

2. The Staff response impermissibly conflates federal and state authority to conclude the Commission has jurisdiction to address IdeaTek's complaint. That complaint asserts a denial of interconnection and number porting under the federal Communications Act, and the Commission's authority to address compliance with interconnection responsibilities is limited to that authority granted to state commission under that Act. Whether or not the state has authority for some other purposes under the state's own statutes (and Staff acknowledges at ¶3 that the Commission's authority

is limited to that arising under statute) the federal Act grants no power for states to create their own definitions for terms used in the federal Act for the purpose of exercising expanded authority.

3. Analysis of the Kansas Telecommunications Act, K.S.A. 66- 2001 *et seq.*, makes one element of the state legislative intent abundantly clear: the state act is intended to conform to, and coordinate closely with, the federal communications act. The federal Act is identified within the Kansas statutes (at K.S.A. 66-1,187(e)); the state's comprehensive act is replete with recognition of, and statements of intent to conform to, that federal authority. The federal act reserves specified roles for state commissions but does not grant to state commissions authority to deviate from the Act's own terms, requirements and limitations.

4. Staff's assertion of state control over number portability (at ¶ 4) is incomplete and therefore flawed. The state statutes referenced by Staff (see Staff's footnote 6) provide no absolute and universal right to portability, even assuming incorrectly that Wamego has refused to port numbers. K.S.A. 66-2003(e) states only that "[c]ustomers shall be accorded number portability and local dialing parity *in conformance with national standards to the extent economically and technically feasible*. The national standards controlling such portability are set out in the federal Act and regulations and orders adopted thereunder. The state has no statutory power to grant greater rights to number portability than exist in the federal authority.

5. Likewise, K.S.A. 66-2003(d) referenced by Staff limits this Commission's interconnection authority to interconnection "[a]s provided in the federal act...." The Commission has no power to expand its lawful roles specified and delegated by the federal Act, or to expand such roles through the mere confirmation of that same limited authority in state statute.

6. K.S.A. 66-2005(y), further referenced but not quoted by Staff, states "The commission shall afford such telecommunications carrier all substantive and procedural rights available to such carrier regarding interconnection *pursuant to 47 U.S.C. §§ 251 and 252* as in effect on the effective date of this act. The federal Act and federal authority determine and control not only the substantive and procedural rights available thereunder, but also what entities are "telecommunications carriers" entitled to such rights. Staff's contentions would impermissibly bootstrap a state definition of "telecommunications carriers" into the federal Act.

7. As the Commission is aware, Section 251(a)(1) of the FCA establishes the duty of telecommunications carriers to interconnect, directly or indirectly, with other telecommunications carriers. That section states as follows:

Section 251 – Interconnection

(a) General Duty of Telecommunications Carriers. – Each telecommunications carrier has the duty –

(1) To interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;

The FCC has stated that "the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, *do in fact provide telecommunications services to their customers*, either on a wholesale or retail basis."<sup>1</sup>

Wamego is a telecommunications carrier that is required to provide interconnection to other telecommunications carriers. However, as previously discussed in Wamego's Response, IdeaTek is not a telecommunications carrier for purposes of federal act

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<sup>1</sup> *In re Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, 3520 ¶ 14 (2007) (emphasis added) ("TWC Order").

requirements because VoIP services are not telecommunications services.<sup>2</sup> Rather, VoIP services are information services. As such, the interconnection duties set forth in Section 251(a) simply do not apply as between Wamego and IdeaTek.

8. When the FCC considered a complaint from a VoIP carrier that ILECs were refusing to interconnect with other LECs serving as intermediate carriers for the routing of VoIP traffic, the FCC found that ILECs were required to interconnect with all telecommunications carriers, even if those carriers were also routing calls from VoIP-based providers.<sup>3</sup> However, the FCC declined to rule that the VoIP carriers themselves had interconnection rights pursuant to Section 251(a) of the FCA. The FCC determined that only *telecommunications carriers* were entitled to interconnect and exchange traffic with ILECs pursuant to sections 251(a) and 251(b) of the FCA when providing services to other service providers, including VoIP service providers.<sup>4</sup> In other words, for local traffic, ILECs are required to interconnect with other telecommunications service providers for the exchange of an information service provider's VoIP traffic pursuant to Section 251(a) of the FCA, and to perform duties, including number porting, pursuant to Section 251(b); however, telecommunications carriers, including ILECs, are not required to directly interconnect with information service providers, such as VoIP carriers, under Section 251(a). As noted above, the responsibility for determining which entities qualify as telecommunications carriers for purposes of the federal act is a federal matter, not an issue delegated by federal law to a state commission.

