BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of Certification of Compliance with Section 254(e) of the Federal Telecommunications Act of 1996 and Certification of Appropriate Use of Kansas Universal Service Fund Support	))))	Docket No. 19-GIMT-399-GIT

PETITION OF INDEPENDENT TELECOMMUNICATIONS GROUP, COLUMBUS ET AL., FOR RECONSIDERATION OF ORDER IMPOSING PENALTIES

COMES NOW The Independent Telecommunications Group, Columbus *et al.*, ("Columbus") and requests reconsideration of the Order of January 28, 2020 in this proceeding imposing penalties as recommended therein by Staff. In support of reconsideration Columbus states:

1. Columbus is an informal association of rural local exchange carriers ("RLECs") including the following individual carriers:

Columbus Communications Services, LLC
Cunningham Telephone Co., Inc.
Gorham Telephone Co., Inc.
H & B Communications, Inc.
Home Telephone Company, Inc.
LaHarpe Telephone Company, Inc.
Moundridge Telephone Company, Inc.
Totah Communications, Inc.
Twin Valley Telephone, Inc.
Wamego Telecommunications Company, Inc.
Wilson Telephone Company, Inc.
Zenda Telephone Company, Inc.

2. On October 8, 2019 Commission Staff ("Staff") filed a Report and Recommendation ("R&R") asserting certain filings by RLECs, due July 1, 2019 by Commission Order of April 11, 2019, were incomplete and/or incorrect. The R&R stated, for each subject carrier, "...the date *Staff considered* the ETC's filing to be

complete, the number of days the filing was *incomplete beyond the due date,* [and] the nature of the noncompliance...." (R&R, p. 1).

3. On October 11, 2019, Columbus filed a response to Staff's R&R generally opposing imposition of monetary penalties and opposing the methodology by which Staff reached its conclusion as to how long individual filings were incomplete or in error. Additionally, on October 11, 2019, five of the RLECs within the Columbus group submitted individual responses, asserting information addressing Staff's conclusions regarding claimed errors or incompleteness in those RLECs' respective filings.

4. The record does not reflect a reply by Staff or any other party disputing the factual assertions of the October 11, 2019 responses by Columbus or any of its individual RLECs between the Columbus Response and the Order of January 28, 2020.

5. On January 28, 2020, over fifteen weeks after the Columbus Responses, the Commission entered its Order imposing penalties in amounts consistent with the information in Staff's R&R. That information made no effort to identify the time elapsed between a company being made aware of an alldeged error or alleged incompleteness in a filing and the time when Staff became satisfied that a filing had been corrected or completed. In most cases that period of time amounted to a few days, a few hours or even minutes. That relevant interval bears no relationship to the the arbitrarily selected interval between the ordered due date and Staff's subsequent satisfaction.

6. The Order imposing penalties is arbitrary and capricious generally, as it is not supported by substantial competent evidence warranting the imposition of penalties. The Order is additionally unlawful, as it imposes penal forfeiture for circumstances that do not constitute failure, neglect or refusal to obey any lawful requirement or order made by the Commission. Further, the manner in which the amount of each penalty imposed on a Columbus carrier was determined is arbitrary,

capricious and unreasonably discriminatory as to actions of similarly situated individual carriers.

7. The Commission's Order of January 28, 2020 entirely fails to address the Columbus assertion regarding timely submission of Excel files to Staff. As noted in the Columbus Response, the Order initiating this Docket did not specify that Excel files were required to be emailed to Staff by a date certain. That Order explicitly states: "B. *The required ETC certifications, along with the attached worksheet(s), shall be filed* with the Commission in this docket on or before July 1, 2019." (Emphasis supplied).

8. As stated in Columbus's Response, all ordered certifications and worksheets by Columbus companies were filed on or before that date. The record includes no assertion to the contrary. Paragraph B further states "Note that copies of the supporting Excel files for Attachments 2-5 *should* be e-mailed to c.aarnes@kcc.ks.gov and s.reams@kcc.ks.gov." (Emphasis supplied). The order does not direct that these supporting files "shall" or "must" or "are ordered to be" be e-mailed to the identified Staff members (Christine Aarnes and Sandra K. Reams, Chief and Assistant Chief of Telecommunications respectively) by a specific date.

9. The Order lacks a specific mandate for submission by email of Excel files, unlike the "ETC certifications, along with the attached worksheets" expressly ordered to be filed by a specific date. An obligation merely stated aspirationally, and not expressly mandated, cannot lawfully give rise to a penalty.

