers subscribing to the local telecommunications service;
- An exchange, group of exchanges or other clearly defined geographical area where the local telecommunications service is provided and the wireless carrier's services are available; and
- A wireless carrier's services that are the functional equivalent of or substitute for the local telecommunications service.

Subsection (G)(1). This statutory test requires analysis at a granular level: the services of an individual wireless carrier must be compared to a particular local telecommunications service for a class of customers in a specific area. Only when that test is met may a wireless carrier be required to provide USF support for the area in which competition is taking place.

SCTC and the other parties (collectively, the "Proponents") supporting SCTC's Petition ask the Commission to refashion the statutory test to better suit their purposes. Indeed, they disparaged the statutory criteria, stating that "it may be that, back in 1996, we had no idea how the wireless market would develop and that may explain the way the words were chosen." (Record, p. 68, II. 9-12). That those words were "chosen" by the South Carolina Legislature and are binding on this Commission seems to be of little significance to the Proponents who advance an alternative approach which itself has no statutory basis. The alternative approach was described by SCTC witness Meredith, who took what he said was a "more global view" than that of the Legislature and stated the test should be "whether wireless voice service competes with landline voice service in South Carolina." (Record, p. 191, 197.) At the hearing, the Proponents submitted evidence intended to meet their new "test" rather than the more granular and rigorous test set forth by statute. As a result, the Proponents have failed to prove that any wireless carrier's services compete with any particular local telecommunications service offered by a LEC in a clearly defined geographic area. The Commission should therefore deny the Petition and decline to make the determination requested by the Proponents.

II. APPLICABLE LAW AND LEGAL STANDARD

The following provisions of S.C. Code Ann. § 58-9-280 are pertinent to the Commission's consideration in this Docket:

S.C. Code Ann. § 58-9-280(E): The purpose of the state USF as defined by the General Assembly is "continuing South Carolina's commitment to universally available basic local

exchange telephone service at affordable rates . . . ."

S.C. Code Ann. § 58-9-280(E)(2): The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

S.C. Code Ann. § 58-9-280(E)(3): The commission also shall require any company providing telecommunications service to contribute to the USF 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 local telecommunications service provided in this State.

S.C. Code Ann. § 58-9-280(G)(1): Competition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers.

As the Petitioner, SCTC bears the burden of proof in this Docket. *Leventis v. SCDHEC*, 340 S.C. 118, 530 S.E.2d 643 (2000) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue."). *See also In Re: Petition of AT&T Communications of the Southern States, Inc. Requesting Alternative Regulation of Certain Services in South Carolina,* Order No. 95-1734 in Docket No. 95-661-C issued December 15, 1995 ("[T]he Commission concludes that AT&T has not met its burden of proof as described under the statute with regard to any of its services.").

The Commission must determine whether competition exists based upon the applicable statutory requirements and those facts applicable to those criteria, and not merely upon opinions, expert or otherwise, not supported by facts. *See South Carolina Cable Television Association v.*

SCPSC, 313 S.C. 48, 53, 437 S.E.2d 38, 41, (1993) ("The fact that one is authorized to compete is not evidence that it does, in fact, compete.").

III. ARGUMENT

At the hearing, the Proponents sought to convince the Commission that they only needed to prove that "wireless voice service competes with landline voice service in South Carolina." (Record, p. 197.) However, this broad-brush approach ignored the statutory test for competition established by the General Assembly, which expressly requires a showing that a *particular* wireless carrier's services are the functional equivalent of, or a substitute for, a *particular* LEC telecommunications service in a *clearly defined* geographic area. As a result, the Proponents' generalized evidence regarding certain functional similarities between wireline and wireless services, the existence and operation of wireless carriers in South Carolina, and the growth of wireless subscribership does not suffice to demonstrate "competition" because that evidence did not meet the test set out in Subsections (E)(3) and (G)(1).

A. The Petition Must Be Reviewed Under Subsections (E)(3) and (G)(1)

The Commission must apply the statutory framework and test for "competition" established by the General Assembly rather than the refashioned test invented by SCTC. Subsections E(3) and (G)(1) provide that framework as demonstrated by the plain language of those provisions, references to these specific Subsections elsewhere in Chapter 9 of Title 58, principles of statutory construction, the Petition itself and the Notice of Filing issued in this Docket, and previous pronouncements of this Commission.

