

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

In the Matter of Application of Community)
Wireless Communications Filing for Kansas) Docket No. 09-CWCZ-976-VSA
Video Service Authorization.)

**ORDER GRANTING PETITION TO INTERVENE
AND DENYING PETITION TO DENY APPLICATION**

The above-captioned matter comes on before the State Corporation Commission of the State of Kansas (Commission) for consideration and determination. Having examined its files and records, and being duly advised in the premises, the Commission grants the Petition to Intervene by World Company d/b/a Sunflower Broadband (Sunflower) and denies the Petition of Sunflower to Deny the Application of Community Wireless Communications Co. (Community) for Kansas video service authorization (Petition).

Background

1. Community filed its Initial Application for Kansas Video Service Authorization (Initial Application) on June 16, 2009. Community corrected several minor errors and its completed application was submitted on June 19, 2009.¹

2. On June 23, 2009, Staff provided its Memorandum, analyzing the Application. The Application was posted on the Commission's web site the same day to provide interested persons with the opportunity to comment on the Application. Sunflower was

¹ Commission staff (Staff) Memorandum, dated June 22, 2009.

prompted to action by the website notice.² Sunflower filed a petition to deny Community's application on July 7, 2009.

3. Staff's Memorandum advised the Commission that Community had met all of its reporting obligations required by K.S.A. 2008 Supp 12-2023 of the Video Competition Act (VCA) and recommended approval of the Application.³ Staff filed a second Memorandum on July 9, 2009. In Staff's second Memorandum, Staff noted the allegations made by Sunflower in its first petition filed July 7. Staff suggested the Commission suspend Community's application pending investigation of the allegations and recommended the applicant review the allegations and respond along with opportunity for rebuttal. Staff Memorandum filed July 9.

4. On July 14, 2009, Sunflower filed its Petition to Intervene and its Amended petition to deny Community's application. As in its initial petition to deny Community's application, Sunflower claimed that Community (a) neither provides video programming nor has it submitted any evidence that it ever would; (b) neither provides local broadcast signals or emergency alert messages nor has it submitted any evidence that it ever would; (c) does not comply with a range of federal laws and regulations applicable to video service providers, and has not submitted any evidence that it would do so and has admitted in a filing with the Federal Communications Commission (FCC) that it would not comply with the "must carry" laws; and (d) has not submitted any evidence that it can deliver on its promise to build a network throughout the City of Lawrence within five years.

² Amended Petition, at ¶ 3.

³ Staff used the original Authorization template that was placed in effect immediately after passage of the VCA. The Commission finds that Staff reference to K.S.A. 12-2006 is incidental and does not affect Community's Application.

5. On July 15, 2009, Community filed its response to Sunflower's petition to deny Community's application. As recommended by Staff in its July 9 memorandum, Community provided a detailed response to the issues raised in Sunflower's petition to deny. In light of the nature of the statutory scheme, which provides for the granting of an application if an applicant meets the statutory requirements, and Community's thorough response to the issues, the Commission finds further investigation or additional filings by the parties would not aid the Commission in deciding this matter.

Sunflower's Petition to Intervene

6. In its Petition to Intervene, Sunflower stated it is a provider of broadband communication services, including cable television services as well as telephone and high-speed data services, for residential and business customers throughout the state of Kansas and particularly in Lawrence. Sunflower stated that as a franchised cable operator and holder of a Video Service Authorization ("VSA") from the Commission, Sunflower has rights-of-way in Lawrence. Sunflower stated its legal interests could be directly affected by the outcome of this proceeding.

7. The Commission has broad discretion to grant a petition for intervention if it is in the interest of justice, if the intervention will not impair the orderly and prompt conduct of the proceedings, and if the party has stated facts demonstrating its legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding. K.S.A. 77-521(a)(3); K.A.R. 82-1-225. Furthermore, at any time during a proceeding, the Commission may impose limitations on an intervener's participation. K.S.A. 77-521(c).

8. K.S.A. 12-2023(a) provides the Commission shall issue a video service authorization within 30 calendar days after receipt of a properly completed application. Community filed its amended application on June 19 and this time period ends July 20. Sunflower filed its petition to intervene on July 14. This presents a question of whether Sunflower's petition should be denied as untimely and interfering with the orderly and prompt conduct of the proceedings. However, under the circumstances of this case, the Commission will grant Sunflower's petition. The Commission notes Sunflower initially filed a petition to deny the application on July 7 and that both Staff and Community have addressed Sunflower's arguments. Under the circumstances of this docket, the Commission finds and concludes that Sunflower has met the requirements of K.A.R. 82-1-225 and that granting Sunflower intervention will not interfere with the orderly and prompt conduct of the proceedings. Therefore, the Commission will address Sunflower's petition to deny the application.

Sunflower's Petition to Deny the Application

9. Section 12-2023 of the Video Competition Act requires an entity or person seeking to provide cable service or video service in this state on or after July 1, 2006, to file an application with the Commission, containing a number of information points:

- a. The location of applicants' principal place of business and the names of applicant's principal executive officers. Community did so in Attachments 1 and 2 to its Initial Application form. See Staff Memorandum filed June 23.
- b. Applicant has filed with the FCC all forms required by that agency in advance of offering video service in Kansas. Community did so on June 8, 2009,

and obtained the Community Unit Identification Number (CUID) KSO766.

