

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of an Investigation to)
Determine the Assessment Rate for the) Docket No. 20-GIMT-086-GIT
Twenty-Fourth Year of the Kansas)
Universal Service Fund, Effective March 1,)
2019.)

PETITION FOR RECONSIDERATION AND CLARIFICATION

COME NOW the following rural local exchange carriers ("RLECs"):

Independent Telecommunications Group ("ITG"):

Cunningham Telephone Co., Inc.
Gorham Telephone Co. Inc.
H & B Communications, Inc.
Home Telephone Co., Inc.
Totah Communications, Inc.
Twin Valley Telephone, Inc.
Wamego Telecommunications Co., Inc.
Wilson Telephone Co., Inc.
Zenda Telephone Co., Inc.

State Independent Alliance ("SIA"):

Blue Valley Tele-Communications, Inc.
Craw-Kan Telephone Cooperative, Inc.
Golden Belt Telephone Association, Inc.
Haviland Telephone Company, Inc.
J.B.N. Telephone Company, Inc.
KanOkla Telephone Association
Madison Telephone, LLC
Peoples Telecommunications, LLC
The Pioneer Telephone Association, Inc.
Rainbow Telecommunications Association, Inc.
S&A Telephone Company, Inc.
The S&T Telephone Cooperative Association, Inc.
South Central Telephone Association
The Tri-County Telephone Association, Inc.
United Telephone Association, Inc.

and

Southern Kansas Telephone Co., Inc.
Rural Telephone Service Co., Inc. d/b/a Nex-Tech
Mutual Telephone Company
Wheat State Telephone Company

and pursuant to K.S.A. 77-529(a)(1) and K.S.A. 66-118b, and for their Petition for Reconsideration of the Commission's "Order Adopting KUSF Assessment Rate," issued January 23, 2020 ("Order") in this docket, state as follows:

1. Each of the RLECs is a Kansas local exchange carrier providing local exchange and exchange access services subject to one or more Certificates of Convenience and Authority issued by this Commission.

2. Each of the RLECs is a rural telephone company as defined by K.S.A. 66-1,187(l); each serves as a carrier of last resort and is entitled to recover the costs of serving as carrier of last resort, pursuant to K.S.A. 66-2009. Pursuant to K.S.A. 66-2005(b), each of the RLECs has elected to operate under traditional rate of return regulation. This form of state regulation is a continuation of the form of regulation under which the RLECs have operated since long before the adoption of the Kansas Telecommunications Act; in many cases, since their inception.

3. In the Order, the Commission states, at paragraph 9 "The revised K.S.A. 66-2008(e)(1) adds the phrase 'subject to the annual cap established pursuant to subsection (e)(3)' to clarify that rate of return carriers' recovery of their costs is superseded by the cap." The Commission further states, at Ordering Paragraph A that "The statutory cap will not be addressed at this time because the Legislature has amended K.S.A. 66-2008(e)(1) and K.S.A. 66-2008(e)(3) to clarify that: (1) the statutory cap supersedes the rate of return carriers' recovery of their costs...."

4. The quoted language, on its face, contravenes the RLECs' existing rights to recover their costs of providing state-mandated public utility service under traditional rate of return regulation. Nowhere in the record or in the law is there support for such a broad implied amendment asserting the RLECs' rights have been "superseded."

5. The Commission's sudden pronouncement, without any evidentiary or record basis whatsoever, that the Legislature's implementation of the statutory cap evidenced an intent to negate the RLECs' rights to cost recovery is without support in the record, is contrary to law and is immaterial to the subject of this Docket.

6. Traditional rate of return regulation is, as this Commission should be well aware, a contract between the government and the regulated utility. The government constrains the prices set by the utility (see, e.g., K.S.A. 66-2005), requires the utility to operate in certain geographic areas (see, e.g., K.S.A. 66-131), and requires the utility to serve as the carrier of last resort in its geographic areas (see, e.g., K.S.A. 66-2009). In exchange, the Commission "shall ensure the reasonable opportunity for recovery of such carrier's intrastate embedded costs, revenue requirements, investments and expenses, subject to the annual cap . . ."

