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February 25, 2004

HAND DELIVERED

Ms. Lynda Dorr  
Secretary to the Commission  
Public Service Commission of Wisconsin  
610 North Whitney Way  
Madison, WI 53707-7854

Re:    Objections Under Wis. Stats. §196.85(3)-(8)    )  
      Filed Against Wisconsin Advanced            ) 05-DA-100  
      Telecommunications Foundation Assessment    )

Dear Ms. Dorr:

Please find enclosed the original and 20 copies of the Initial Brief of the Objectors, Wisconsin State Telecommunications Association, et al in the above referenced docket.

Sincerely,

Ray J. Riordan  
Attorney for the Objectors

Enclosure

BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

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Objections Under Wis. Stats. §196.85(3)-(8) )  
Filed Against Wisconsin Advanced ) Docket No. 05-DA-100  
Telecommunications Foundation Assessment)

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**Brief in Support of Objections to Assessments by Objectors Wisconsin State  
Telecommunications Association et al**

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**I. Introduction**

1993 Act 496 established the Wisconsin Advanced Telecommunications Foundation (WATF). One of its purposes was to solicit voluntary contributions of about \$30 million from telecommunications providers in Wisconsin for an endowment. The income from which was for the advancement, education, effective use, application, and protection of privacy concerning advanced telecommunications technology, services and infrastructure, including other information technologies, for the state. The WATF decided that the amounts requested would be based on the providers' gross revenues and gross intrastate revenues. However, the actual amount requested varied substantially because of arbitrary decisions by the WATF. Of the contributions requested less than \$4 million was not given.

The legislature in 2001 Act 16 included a provision that directed the Public Service Commission to assess those telecommunications providers that did not voluntarily contributed to pay the difference between what was solicited and what they contributed.

## **II. The WSTA Assessment is a Tax. It is Not an Assessment.**

2001 Act 16, the 2001 - 2003 Budget Act, provides in Section 9142(3mk) that the PSC shall assess against each telecommunications provider the difference between the amount solicited by the Wisconsin Advanced Telecommunication Foundation (WATF) and the amount contributed by the telecommunications provider and shall bill that amount to the telecommunications provider under §196.85 Wis. Stats.<sup>1</sup> §196.85 Wis. Stats. is the statutory section that permits the PSC to assess public utilities for payment of the PCS's expenditures in regulating utilities.

The other "assessments" under §195.85, Wis. Stats. are to provide for the payment, "...of its [PSC] total expenditures during the prior fiscal year which are reasonably attributable to the performance of its duties..."<sup>2</sup> The funds collected from the telecommunications providers under this tax are to go under §20.275(1)(jm) to school districts, secured correctional facilities and charter schools.<sup>3</sup> None goes to pay for the PSC operating expenditures. A tax is a charge whose primary purpose is to obtain revenue.<sup>4</sup> Since it is based on the gross revenues of the telecommunications providers, it is a gross revenue tax.

## **III. The WATF Tax Violates the Equal Protection Laws of the Wisconsin and United States Constitutions.**

The WATF Tax only applies to telecommunications providers that did not pay the amount solicited by the WATF. The amount solicited by the WATF was based on the gross revenues of the telecommunications providers that were solicited. Many other

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<sup>1</sup> 2001 Wis Act 16, Section 9142(3mk), Nonstatutory provisions; public service commission

<sup>2</sup> §196.85(2), Wis. Stats.

<sup>3</sup> 2001 Wis. Act 16, Section 569q.

<sup>4</sup> State v. Jackman, 211 NW2d 480, 60 Wis2d 700 (1973); City of Milwaukee v. Milwaukee & Suburban Transport Corp., 94 NW2d 584, 6 Wis2d 299 (1959)

telecommunications providers were not solicited for some or all of the years from 1995 to 2000. The determination of the amount to be solicited was determined by the WATF. Nothing in the Act that created the WATF gave it any guidance on how to determine the amount of contribution to be solicited from each telecommunications provider. Since the amount solicited later became a tax imposed by the legislature and the legislature had given no direction on how to determine the amount to be solicited, the tax is arbitrary.