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<sup>2</sup> Wamego Response at 5-6.

<sup>3</sup> See generally, *TWC Order*.

<sup>4</sup> *In re Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; a National Broadband Plan for Our Future; Developing A Unified Intercarrier Compensation Regime*, 26 FCC Rcd. 8259, 8262 (2011) ("CRC/Time Warner Decision").

9. Although IdeaTek frames its complaint as one for number portability and blocking, notwithstanding that Wamego is not refusing to port numbers and is not blocking any of IdeaTek's calls, Wamego's porting obligations under Section 251(b) cannot be resolved by this Commission unless and until IdeaTek has first made appropriate arrangements to exchange local traffic with Wamego either directly through a commercial agreement, or indirectly through a telecommunications carrier other than Wamego. The FCC has ruled that "obligations under Section 251(b), which include the obligation to provide number portability, are not self-effectuating",<sup>5</sup> i.e., they are not rights that are automatically triggered in a vacuum. "Rather, they are implemented in agreements that may implicate the interconnection obligations set forth in section 251(a) in a way not raised by section 251(a) in isolation."<sup>6</sup>

10. In the context of this proceeding, IdeaTek necessarily seeks interconnection for the exchange of traffic with Wamego, which is a condition precedent to Wamego being able to port non-8xx numbers to IdeaTek. The interconnection of Wamego and IdeaTek's networks can be accomplished in one of two ways: (1) directly through a commercial agreement between IdeaTek and Wamego for the exchange of local traffic; or (2) indirectly through the facilities of an independent intermediate carrier willing and able to transport local traffic between IdeaTek and Wamego. With regard to a direct interconnection, Wamego had offered negotiation of a commercial agreement for the direct interconnection of their networks before IdeaTek filed its complaint. Because IdeaTek is an information service provider, and not a telecommunications service provider, any agreement for a direct interconnection is, by

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<sup>5</sup> *Id.* at 8270 ¶ 21.

<sup>6</sup> *Id.*

definition, outside of the Section 251(a) interconnection agreement statutory regime. Such an agreement is a commercial agreement that is not subject to the Commission's jurisdiction.

11. The second method – an indirect interconnection – can be achieved by using an intermediate carrier. However, as explained in Wamego's Response, Wamego has informed IdeaTek on several occasions that facilities for the indirect exchange of local traffic do not currently exist. Wamego cannot route local traffic over facilities of a third party that has not authorized its facilities for transport of local traffic to IdeaTek.<sup>7</sup> Such third parties, not Wamego, are in control of their own facilities and what types of traffic may be delivered to such facilities for transport. No such third party is a party to this proceeding.<sup>8</sup>

12. If IdeaTek can obtain and provide documentation of authority from the third party owner of any such existing facilities authorizing the transport of all local traffic from the Wamego network to IdeaTek, then Wamego stands ready to make the necessary changes to its network for the exchange of local traffic indirectly with IdeaTek – as IdeaTek has been informed repeatedly.

13. As discussed above, IdeaTek has not yet issued a local number porting request to Wamego. Even if, *arguendo*, IdeaTek did issue such a request, Wamego would not be able to successfully complete the porting request because, as the FCC recognized, Section 251(b) duties arise in the context of an arrangement for the exchange of traffic between service providers. Either an agreement for interconnection between the parties is required, or the parties must be able to exchange local traffic

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<sup>7</sup> Wamego Response ¶ 33.

<sup>8</sup> *Id.* ¶ 34.

through a third party transiting carrier, before the port could be effectuated. The Commission does not have jurisdiction in either scenario to adjudicate a complaint because (1) the KCC does not have authority under Section 251(a) (or under the applicable Kansas statutes referencing that section to convey authority to the Commission) to adjudicate an interconnection agreement between a telecommunications carrier and an information service provider in the first instance, and (2) Wamego does not have access to facilities of a third party that can be used for local traffic. Finally, the Commission lacks jurisdiction to require a third party that is not a party to this proceeding to allow the transiting of local traffic from Wamego to IdeaTek.

14. Staff further errs when it asserts (at ¶ 6) that “the KCC is not regulating VoIP.” Regulation involves not only control and restriction but also the state’s regulatory establishment of rights and authority. In the present complaint IdeaTek asks this Commission to grant to it the power to determine how it will provide its own VoIP service, including the claimed power to require separate carriers to perform elements of that service on IdeaTek’s behalf and for IdeaTek’s benefit.