Accordingly, the Commission must reject the Proponents' attempts to (i) substitute Subsection (E)(2) for Subsection (E)(3) and thereby avoid the specific framework for wireless carriers mandated by the General Assembly; and (ii) ignore the criteria for a finding of

"competition" required by Subsection (G)(1), in favor of their definition of "competition" that is nothing more than their own creation.

1. Subsection (E)(3) Frames the Issue to Be Decided in this Case

The General Assembly authorized the Commission generally to require all "telecommunications companies" to contribute to the USF, but provided a separate, specific standard for wireless carriers, which states that wireless carriers must contribute only if their services compete with a local telecommunications service. Subsection (E)(2) states the general requirement that "telecommunications companies" contribute to the USF:

> (2) The commission shall require all telecommunications companies providing telecommunications services within South Carolina to contribute to the USF as determined by the commission.

Subsection (E)(3) creates another test for wireless carriers, which qualifies and operates as an exception to Subsection (E)(2). It describes how the Commission's determination must be made for a company providing "radio-based local exchange services" (i.e., wireless services)[2]:

> (3) The commission also shall require any company providing telecommunications service to contribute to the USF 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 local telecommunications service provided in this State.

Subsection (E)(3) thus frames the issue the Commission must decide, for each wireless carrier for which evidence was presented in this case: whether the wireless carrier's services compete with particular local telecommunications services provided by a LEC.

SCTC mistakenly argued that the Commission also may apply Subsection (E)(2) in making a determination whether wireless carriers must contribute to the USF. (Meredith

[2] The parties do not dispute that as used in Subsection (E)(3), "radio-based local exchange services" include wireless services provided by wireless carriers.

Rebuttal, Record p. 219 ll. 14-15.) Under its theory, the Commission may require all wireless carriers to contribute under Subsection (E)(2) if it determines that wireless services are "telecommunications services," which are defined to include "those nonwireline services provided in competition with landline services." S.C. Code Ann. § 58-9-10(15). This theory is at odds with SCTC's Petition[3] and statements by its witnesses acknowledging that Subsection (E)(3) states an exception to Subsection (E)(2).[4] More importantly, for at least five reasons SCTC is wrong as a matter of law.

First, SCTC misread the statute. As noted above, the statute's plain language demonstrates the Legislature's intention to make Subsection (E)(3) (applicable specifically to wireless carriers) qualify and provide an exception to Subsection (E)(2) (applicable generally to "telecommunications companies"). Rules of statutory construction require the Commission to apply Subsection (E)(3) (a more specific statutory provision applicable particularly to wireless carriers) here rather than Subsection (E)(2) (a more general provision addressing the same subject). *See Spectre v. SC DHEC*, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect").

SCTC's selective reading, which applies Subsection (E)(2) and effectively ignores Subsection (E)(3), would write Subsection (E)(3) out of S.C. Code Ann. § 58-9-280 and violate the rule of statutory construction requiring that all words of a statute be given effect. *See Ballard*

[3] *See* Petition at Page 1: "The South Carolina Telephone Coalition and its individual member companies ("SCTC") hereby petition the Public Service Commission of South Carolina ("Commission"), pursuant to S.C. Code Ann. § 58-9-280(E)(3) and Commission Regulation 103-825 . . . ."

[4] *See, e.g.* Testimony of Keith Oliver "However, as I said earlier, our Legislature . . . wrote into the law a specific exception to give the wireless time to develop, and we see that in the version of (E)(3)." (Record p. 87).

v. Ballard, 314 S.C. 40, 443 S.E.2d 802 (1994) (Court is constrained to avoid construction that would read provision out of statute). If the broader test in Subsection (E)(2) applied to wireless carriers, it would swallow the exception or qualifier in Subsection (E)(3) and render the latter section's language surplusage, and its effect meaningless. *See CFRE v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (statute must be read so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Second, the General Assembly's enactment in 2004[5] of S.C. Code Ann. § 58-9-576(A)(3) expressed its clear intention that Subsection (E)(3) – and not (E)(2) – apply in cases such as this.

> A determination by the commission under subitem (3) of this subsection shall not constitute a determination ***under Section 58-9-280(E)(3)*** or (G)(1), or any other applicable provision of law, that a wireless provider is providing services that compete with a local telecommunications service in this State for purposes of participation in the state Universal Service Fund.