For the purposes of this tax there is no relevant distinction among the various telecommunications providers. Even if there was a distinction, there was certainly no distinction among each telecommunication provider in the subclasses of telecommunications providers: Incumbent local exchange carriers (ILEC), alternative telecommunications utilities (ATU), commercial mobile radio service providers (CMRS) and resellers. However many telecommunications providers were not billed the WATF tax including: 19 ILECs (3 with WATF balances), 9 ATUs (5 with WATF balances), 8 CMRSs (2 with WATF balances) and 60 resellers (20 with WATF balances).<sup>5</sup>

The anticipated contribution for each telecommunications provider that the WATF solicited each year was based on the gross revenue information that WATF had for those telecommunications providers. The WATF used gross revenue data obtained from the Department of Revenue (DOR) for the years 1995 through 1999. 1993 data was used to determine the anticipated contributions for 1995 and 1996. For the years 1997 to 1999 the DOR Gross Revenues data was used from two years prior.<sup>6</sup>

While WATF anticipated contributions for many of the telecommunications providers for each year from 1995 through 2000, an anticipated contribution was not

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<sup>5</sup> See exhibits II & KK.

<sup>6</sup> Stipulation of Facts, items 12, 13 and 28

determined for many others. These include all CMRS providers and competitive local exchange carriers (a type of ATU) for the years 1995 through 1997.<sup>7</sup> Yet, the WATF had the gross revenue data for the CMRS providers and ATUs because it was included on the sheets the WATF obtained from the DOR and used to calculate other telecommunications providers' anticipated contributions.<sup>8</sup>

For the year 2000, 1999 intrastate gross revenue data was used. Where the 1999 intrastate revenue information was not available (i.e. a provider filed its 1999 PSC Annual Report on a confidential basis) the WATF used Universal Service Fund (USF) gross intrastate figures. When that was not available, the PSC requested 1999 gross revenue information directly from the provider. If the provider declined to provide that information, that provider was not solicited for a contribution.<sup>9</sup> To avoid the solicitation it was only necessary to file the data confidentially and decline to give the data to the WATF when requested.

Equal protection guarantees that those who are similarly situated will be treated alike.<sup>10</sup> A classification will be held constitutional if there exists a rational basis for the legislature's treating the classes differently.<sup>11</sup> The basis for the classification must have a fair and substantial relation to the purpose of the enactment.<sup>12</sup> The Wisconsin Supreme Court has set forth five factors to be considered in determining whether there exists a rational basis justifying a legislative classification:

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<sup>7</sup> Stipulation of Facts, item 28(e)

<sup>8</sup> See exhibit C, deposition exhibit 5

<sup>9</sup> Stipulation of Facts, item 28(f)

<sup>10</sup> GTE Sprint Communications v. Wisconsin Bell, 155 Wis2d 184, 454 NW2d 797, 801 (1990)

<sup>11</sup> GTE Sprint, Id,

<sup>12</sup> GTE Sprint, Id,

[F]irst, the classification must be based upon substantial distinctions which make one class really different from another; second, the classification must be germane to the purpose of the law; third, the classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the number included within a class; fourth, to whatever class a law may apply, it must apply equally to each member thereof; and fifth, the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.<sup>13</sup>

All of the entities subject to this tax are telecommunications providers as defined in §196.01(8p) and are listed on Exhibit JJ.<sup>14</sup> Some of those telecommunications providers paid proportionally less because they were not given an anticipatory contribution for certain years as described above. Other telecommunications providers were not subject to the tax and are listed on Exhibits II and KK. Since the class “telecommunications providers” was designated and defined by the legislature in 2001 Wis. Act 16. All of the entities listed on Exhibits II, JJ, KK, LL and MM are telecommunications providers as defined in the 2001 Act 16, Section 9142 (3mk).

***Therefore, there is no distinction, by definition, between the telecommunications providers that were fully taxed and those that were not. By definition they all belong to the same class.*** (emphasis added)

The classification of telecommunications providers that must pay is based solely on circumstances that existed on the effective date of the Act. Any addition to the

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<sup>13</sup> GTE Sprint, Id at 797 NW 2d, 801

<sup>14</sup> 2001 Wis. Act 16, Section 9142(3mk)(a)4.

members of that class is precluded. The class is the telecommunications providers that were solicited and did not contribute at least the amount solicited. The telecommunications providers to be taxed were set with the passage of the Act.<sup>15</sup> They are identified on Exhibit GG and cannot be increased.