10. As far back as Blackstone in 1765 it was recognized that penal statutes must be construed strictly. K.S.A. 66-138's authorization of forfeiture and penalty is limited to cases of a regulated utility that "fails, neglects or refuses to obey any lawful *requirement or order* made by the commission." The statement that carriers "should" provide Excel files, with or without a date specified for compliance, falls short of a

requirement or order supporting a forfeiture for noncompliance. The express requirement and order for provision of the "ETC certifications, along with the attached worksheets" by July 1, 2019 was met by each Columbus company; additionally all Excel files were emailed, as the Commission said "should" be done.

11. Kansas case law recognizes the non-mandatory import of the word "should." In *Fischer v. State*, 296 Kan. 808, 295 P. 3d 560 (2013), the Kansas Supreme Court had occasion to consider the effect of the word and whether it commands a particular action or forbearance. In that proceeding the Supreme Court reversed a divided Court of Appeals opinion interpreting "should" as meaning "must" or "shall." The Court reviewed the text and history of Supreme Court Rule 183(h). Formerly that rule had stated:

> The prisoner *should* be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to events in which the prisoner participated. The sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing and requiring the prisoner to be present. (Emphasis supplied) Supreme Court Rule 183(h) (2011 Kan. Ct. R. Annot. 260).

Subsequent to the facts at issue in *Fischer*, Rule 183(h) was amended to state:

> When the movant is imprisoned, the movant *must* be produced at the hearing on a motion to vacate, set aside, or correct sentence if there are substantial issues of fact regarding events in which the movant participated. A sentencing court may determine whether a claim is substantial before granting an evidentiary hearing and requiring the movant to be present." (Emphasis added.) 2012 Kan. Ct. R. Annot. 276.

As is true of statutes, an amendment to a court rule is always intended to have some effect; absent an intent to modify the meaning or effect of a rule, any amendment would be meaningless and without effect. The sole substantive amendment to the Rule was a change from "should" to "must." The change in Rule 183(h) demonstrates that as a matter of construction the word "should," unlike "must," is not mandatory. The

Supreme Court's reversal of the Court of Appeals opinion rejects the lower Court's conclusion that "should" is mandatory.

12. The Order's provision for furnishing an Excel file to Staff via email appears in a separate sentence, after the specification of the Commission's express order for filing of ETC certifications and attached worksheets by a date certain. It is undisputed that each Columbus company subjected to a penalty had, in fact, provided to Staff its ETC certifications and attached worksheets by July 1, 2019 as ordered. The Columbus RLEC actions expressly mandated by the Order were timely accomplished.

13. Staff's Report and Recommendation dated October 3, 2019 identifies K.S.A. 66-138 as the statutory basis for Commission imposition of a forfeiture. The relevant portion of that statutory authority states:

> If any common carrier or public utility governed by the provisions of this act... fails, neglects or refuses to obey any lawful requirement or order made by the commission..., it shall, for every such violation, failure or refusal, forfeit and pay to the state treasurer (1) A sum not less than $100 and not more than $1,000 for such offense if the violator is a telecommunications public utility subject to traditional rate of return regulation....

A statement by the Commission that a regulated carrier "should" take some action falls short of constituting a "requirement or order" statutorily warranting a forfeiture; this is particularly true in the present case, in which the order directs that certain action "shall" be taken by a date certain but a subsequent sentence states that a different action "should" be performed without specifying a date deadline for the second action. No RLEC failed, neglected or refused to perform the second specified action and each carrier assured Staff's receipt of the Excel files by email, either contemporaneously with the required filing or promptly upon Staff's notification that those files had not been received with the ordered materials.

14. The Commission's Order is unreasonable, arbitrary and capricious in that it ignores the substance of Columbus's Response of October 8, 2019. Neither Staff nor the Commission has addressed or challenged the numerous issues raised in that Response. The response demonstrates imposition of a penalty is unreasonable and arbitrary, specifically as a regulatory response to a good faith error in information provided, particularly when corrected information or explanation is promptly provided to Staff.

15. Columbus states again there can be no public purpose in imposing a forfeiture of public utility property as a consequence of an inadvertent good faith error in information provided to Commission Staff. Unless there is some indication of a culpable failure to take reasonable care, or to make timely correction, there is no benefit that a forfeiture "incentive" can produce. Small rural carriers could double or triple their effort and expense without a resulting assurance of absolute accuracy.