S.C. Code Ann. § 58-9-576(A)(3) (emphasis added). The "determination" to which S.C. Code Ann. § 58-9-576(A)(3) refers involves a LEC's entitlement to alternative regulation based on a showing that "at least two wireless providers have coverage generally available in the LEC's service area and that the providers are not affiliates of the LEC." In making clear that a LEC's showing of wireless coverage did not constitute a determination that any wireless carrier must contribute to the USF, the Legislature cited Subsection (E)(3) and not (E)(2). This clear legislative declaration reinforces the conclusion that the General Assembly did not intend for Subsection (E)(2) to apply here.

Third, the Commission lacks jurisdiction to require commercial mobile service providers that are not eligible telecommunications carriers or carriers of last resort to contribute to the USF

[5] 2005 South Carolina Laws Act 5 (H.B. 3080).

under Subsection (E)(2). S.C. Code Ann. § 58-11-100, the statute governing the Commission's authority over wireless carriers, provides:

> (A) No radio common carrier shall begin or continue the construction or operation of a radio common carrier system, either directly or indirectly, without first obtaining from the commission a certificate that the public convenience and necessity requires the construction or operation.
> (B) Notwithstanding the provisions of subsection (A) or another provision of law, neither the commission nor the Office of Regulatory Staff may impose requirements related to the terms, conditions, rates, or availability of, or otherwise regulate "commercial mobile service" as that term is presently defined in 47 U.S.C.A. Section 332(d)(1) for as long as Section 332 of 47 U.S.C. or similar federal legislation remains in effect.
> (C) ***Nothing in this section affects any jurisdiction conferred upon the commission by Section 58-9-280(E)(3).***
> (D) Nothing in this section affects the commission's jurisdiction or authority to address and resolve issues relating to arrangements and compensation between telecommunications carriers and commercial mobile service providers, pursuant to 47 U.S.C. Sections 251 and 252 or pursuant to other applicable provisions of law.
> (E) Nothing in this section shall prohibit the commission from applying to commercial mobile service providers that have sought and received designation from the commission, and operate as eligible telecommunications carriers, pursuant to 47 U.S.C. Section 214(e), or as carriers of last resort, as defined in Section 58-9-10(10), the same rules, requirements, or standards that are generally applicable to carriers that are subject to alternative regulation under Section 58-9-576 and that operate as eligible telecommunications carriers or as carriers of last resort.

(Emphasis added.). Because the jurisdictional carve-out in subsection (C) is limited to Subsection (E)(3), the Commission may not make the determination requested in this case under Subsection (E)(2).

Fourth, the Revised Notice of Filing[6] in this docket made clear that the Petition sought relief under Subsection (E)(3):

> The South Carolina Telephone Coalition and its individual member companies ("SCTC") have filed with the Public Service Commission of South Carolina ("Commission") a Petition seeking to have the Commission make a determination, pursuant to S.C. Code Ann. §58-9-280(E)(3) and 10 S.C. Code Ann. Regs. 103-825, that carriers who offer retail wireless services in South Carolina are providing telecommunications services in South Carolina, and that they are providing radio-based local exchange services in this State that compete with local telecommunications service provided in this State.

The Revised Notice of Filing made no mention of Subsection (E)(2). The fact that the Revised Notice of Filing specifically referenced Subsection (E)(3) but did not include Subsection (E)(2) further demonstrates that Subsection (E)(3) is the framework the Commission must use.

Fifth, the Commission has previously recognized that Subsection (E)(3) is the appropriate framework to be followed in determining whether wireless carriers must contribute to the USF. *See, e.g. Proceeding to Establish Guidelines for an Intrastate Universal Service Fund*, "Order Issuing Declaratory Ruling," Order No. 2006-335 issued in Docket No. 1997-239-C, July 3, 2006 at Page 3 (("the General Assembly has given the Commission the opportunity pursuant to S.C. Code Ann. § 58-9-280(E)(3) and (9) to include wireless and broadband revenues within the Fund . . . .").

Therefore, the plain language of S.C. Code Ann. § 58-9-280, rules of statutory construction, other statutory provisions enacted by the General Assembly and found in Title 58, the Revised Notice of Filing issued in this docket, and previous Commission determinations regarding the USF demonstrate clearly that the Commission must apply Subsection (E)(3) and not Subsection (E)(2).