The tax does not apply equally to all telecommunications providers. First, many were not taxed. Second, even those taxed they were taxed at proportionally different rates because many were not subject to anticipatory contributions for some of the years. Third, some that did not contribute as much as their anticipatory contribution were not taxed.<sup>16</sup> Fourth, some entities' affiliated telecommunications providers' anticipatory contributions and the anticipatory contributions solicited were combined which resulted in a lower WATF tax for the combined affiliates than those who were not combined.<sup>17</sup>

#### **IV. The WATF Tax Violates The Uniform Taxation Provisions of the Wisconsin Constitutions.**

Article VIII, Section 1 with limited exceptions provides that taxation of property shall be uniform. For direct taxation of property, under the uniformity rule there can be but one constitutional class.<sup>18</sup> All within that class must be taxed on a basis of equality as far as practical and all property taxed must bear its burden equally on an ad valorem basis.<sup>19</sup>

A tax upon the gross income of a particular kinds of business constitutes a tax upon the property itself.<sup>20</sup> A tax measured in the terms of income from a business is not

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<sup>15</sup> 2001 Wis. Act 16, Section 9142(3mk)(b)1. & 2.

<sup>16</sup> Exhibit II

<sup>17</sup> Exhibits LL and MM

<sup>18</sup> Gottlieb v. City of Milwaukee, 33 Wis2d 505, 147 NW2d 633, 641

<sup>19</sup> Gottlieb, Id

<sup>20</sup> Welch v. Henry, (1937) 271 NW 68, 72

an income within the meaning of that term as used in the Constitution, but as a property tax that must satisfy the constitutional requirements of uniformity.

The Wisconsin Court of Appeals affirmed that a gross receipts tax is a property tax by ruling, “The gross receipts tax is a surrogate property tax, which taxes equipment and property as valued by revenue.” Wisconsin Tel. Co. v. Wisconsin Dept. of Revenue, 125 Wis2d 339, 371 NW2d 825 (Wis.App. 1985)

Since the telecommunications providers were not taxed equally, the tax violated the uniformity provisions of the Wisconsin Constitution.

#### **V. The WATF Tax is a Private Law**

Article 4, Section 18 of the Wisconsin Constitution provides, “No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.” This constitutional provision addresses the form in which private or local legislation is enacted and not the substance of the legislation.<sup>21</sup> Where the legislation is alleged to have violated a constitutional provision mandating the procedure by which bills must pass, the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement.<sup>22</sup>

The purpose of the constitutional proscriptions against special, private or local legislation were intended to prevent the granting of special privileges or the imposition of special disabilities and to encourage the legislature to devote its time to the interests of the state at large. The constitutional limitations seek to insure that the legislature and the

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<sup>21</sup> Jackson v. Benson, (1998) 218 Wis2d 835, 578 NW2d 602, 623

<sup>22</sup> Jackson, Id at 578 NW2d 624

people of the state are advised of the real nature and subject matter of the legislation being considered to avoid fraud or surprise.<sup>23</sup>

The 2001 – 2003 Biennial Budget Bill, a 1,827-page document, was introduced in the legislature as Senate Bill 55. It did not contain the WATF tax. After about 5 months and two substitute amendments and between 150 and 200 proposed amendments a Budget Bill was adopted by the legislature. That very extensive Budget Bill now contained the WATF tax. The title of the Budget Bill was, “An Act relating to: state finances and appropriations, constituting the executive budget act of the 2001 legislature.”<sup>24</sup>

Through the evolution of several cases, the Wisconsin Supreme Court distilled the law for assessing whether a bill is “private or local” by finding the bill must satisfy all five of the following elements:

First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.

Second, the classification adopted must be germane to the purpose of the law.

Third, the classification must not be based on existing circumstances only.

Instead the classification must be subject to being open, such that other cities could join the class.

Fourth, when a law applies to a class, it must apply equally to all members of the class.

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<sup>23</sup> Soo Line R.Co. v. Department of Transp., (1981) 101 Wis2d 79, 303 NW2d 626, 630

<sup>24</sup> 2001 Senate Bill 55

...Fifth, the characteristics of each class should be so far different from those of other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.<sup>25</sup>

These are basically the same criteria used to determine whether a law violates the Equal Protection provisions of the Wisconsin and US Constitutions. However, unlike under the Equal Protection clause, there is no presumption of constitutionality under the prohibition of Private Laws.

Due to the similarity of criteria, I will not reiterate how the WATF Tax violates all of these criteria.

The WATF Tax attempts to punish telecommunications providers that did not contribute voluntarily to the WATF endowment fund by assessing substantive monetary penalties on an identified and specific segment of all telecommunications providers. The penalty was a small part of the Biennium Budget that contains hundreds of pages. The title to the Budget Bill gave no indication that it would impose such a penalty.