16. There is likewise no response by Staff or the Commission to Columbus's opposition to the manner in which the amounts of penalties are set and imposed. There is no refutation in the record as to Columbus's contention that a penalty, if warranted at all, should be imposed only for the time during which a carrier had notice of an error and yet failed to make a correction. As observed in Columbus's Response, a carrier cannot logically or practically make a correction when it has no cause to believe a correction is needed. When such a correction is timely provided on notice, without material burden on Staff's activities, the amount of a penalty becomes a matter solely under Staff's control and subject to Staff's workload. The affected company has no way to remediate an error before learning of the error's existence.

17. Columbus understands Staff cannot process each RLEC's annual recertification submissions on the ordered due date; instead, each is analyzed in turn.

The result of this practical limitation is that two RLECs that have good faith errors in their filings can be subjected to significantly different penalty amounts without a rational or material difference in their respective circumstances or responses. If Staff reviews the filings in alphabetical order, for example, Zenda Telephone Company would be at risk of a significantly greater penalty than might be imposed on Blue Valley Telephone under identical facts. A greater penalty is facially unreasonable when based on an elapsed time resulting solely from Staff's processes when the subject carrier is without knowledge of, and therefore without knowledge of need to correct, any error.

18. The arbitrariness and irrationality of the methodology used to set penalty amounts contravenes the rule enunciated in *Home Telephone Company v. KCC*, 31 Kan App. 2nd 1002 (at 1016); 76 Pac 3rd 1071(2003): "Not only must an agency's decreed result be within the scope of its lawful authority, but also the process by which it reaches that result must be logical and rational. *Allentown Mack Sales Service, Inc. v. NLRB* , 522 U.S. 359, 374, 139 L. Ed. 2d 797, 118 S. Ct. 818 (1998)." Clearly enhancement of an RLEC's penalty due solely to an accident of alphabetical order cannot be called "a process that is both logical and fair" as required by *Home, supra.*

19. It is also arbitrary and capricious to find a single error or omission constitutes multiple failures justifying imposition of multiples of a statutorily authorized penal amount. Such an arbitrary practice compounds the unreasonably discriminatory result addressed at ¶¶ 16-18 above. When an RLEC lacks knowledge of an error made in a good faith effort toward compliance it cannot reasonably be said to have compounded the error merely due to the passage of time.

20. In the case of annual ETC certification the RLECs are aware of the requirements of the Commission's Orders and do not benefit from delay in compliance. This distinguishes any RLEC failure from the failure of a regulated entity to be aware

of, and comply with, a remittance requirement. There is no valid comparison between, *e.g.*, a wireless reseller that neglects to make itself aware of KUSF contribution obligations (thereby benefiting by retention of revenues) and a rural LEC that merely transposes a number in error in an annual required filing. This is particularly so when the latter carrier promptly submits a correction when it is made aware of the error.

21. A single error in information provided in good faith does not support the fiction of multiple errors and enhanced penalty unless it appears the carrier had reason to be aware of the error and unreasonably delayed efforts to provide a correction. Such enhancement of penalty is an incentive for Staff to delay review and notification of the error, rather than a means to advance the completion of Staff or carrier responsibilities.

22. Neither Staff nor the Commission addresses Columbus's prior Response regarding the Commission's standard of perfection applied to RLEC filings. No attention has been given to the costs to a small telephone company that would be necessary to avoid the possibility of a penalty. Assurance of an error-free filing would require completion of all filings well in advance of their due dates, for submission to Staff for preliminary review and confirmation the intended filing is error-free. Rather than easing the burden on Staff, this course of action would compound the time demands on Staff's limited resources, effectively "front-loading" review of multiple filings. Even after such a "pre-clearance" Staff would be required to re-review the filing once it is made, to assure consistency with the version reviewed in advance.

23. Staff has not suggested in response how a preliminary review of anticipated filings would improve its own performance or reduce its overall workload. "Get it right the first time" may be a laudable objective, but one impossible to implement with certainty, notwithstanding all reasonable efforts to assure accuracy. Perfection cannot be

guaranteed, nor can Staff's burden be reduced, through rote imposition of penalties for inadvertent error.

24. It remains undisputed that Staff was able timely to discharge its responsibilities in this docket through the same practice that had been utilized in all prior years. That effective process, as demonstrated again in this Docket, has required only timely notification to carriers of evident errors or omissions, followed by prompt correction with negligible added effort or cost to the carrier or to Staff. It is evident, though, that the burden imposed in this Docket on Staff to make a separate report and make recommendations for penalties added to the existing Staff responsibilities in the proceeding.