[6] See Docket Id 258924, "Revised Notice of Filing and Prefile Testimony Deadlines," in Docket No. 2015-290-C , https://dms.psc.sc.gov/Attachments/Matter/46ca540d-a40e-448b-ae2a-0edba562a74e

2. The Commission Must Apply the Test Set Out in Subsection (G)(1) to Determine Whether a Wireless Carrier's Services Compete with a Local Telecommunications Service

Subsection (E)(3) requires the Commission to determine whether a wireless carrier's services compete with a local telecommunications service, but does not define the term "compete." The only test in Section 58-9-280 for whether one service competes with another is provided in Subsection 58-9-280(G)(1):

> (G)(1) Competition exists for a particular service if, for an identifiable class or group of customers in an exchange, group of exchanges, or other clearly defined geographical area, the service, its functional equivalent, or a substitute service is available from two or more providers.

This test must be applied here for several reasons. First, the Commission must use a test crafted by the Legislature rather than developing its own test or using a test suggested by the Proponents, especially because the Subsection (G)(1) test is in the same section of the Code (S.C. Code Ann. §58-9-280) as Subsection (E)(3). Second, as described above, in adopting S.C. Code Ann. § 58-9-576(A)(3), the Legislature expressed its intention that the test in Subsection (G)(1) must be applied in cases like this. That subsection provides that a determination that a LEC qualifies for alternative regulation does not constitute a determination whether a wireless carrier must contribute to the USF "under Section 58-9-280(E)(3) ***or (G)(1)***." S.C. Code Ann. § 58-9-576(A)(3) (emphasis added). This provision leaves no doubt that the Legislature requires the Commission to apply the competition test in Subsection (G)(1) when deciding whether a wireless carrier must contribute to the USF. Third, the Commission previously applied Subsection (G)(1) when, relying on the testimony of Commission Staff witness Gary Walsh, it determined, in Docket No. 97-239-C[7], that wireless carriers should not be required to contribute to the USF.

[7] *See* Prefiled Direct Testimony of Gary E. Walsh, p.9, l.23 – p.10, l.5; Tr. Vol. IV, p. 1128, Docket No. 97-239-C (July 17, 2000)("Walsh Testimony")("[U]nder §58-9-280(G), the legislature has provided specific criteria that must

The testimony and arguments of the Proponents[8] that Subsection (G)(1) is not applicable in this case are simply incorrect. For example, SCTC and Home Telephone witness Oliver testified that Subsection (G)(1) does not relate to funding the state USF: "This section [Subsection (G)(1)] bore no relationship to the concept of who should contribute to state USF, but was drafted to set a fairly high competitive bar to ensure consumers were protected before a service was deregulated." (Oliver Rebuttal, R. p. 109, ll. 7-10). Mr. Oliver was half-right: Subsection (G)(1) does "set a fairly high competitive bar," but as described above the General Assembly has articulated clearly and specifically that Subsection (G)(1) applies in this context. And as the Commission knows, Mr. Oliver's testimony that he "worked directly with the development of (G)(1), so I know why it was there and what the intent was" is not in fact competent evidence regarding the legislative intent of the General Assembly or the application of Subsection (G)(1). *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942) ("It is a settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature.").

B. Subsections (E)(3) and (G)(1) Require Granular Review

Subsections (E)(3) and (G)(1) require the Commission to use specific, exacting standards when evaluating competition between a wireless carriers' services and a local

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be met to determine whether or not a wireless service competes with a local exchange service."); *also at* Commission Order No. 2001-419 at 21.

[8] Mr. Ellerbe suggested (Record p. 68) that wireless carriers must pay into the USF in order for S.C. Code Ann. § 58-9-280 and the operation of the USF to be consistent with Section 254(f) of the Federal Telecommunications Act. This approach would exceed the Commission's authority. The Commission must follow Subsection (E)(3) and (G)(1) because both are part of a validly enacted statute.

telecommunications service provided by a LEC. Subsection (E)(3) requires the Commission to determine whether the wireless carrier's services compete with "a local telecommunications service." Under Subsection (G)(1), competition exists for a *particular* local telecommunications service if the wireless carrier makes "the service, its functional equivalent, or a substitute service" available to "an identifiable class or group of [the LEC's] customers" residing in "an exchange, group of exchanges, or other clearly defined geographical area." (Emphasis added). Because these standards are mandated by statute, the Commission must apply them and may not change or ignore them. *See Porter v. SCPSC,* 335 S.C. 157, 164, 515 S.E.2d 923, 926, (1999) (Commission required to apply factors enumerated in statute in order to determine whether competition exists).