#### **VI. 2001 Act 16, Section 9142(3mk) Is a Penal Statute.**

In the alternative, if 2001 Act 16, Section 9142(3mk) is not a tax, it is a penal statute. “A penalty may be imposed by statute for the doing or not doing of a designated act...” Zarnott v. Timken-Detroit Axle Co., 244 Wis 596, 13 NW2d 53, 55 (1944). The penalty was on the telecommunications providers for not contributing the to the WATF as solicited. Those that did contribute as solicited were not assessed a penalty.

Therefore, as a result of their failure to so contribute, a penalty was imposed. Further evidence that it is a penalty is that the WATF was dissolved and any monies collected

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<sup>25</sup> Jackson, Id at 578 NW2d 625; Davis v. Grover, 480 NW2d 460, 166 Wis2d 501; City of Brookfield v. Milwaukee Metropolitan Sewerage Dist., 144 Wis2d 896, 426 NW2d 591 (1988)

will not be going to the WATF or to be used for the purposes that the WATF was created. Those funds will be going to the state's general fund.

**VII. 2001 Act 16, Section 9142(3mk) is Unconstitutional Because It Was Enacted Retrospectively and is a Bill of Attainder.**

“The legislature may not constitutionally enact retrospective laws creating new obligations with respect to past transactions...(citations omitted).” Haase v. Sawicki, 20 Wis2d 308, 121 NW2d 876, 878-879 (1963). “This is because a statute that seeks to impose a new duty or obligation even though none existed when the retroactive statute was enacted.” Haase, Id at 121 NW2d 879. This is because such retroactive legislation offends the due process clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and Sec. 1, Art. I, of the Wisconsin Constitution.

“...the presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.’...(citations omitted)...In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.” Landgraft v. USI Film Products, 511 US 244, 265-266, 114 SCt 1483, 1497, 128 Led2d 229. “The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation...The prohibitions on ‘Bills of Attainder’ in Art. I sec. 9-10, prohibit legislatures from singling

out disfavored person and meting out summary punishment for past conduct.” Landgraft, Id. at 511 US 266, 114 SCt 1497.

“The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statutes prospective application under the Clause ‘may not suffice’ to warrant its retroactive application.” Landgraft, Id. at 511 US 266, 114 SCt 1497.

Article I, Section 12 of the Wisconsin Constitution prohibits Bills of Attainder and ex post facto laws.<sup>26</sup>

The telecommunications providers had no notice of the potential penalty when they failed to make the requested contributions. Nor did they anticipate there would be penalties for not contributing. If they had, they would have been able to question and petition for changes in the anticipated contributions.

Further, the law is an unconstitutional Bill of Attainder. Telecommunications providers were determined to be guilty of not paying the contribution without a hearing or trial if their name was on a document developed by the WATF and assessed a predetermined penalty by the PSC

### **VIII. Conclusion**

2001 Act 16, Section 9142(3mk) is a law that is invalid on several levels. It was a private law included in an enormous Budget Bill as a punitive measure against certain telecommunications providers for their past acts. It placed an unequal burden on various entities within the class of telecommunications providers. The past acts were allegedly

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<sup>26</sup> See Mueller v. Powers, 64 Wis2d 643, 221 NW2d 692 and State v. White, 97 Wis2d 517, 294 NW2d 36 (WisApp 1976) for cases where the retroactive effect of penal statutes were declared unconstitutional due to violation of the prohibition on ex post facto laws.

the entities subject to the penalties did not contribute the amount for which they were solicited by the WATF.

The PSC has the ability to declare determine the amount it is to assess is unlawful or invalid because the legislature has given it that power.<sup>27</sup> The PSC should declare the its assessment is unlawful and invalid because (1) it denies the telecommunications providers equal protection of the law; (2) it violates the uniform taxation of the law; (3) it is a private law and was adopted without complying with constitutional procedures for private laws; (4) it is an unconstitutional ex post facto law; and (5) it is an unconstitutional Bill of Attainder.

For the reasons stated herein, we request the Commission:

- (1) Rule in favor of the objections to the assessment;
- (2) Declare the assessment erroneous, unlawful and invalid;
- (3) Cancel the assessment; and
- (4) Order a refund of all payments to the Objectors.

Dated this 25<sup>th</sup> day of February 2004

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<sup>27</sup> §196.85(4)(a)