25. Regulatory emphasis on a mere "gotcha" ability to impose a penalty would do nothing to advance the public interest in the annual certification of eligible telecommunications carriers. There is no evidence such a penalty can be effective to eliminate inadvertent errors. Instead, such a practice would indicate regulatory rigidity making the provision of service to consumers more difficult.

26. The RLECs are obliged to note that Commission and Staff committed multiple errors in the preparation and issuance of the Order now at issue. Although separate counsel for most RLECs had filed pleadings in this docket in October on behalf of their respective clients Staff neglected to add counsel to the service list for the Docket. Upon being advised that the Order of January 28, 2020 had not been served on counsel, Staff counsel undertook corrective action by providing electronic copies of the Order. Even then, the Staff did not add these recipients to the service list and no electronic service of the February 4, 2020 Order *Nunc pro Tunc* has been provided to counsel. The Commission issued its *Nunc pro Tunc* order due to the failure to include three pages of a four-page attachment to the Order of January 28, 2020.

27. It is both ironic and informative to note the Commission issued a Nunc pro Tunc order to correct an inadvertent and correctable error in the preparation of its Order of January 28, 2020, when the purpose of the initial order was to impose penalties for inadvertent and correctable errors. Plainly the Commission's perfection standard for imposition of penalties in this Docket is one that neither RLECs nor Commission Staff can reasonably be expected to achieve without exception. Imposition of a penalty for failure to meet such a standard is unreasonable and unwarranted.

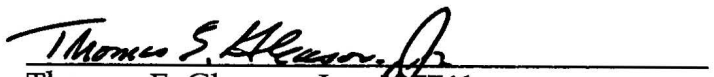
28. Columbus's reference to errors in the January 28 Order is in no sense intended as a criticism of Staff's performance, or that of the Commission itself in issuing a flawed Order; rather it is a recognition that the Commission and its Staff, like the RLECs, operate at all times under circumstances of human performance subject to multiple responsibilities and limited resources. The Order at issue imposes forfeiture for a regulated entity's failure to meet a standard of perfection the regulator itself is unable to satisfy.

29. The record reflects no substantive response to the RLECs' observation that the possibility of error is inherent in all human activity, and that the legitimate application of penalty as incentive should be limited to showings of intentional error or the lack of reasonable care to avoid error. There is no showing of such intent or lack of reasonable effort in any of the errors for which penalties have been ordered, and thus there is no public interest in the imposition of these penalties. To the contrary, imposition of regulatory burdens ineffective to produce a public benefit is detrimental to the public interest. If such penalties are imposed for the sake of regulatory consistency, without regard to their efficacy, the Commission's underlying penalty policies are overdue for re-examination.

30. As noted in the Columbus Response of October 8, 2019 a penalty detracts from a small telephone company's ability to provide the service mandated by the state. Likewise, adding the necessary specialized personnel in an effort to attempt assurance of perfect filings with this Commission would divert scarce resources otherwise needed to assure the continuing provision of high quality, reliable and affordable telecommunications public utility service. Regulatory practices that impose unrecoverable administrative expense, without clearly effective and demonstrable public benefit, are contrary to the public interest.

WHEREFORE Columbus requests reconsideration of the Commission's order of January 28, 2020 and the Order *Nunc pro Tunc* dated February 4, 2020 correcting an error in the January 28 Order. Specifically, the Commission on reconsideration should rescind all penalties imposed in connection with the provision of Excel files and rescind as *de minimis* any corrected inadvertent error in ETC certifications and attached worksheets filed. Columbus further requests the Commission consider initiating a general investigation to determine appropriate policies in the public interest for imposition of forfeitures authorized but not mandated under K.S.A. 66-138, and to revise the methodology used to set the amounts of penalties in order to avoid arbitrary or unreasonably discriminatory results.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS, DOUGLAS COUNTY, ss:

Thomas E. Gleason, Jr., of lawful age, being first duly sworn, on his oath states: He is the attorney for the Independent Telecommunications Group, Columbus, et al.; that he has read the above and foregoing Petition for Reconsideration; that the statements, allegations and matters contained therein are true and correct.

Thomas E. Gleason, Jr.

Subscribed and sworn to before me this 12th day of February, 2020.

Notary Public

My Appointment Expires: 8-29-2020

NOTARY PUBLIC - State of Kansas
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CERTIFICATE OF SERVICE

Thomas E. Gleason, Jr., hereby certifies that a true and correct copy of the above and foregoing Petition for Reconsideration was served electronically on the following on this 12th day of February, 2020:

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