At every turn the Proponents' witnesses asked the Commission to do just that – change the statutory criteria or even disregard them so the Commission can make a determination that competition exists. This the Commission cannot do. *See Ballard v. Ballard,* 314 S.C. 40, 443 S.E.2d 802 (1994) (Court is constrained to avoid construction that would read provision out of statute). The South Carolina Supreme Court has not hesitated to reverse this Commission when it failed to apply statutory criteria and instead relied upon supposed expert testimony provided by one or more parties. *See South Carolina Cable Television Ass'n v. Pub. Serv. Comm'n,* 313 S.C. 48, 437 S.E.2d 38 (1993). The Commission must reject the Proponents' invitation to turn a blind eye to Subsections (E)(3) and (G)(1), and instead must apply them rigorously[9] to ensure that it dutifully carries out the Legislature's intent.

[9] Mr. Rozycki's opinions that each of the Subsection (G)(1) requirements were met in this case (Record p. 481-482), which were offered not in his prefiled testimony but via "friendly" cross-examination from Mr. Maybank on behalf of Windstream, are not sufficient to satisfy the Subsection (G)(1) test because Mr. Rozycki did not identify or reference any particular local telecommunications service offered by Windstream or any other LEC. Nor did the

Each aspect of the applicable statutory criteria is described below.

1. For each LEC, the particular local telecommunications service alleged to be in competition with a wireless carrier's services must be identified

Subsection (E)(3) provides that a wireless carrier may be required to contribute to the USF only if the Commission determines that its services "compete with a local telecommunications service provided in this State." Subsection (G)(1) requires the Commission to make its determination of "competition" with respect to a "particular service," in this case a particular local telecommunications service. As the Commission is well aware, any "particular service" is necessarily defined (and indeed distinguished from any other "particular service") by its rates, terms and conditions. Title 58 and the Commission's Rules explicitly recognize the importance of rates, terms and conditions in terms of evaluating a particular service. In fact, each of the members of the SCTC who have elected alternative regulation under S.C. Code Ann. § 58-9-576(B) have been required by S.C. Code Ann. § 58-9-576(B)(6) to "file tariffs . . . for its local exchange services that set out the *terms and conditions of the services and the rates for these services*." (Emphasis added). Perhaps even more crucially, the very same statute explicitly identifies, the "rates, terms, and conditions" of particular services as being subject to a statutory determination of reasonableness. S.C. Code Ann. § 58-9-576(B)(2) ("on the date a LEC notifies the commission of its intent to elect the plan described in this section, existing *rates, terms, and conditions for the services* provided by the electing LEC contained in the then-existing tariffs and contracts are considered just and reasonable.") (emphasis added). It is clear, therefore, under South Carolina law, that every particular local exchange service has rates, terms and conditions associated with it that are an integral part of that service.

ORS Annual Report on the Status of Local Telephone Competition in South Carolina (Hearing Exhibit Eight) reference Subsection (G)(1) or reflect the rigorous analysis required by Subsection (G)(1).

As a result, the Commission must be presented with evidence concerning the rates, terms and conditions of a *particular* local telecommunications service offered by a LEC so it can determine (as required by Subsection (G)(1)) whether the services of a wireless carrier provide the same service, a functional equivalent or a substitute service. For example, a local telecommunications service may be provided on a standalone basis, in a package in which other services are separately priced, or in a bundle in which all services are offered for a single price. *See, e.g.* S.C. Code Ann. §§ 58-9-280(I), 58-9-285. The rates, terms and conditions for such services, packages and bundles vary by LEC, so the Commission's analysis necessarily must be conducted on a LEC-by-LEC basis.