15. Staff’s analysis overlooks the statutory definition, cited by Wamego in its Objection, specifying (in K.S.A. 66-2017(d)(4)) that “‘Voice over Internet Protocol’ or ‘VoIP’ is any *service that... (C) permits a user to receive a call that originates on the public switched telephone network (PSTN).*” IdeaTek asks this Commission to afford it the power to fulfill that defined component of its own service by forcing a separate entity to provide that capability, at the unrelated carrier’s sole expense and for IdeaTek’s sole commercial benefit. Any such order as requested would constitute regulation of the means of a VoIP provider providing a VoIP service to its customers, and therefore regulation of the service itself. K.S.A. 66-2017(a) prohibits such regulation. That express

prohibition, being specific to the service offered by IdeaTek, controls the scope of Commission authority otherwise claimed to exist in such general grants as appear in K.S.A. 66-1,191 or K.S.A. 66-1,192.

16. K.S.A. 66-1,191 addresses only investigations undertaken on the Commission's own initiative and is therefore inapplicable to an externally initiated complaint. That section further addresses authorizes investigations of "rates, joint rates, tolls, charges and exactions, classifications or schedules of rates or joint rates and rules and regulations of telecommunications public utilities over which the commission has control." IdeaTek's complaint makes no reference to any of the enumerated subjects.

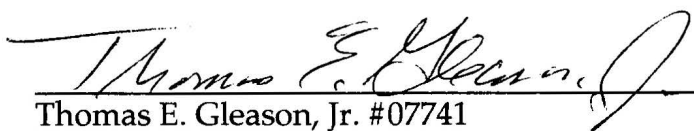
17. K.S.A. 66-1,192 addresses the Commission's authority to initiate investigation on complaint. That section addresses "*any service performed or to be performed by [a] telecommunications public utility* for the public. Under the statutory definition of VoIP the ability to receive calls originating on the PSTN is identified as a specific component of that service. IdeaTek, not Wamego, is the party claiming to provide a VoIP service to the public and is therefore the party responsible to provide that functionality of the service it sells. The ability of any IdeaTek customer to receive calls originating on the PSTN is not a "service performed or to be performed by" Wamego. Instead it is statutorily identified as a capability to be provided by the VoIP provider. The Commission's statutory disability (K.S.A. 66-2017) in regulating VoIP service does not constitute authority under § 66-1,192 to impose on a telecommunications public utility any obligation to meet the VoIP provider's own service responsibilities.

WHEREFORE Wamego restates its jurisdictional objection and requests the Order of the Commission dismissing outright the Complaint by IdeaTek for lack of jurisdiction as set forth herein.



Respectfully submitted,

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**VERIFICATION**

STATE OF KANSAS

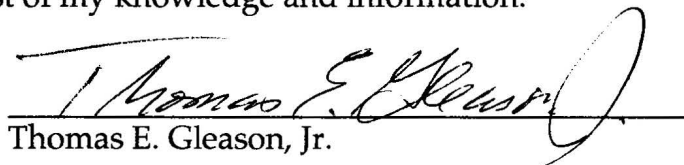
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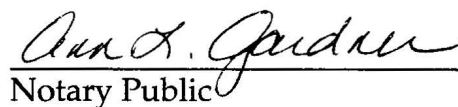
COUNTY OF DOUGLAS

)

I, Thomas E. Gleason, Jr., of lawful age, being first duly sworn upon my oath, state: I am an attorney for Wamego Telecommunications Company, Inc.; I have read the foregoing pleading, and upon information and belief state that the matters therein appearing are true and correct to the best of my knowledge and information.

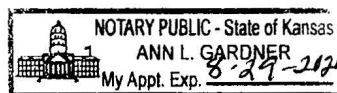
  
Thomas E. Gleason, Jr.

Subscribed and sworn to before me this 10th day of April, 2019.

  
Notary Public

My Commission Expires:

8-29-2020



## CERTIFICATE OF SERVICE

Thomas E. Gleason, Jr. certifies that the foregoing pleading was served by electronic delivery of a correct copy thereof to the following on the 10th day of April, 2019:

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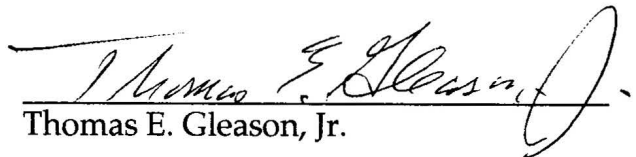
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