Staff verified the number with FCC's Media Bureau's web site. Staff Memorandum filed June 23.

c. Applicant must agree to comply with all applicable federal and state statutes and regulations and (d) must agree to comply with all lawful and applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the video service, including the police powers of the municipalities in which the service is delivered. Community did so by initialing item #5 in the Initial Application, which contains both (c) and (d) of the Video Competition Act. Staff Memorandum filed June 23.

(e) Applicant must provide description of the service area foot-print to be served within the State of Kansas, including any municipalities. Community provided the boundaries of the City of Lawrence as Attachment A to the Initial Application. See Staff Memorandum filed June 23.

(f) Applicant must provide the period of time it shall take applicant to become capable of providing video programming to households in the applicant's footprint, which may not exceed five years. Staff's Memorandum advised the Commission that Community had stated that it would pass 100% of the encompassed residences by June 14, 2014.

(g) Applicant must provide a general description of the type or types of technologies to be used by applicant in the provision of video programming to all households in footprint. Community described in detail the equipment

and technology to be used in Attachment 7 to the Initial Application. See Staff Memorandum filed June 23.

(h) K.S.A. 2008 Supp. 12-2023(i) requires applicant to offer concurrent rebroadcast of local television broadcast channels to alert customers to any public safety emergencies. By initialing item #5 in the Initial Application, Community agreed to comply with all applicable federal and state laws and regulations, including K.S.A. 2008 Supp. 12-2023(i). See Staff Memorandum filed June 23.

10. The Commission concludes that Community has complied with the filing requirements of K.S.A. 2008 Supp. 12-2023.

11. In its Amended Petition, Sunflower alleged, “Section 12-2022(h) defines ‘video service’ as follows: ‘Video service’ means *video programming* services provided through wireline facilities located at least in part in the public rights-of-way. . .”⁴ Sunflower did not finish the definition of K.S.A. 2008 Supp.12-2022(h), which reads to applicable completion “without regard to delivery technology, including internet protocol technology.” Because the system detailed in Ex. 7 of the Initial Application would include optic fiber to the home, Community satisfies K.S.A. 2008 Supp. 12-20229(h) requirements.

12. Sunflower asserted that Community “did not provide video service or video programming and has submitted no evidence that it ever will.”⁵ The Commission disagrees with these assertions. The VCA does not require applicants to currently

⁴ Petition, at ¶ 16 (emphasis in original).

⁵ *Id.*, at ¶¶ 18 – 19.

provide video service or programming, even though Community does⁶, and Community has put forward its commitment to be able to service the entirety of the City of Lawrence within five years.

13. Sunflower complained that the “[a]pplication merely contains some vendor spec sheets and a one-page network schematic.” Sunflower states “[t]here is no evidence that CWC actually has the equipment or the network, or has committed to purchase it.”⁷ Again, the VCA does not require an applicant to have the equipment in hand. Furthermore, the Commission has compared Community’s application with Sunflower’s application⁸ and found that Community’s application contained more system and equipment information than did Sunflower’s. Even if the statute required such a showing, Community’s response indicates it has built a network in Lawrence and plans to expand this network already in place.

14. Sunflower insisted that K.S.A. §12-2023(i) (sic) required that “an applicant must provide or be able to provide local broadcast signals or emergency alert messages.”⁹ K.S.A. 2008 12-1023(i) applies to a video service provider, not an applicant. Further, Community has affirmed that once it receives video service authorization, it will offer broadcast signals or emergency alert messages.¹⁰

15. Sunflower alleged that Community currently does not comply with any of the litany of federal regulations that Sunflower listed, such as designation of a principal headend and carriage on the video service providers system of all local commercial and

⁶ Exhibit A to Community Wireless Communications Co.’s Response to the World Company’s Petition to Deny Application (Response).

⁷ Petition, at ¶ 20.

⁸ Docket No. 08-SUCC-064-VSA

⁹ Petition, at ¶ 23.

¹⁰ Response, at ¶ 35.

noncommercial broadcast stations.¹¹ All of the federal listings pertain to providers of video and/or cable telephone services. Community has indicated it will comply with all applicable federal and state statutes and regulations.

16. Finally, Sunflower urged the Commission to deny the Application of Community because Community has no existing video network or infrastructure and has provided no evidence that it has ability to build a wireline network passing 100% of the households in the City of Lawrence in five years.¹² A person or entity is not required to operate an existing video network or infrastructure to apply for video service authorization. Furthermore, Community has a broadband and satellite T.V. network in Lawrence and has announced its plan to develop it further and install fiber-optic cable.¹³

17. The Commission finds Sunflower's Petition to be without merit. The Commission finds Community's application meets the requirements of K.S.A. 12-2023. The Commission denies Sunflower's Petition.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

- A. Sunflower's petition to intervene is granted.
- B. The Commission denies the Petition of World Company d/b/a Sunflower Broadband to Deny Application.
- C. Parties have fifteen days, plus three days if service of this Order is by mail, from the date of service of this Order in which to petition the Commission for reconsideration. All petitions for reconsideration must be served upon the Commission's executive director.

¹¹ *Id.*, at ¶¶ 30 – 36.

¹² *Id.*, at ¶¶ 37 – 43.

¹³ Response, Ex. A.

C. The Commission retains jurisdiction over the parties and subject matter of this docket for the purpose of issuing such additional orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Wright, Chmn.; Moffet, Com.; Harkins, Com.

Dated: JUL 17 2009

ORDERED MAILED

JUL 17 2009

 EXECUTIVE
DIRECTOR

Susan K. Duffy, Executive Director