SCTC urged the Commission to disregard this statutory criterion in several ways. First, it asked the Commission to make its determination for the wireless industry as a whole rather than considering each wireless carrier individually. *Petition* at Page 1. This position conflicts with the plain language of Subsection (E)(3), which requires the Commission to make its determination with respect to "any company" providing wireless services.[10] Second, SCTC argued that the Commission may determine whether wireless services compete with LECs' "voice" services without regard to whether the voice services are local telecommunications services. (Meredith, Record p. 197; Oliver Rebuttal, Record p. 104, ll 15-16: "However, the question before the Commission is much simpler. It is as simple as whether the average South Carolina consumer sees his wireless phone as a valid substitute for his landline phone when making a voice call.") This position flatly contradicts Subsection (E)(3), which requires that the Commission decide whether a wireless carrier's services "compete with a local

[10] The SCTC conceded this reading of Subsection (E)(3) in its Response to Motion to Dismiss Petition, or, in the Alternative, Expand Scope of Proceeding, and to Suspend Case Schedule (Response): "Thus, Subsection (E)(3) provides a method to require *specific* carriers to contribute upon a showing as to that particular carrier." (Response, p. 5).

telecommunications service . . . ." SCTC's contention that the question is simply what the average South Carolina customer perceives ignores the fact that Subsection (E)(3) obligates the Commission to make a finite finding and, as the Petitioner, SCTC bears the burden of proof. This is immutable and SCTC cannot satisfy the burden of proof through witness testimony or legal arguments misstating the legal standard. By failing to define the "local telecommunications service" with which it alleges wireless carriers compete, SCTC failed to satisfy the burden of proof. Third, SCTC claimed that the Commission does not need to consider the rates, terms and conditions of particular services offered by LECs. (Staurulakis, Record, p. 177, ll. 7-8.) This position conflicts with the requirement in Subsection (E)(3) that the Commission consider whether competition exists with "***a*** local telecommunications service" (emphasis added) and the requirement in Subsection (G)(1) that the Commission evaluate whether "[c]ompetition exists for ***a particular service***" (emphasis added). The Commission cannot evaluate a particular local telecommunications service and determine if that particular service is subject to competition if none is identified and described.

By way of example, the SCTC's failure to identify even one "particular service" that may be subject to competition contrasts starkly with the Commission's consideration of competition in another Docket that considered whether a "particular service" was subject to competition pursuant to S.C. Code Ann. § 58-9-585. In Docket No. 1995-661-C, AT&T Communications of the Southern States, LLC sought alternative regulation of certain business services, and identified those particular services offered in its Private Line Services Tariff, Custom Network Tariff, and Consumer Card and Operator Services tariffs. *See Order Addressing Request for Alternative Regulation*, Order No. 95-1734, Docket No. 95-661-C, Issued December 15, 1995. While CTIA is not suggesting that S.C. Code Ann. § 58-9-585 and S.C. Code Ann. § 58-9-280(G)(1) are

identical or have the same test for competition, the fact that the former required that all such "particular services" be identified in order for the Commission to consider whether competition existed demonstrates even more clearly why the SCTC's failure to do so in this case dooms the Petition.

The Commission must therefore decline SCTC's invitation to rewrite the statute and apply a standard divorced from the clear directives in Subsections (E)(3) and (G)(1).

2. For each LEC, an identifiable class or group of customers for its local telecommunications service subject to competition by a wireless carrier's services must be specified

Subsection (G)(1) requires the Commission to consider whether the wireless carrier's services compete for an "identifiable class or group of customers" for the particular local telecommunications service in question. For example, competition might exist for residential customers, small business customers or large business (enterprise) customers. SCTC and other parties declined to provide evidence at this level of granularity, claiming without legal or evidentiary support that competition was taking place for all telecommunications customers. (Meredith, Record p. 197, ll. 7-12: "Really, any customer that pays for voice telecommunications service provided by a landline or wireless provider are customers that are experiencing the marketplace where there is competition statewide. And this is a select and identifiable group of customers.") The statute does not permit parties to omit evidence of this criterion.

3. For each LEC, the exchange, group of exchanges or other clearly defined geographical area where the alleged competition is taking place must be specified

Subsection (G)(1) requires the Commission to determine the geographic area where the alleged competition is taking place. This showing must be made at a granular level – "an exchange, group of exchanges, or other clearly defined geographical area." In the context of a request for alternative regulation, the issue of geographic scope is important so the Commission

can determine the extent to which deregulatory relief will be granted. Likewise, in the context of a request to make a wireless carrier contribute to the USF, the issue is important for determining the extent of the wireless carrier's contribution obligation. In both cases, competition must be shown throughout the geographic area in question. It is not permissible to designate a large area and obtain relief based on a showing of competition in only a portion thereof.

SCTC claimed that the entire state of South Carolina is a "clearly defined geographic area" and that the Commission can make a determination that competition exists if it finds competition in any part of the state. (Meredith Direct, Record p. 203, ll. 15-24; Oliver Rebuttal, Record p. 110, ll. 16-20). This is a test SCTC invented with no basis in the statute. The geographical requirement in Subsection (G)(1) would make no sense if the area identified had nothing to do with the area where competition was actually taking place. It also conflicts with the requirement, discussed above, that the Commission conduct its analysis for each LEC's local telecommunications services, which only are offered in each LEC's service area, and not throughout the entire state of South Carolina. SCTC's position again conflicts with the clear terms of the statute.

4. <u>For each LEC, it must be demonstrated that the services made available by the wireless carrier are the functional equivalent of the LEC's local telecommunications service or a substitute for the LEC's local telecommunications service</u>

Subsection (G)(1) requires the Commission to determine whether a wireless carrier's services are the functional equivalent of, or a substitute for, a LEC's particular local telecommunications service. SCTC and the other parties' misstated the requirements for proving these criteria.

To determine whether one service is a functional equivalent of another, the two services must be described and compared, which involves a detailed analysis of their rates, terms, and

conditions of service. For example, if one particular service includes local calling only, while another provides local and long distance calling, the two services do not provide equivalent functionalities. SCTC attempted to avoid this sort of analysis, asserting that all that must be shown is that LECs and wireless carriers provide service that enables customers to make telephone calls to one another. (Thompson Testimony, Record pp. 248-249). SCTC made no effort to compare all the functionalities of a LEC's local telecommunications service and the services provided by a wireless carrier. SCTC thus failed to provide the kind of evidence that would be necessary for the Commission to reach a determination of functional equivalence.

Similarly detailed analysis is required to determine whether one service is a substitute for, or a functional equivalent of, another in a particular geographic area. As a starting point, the Commission must compare the rates, terms and conditions of the two services. For example, evidence that one service costs $10 per month and the other costs $50 would be a strong indication that they are not perceived as substitutes for one another in the market. (Price Surrebuttal Testimony, Record p. 422). The Commission also should consider market evidence that customers are purchasing one service instead of the other in the specified geographic market, which would provide direct evidence that they are substitutes. SCTC and the other parties did not provide either type of evidence.

C. The Proponents' Evidence Fails to Satisfy the Criteria of Subsections (E)(3) and (G)(1)

The Proponents' evidence falls into two categories: (i) evidence intended to show that wireless services are the functional equivalent of wireline services; and (ii) evidence intended to show that wireless and wireline services are substitutes. This evidence fails to address the statutory criteria the Commission must apply.

1. The Proponents' functional equivalence evidence fails to meet the statutory criteria

SCTC witness Thompson testified that wireless and wireline services are functionally equivalent because their networks overlap, they provide a number of similar functions that enable customers to make telephone calls, and they have similar networks. (Record pp. 246-251). This evidence fails to meet the requirements of Subsections (E)(3) and (G)(1). As a preliminary matter, Mr. Thompson spoke only in general terms without identifying particular wireless or local telecommunications services, classes of customers or clearly defined geographical areas. Because he did not compare any particular wireless service with any particular local telecommunications service, he failed to account for many obvious functional differences that exist between particular services. For example, wireless carriers typically provide all-distance services, while local telecommunications services by definition are more limited in scope. (Price Direct, Record p. 390, II 14-19). Mr. Thompson, however, did not attempt to distinguish between local services offered on a standalone basis and those offered as part of telecommunications service packages or bundles with broadband and video services.

Moreover, Mr. Thompson did not consider critical functionalities that many wireless services offer that local telecommunications services do not, including mobility, Internet access, mobile apps and texting capabilities, to name just a few. Based on these differences alone, it should be obvious that the services provided by smartphones today cannot be considered functionally equivalent to local telecommunications service. Mr. Thompson's superficial analysis failed to mention, much less account for, these differences. The Commission may not simply disregard those major functional differences.

2. The Proponents' substitute service area evidence fails to meet the statutory criteria

Most of the evidence concerning alleged wireless substitution concerns statewide or regional developments, but in a few instances LECs provided evidence specific to their service areas. Neither set of evidence meets the criteria of Subsections (E)(3) and (G)(1).

a. National, statewide and regional evidence

The Proponents offered evidence that certain wireless carriers are operating in South Carolina. This evidence included coverage maps and testimony concerning wireless towers, wireless retail stores, advertising, interconnection agreements, number blocks acquired by wireless carriers, number porting and circuits obtained by wireless carriers to transport their traffic. (Oliver, Record p.81-82; Staurulakis, Record pp. 152-154; Meredith, Record pp. 204-207; Thompson, Record pp. 246-248). They also provided national or statewide evidence that while LECs' access lines have been decreasing over time, wireless subscriptions have been increasing.

Such evidence includes Centers for Disease Control data concerning household use of wireless and wireline services, FCC Local Competition Reports, SCTC member access line trends and AT&T's and Verizon's 10-K reports. (Meredith, Record pp. 194-196. 214-216; Thompson, Record pp. 263-266; Rozycki, Hearing Exhibit Eight; Staurulakis, Record p. 154). Such evidence is geared to the test created by the Proponents rather than the statutory test the Commission must apply. This evidence failed to meet the statutory test in Subsections (E)(3) and (G)(1), because it does not concern any particular local telecommunications service provided to a specified class of customers in any clearly defined geographical area. The Proponents' national, statewide and regional evidence thus failed to provide the Commission with the information it would need to assess whether a particular wireless service is a substitute for a

particular local telecommunications service and, if so, the geographic area where that substitution is taking place. Because this evidence provided no proof concerning whether and where the statutory criteria have been met, it must be disregarded.

b. LEC-specific evidence

Home Telephone, CenturyLink, and Windstream attempted to provide evidence regarding wireless competition in those LEC service areas. This evidence generally concerned the existence of wireless towers, retail stores and advertising in their service areas; number block acquisition; number porting; interconnection agreements; the availability of wireless service; and access line loss. None of the LEC witnesses presenting this testimony, however, identified a particular local telecommunications service with which competition was alleged, by itself a fatal defect. These witnesses also generally failed to identify the classes of customers receiving a particular telecommunications service or the geographic extent of the competition in their service areas.[11] Their evidence therefore failed to meet the statutory test.

D. Public Policy supports a Rigorous Approach When Determining Whether Wireless Carriers Must Contribute to the USF

Public policy supports the rigorous analysis required by Subsections (E)(3) and (G)(1). Indeed, the Commission received 9,500 protests from South Carolina consumers expressing concern that their wireless charges would be increased if wireless carriers are required to contribute to the USF. Higher wireless charges are of particular concern in South Carolina, which has the eighth lowest median income, and poor consumers in South Carolina are more likely to rely on their cell phones as their sole means of voice service and Internet access. (Price,

[11] Windstream witness Willis made a passing attempt to identify classes of customers (residential and business), but not with respect to a particular local telecommunications service. She also stated, based on a web search, that AT&T provides service in each of Windstream's exchanges, but did not provide such evidence concerning other wireless carriers.

Record p. 376, ll. 31-7) It also makes no sense to charge growing technologies like wireless in order to support older technologies that are losing customers. This discourages innovation and dampens economic and job growth. (Price, Record p. 376, ll. 8-12) Moreover, providing such subsidies to one group of providers at another's expense runs counter to South Carolina's pro-market policies. (Price, Record p. 376, ll. 13-16)

The General Assembly's cautious approach also makes sense because wireless carriers already pay wireline carriers handsomely for the use of their networks, through payments for backhaul circuits and interconnection arrangements. (Price, Record p. 376-77, ll. 19-15) For backhaul circuits alone, wireless carriers pay at least $16 million per year, an amount equal to more than 50% of USF funding. (Price, Record p. 377, ll. 1-5) Already receiving this considerable compensation from wireless carriers, the Proponents may not receive USF subsidies from wireless carriers without providing the specific proof required by Subsections (E)(3) and (G)(1).

IV. CONCLUSION

The language of S.C. Code Ann. § 58-9-280, as plainly stated in Subsections (E)(3) and (G)(1), requires that the Commission consider and apply a number of specific criteria before requiring a wireless carrier to contribute to the USF. SCTC and the other parties simply have not made that showing. The Commission therefore must deny SCTC's Petition.

Respectfully submitted,

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December 21, 2015
Columbia, South Carolina