7. Nothing within K.S.A. 66-2008(e) "supersedes" the right to cost recovery by any RLEC. Indeed, K.S.A. 66-2008(f) explicitly provides that "additional supplemental funding . . . other than as provided in subsection (e), may be authorized at the discretion of the commission." Further, K.S.A. 66-2009 provides an entirely separate mandate for cost recovery via an RLEC's status as a carrier of last resort: "The local exchange carrier serving as the carrier of last resort shall remain the carrier of last resort and *shall be entitled to recover the costs* of serving as carrier of last resort." (Emphasis supplied)

8. The Commission's Order asserts an outright denial of the RLECs' right to cost recovery generally. The right to recovery of Commission-approved jurisdictional costs is a foundational element of traditional rate of return regulation. Such a denial thus would negate rate of return regulation entirely, leaving the RLECs to operate under some unknown form of regulatory supervision by the Commission. The legislative history of the KUSF cap (which was inserted into legislation without hearing) discloses no indication of legislative intent to negate the RLECs' election of traditional rate of return regulation pursuant to K.S.A. 66-2005(b). That subsection of statute has not been amended since its original adoption, although there have been numerous and extensive amendments to other portions of K.S.A. 66-2005.

9. Absent continuing assurance of traditional rate of return regulation and its component right of cost recovery the RLECs would be forced to operate subject to an unknown, undefined and unstable regulatory methodology at the Commission's whim. The denial generally of the right to cost recovery would render RLECs unable to plan for network improvements and maintenance, or even to maintain existing operations at cost levels previously reviewed and approved by the Commission. This resulting inability to plan and manage RLEC operations is directly contrary to the public interest in prudent management of telecommunications public utilities, and contrary to the public policy expressed in K.S.A. 66-2001. Nothing in the record of this proceeding or in the legislative history of the KUSF cap amendment suggests a legislative intent to reach such a disruptive result.

10. There is a longstanding presumption against implicit amendment or repeal of an enacted statute.

It is a "cardinal rule" that the repeal of a statute by implication is not favored. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334

(1968). The implied repeal of a statute of longstanding use may be viewed with even greater disfavor. See *Mancari*, 417 U.S. at 549, 94 S.Ct. at 2482. “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618-19, 100 S.Ct. 1905, 1911, 64 L.Ed.2d 548 (1980) (quoting *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483). See *Steed v. Roundy*, 342 F.2d 159, 161 (10th Cir. 1965). *Yellowfish v. City of Stillwater*, 691 F. 2nd 926 (10th Cir.,1982).

11. It is not necessary, however, to rely on that presumption in order to demonstrate the error of law in the Commission’s finding and order. A standard of statutory construction at least as well-settled as the presumption against implied repeal is the rule that statutes must be harmonized whenever harmonization is possible. “... we do not interpret statutes in isolation. Rather, we attempt to harmonize all the parts of an act to the greatest extent possible. See *State v. Hobbs*, 301 Kan. 203, 210-11, 340 P.3d 1179 (2015) (court considers provisions of an act *in pari materia* with view to reconciling, bringing provisions into workable harmony).” *State v. Brown*, 303 Kan. 995, 1006, 368 P.3d 1101 (2016). The Commission’s Order, rather than attempting to harmonize all elements of the Kansas Telecommunications Act, purports to choose which portions of that Act to respect, and which portions have been “superseded,” *i.e.*, repealed.

12. In the case of the KUSF cap the plain language of the statute (K.S.A. 66-2008(e)(3) is sufficient to perform this harmonizing function, specifically as to the relationship between the KUSF cap and the right to cost recovery generally. The language creating the cap refers expressly to a limit only on the high cost support component of the KUSF, making no reference to the right of cost recovery generally under rate of return regulation or to the right to recovery of COLR costs. The Commission’s erroneous finding unnecessarily and unlawfully asserts the intent of the cap amendment is to deny any RLEC right to recovery of any costs regardless of source.


13. The finding and order related to RLEC cost recovery are unnecessary to the balance of the order and are not within the scope of the Order opening and declaring the purpose of the Docket. Those sentences may be removed entirely from Paragraph 9 and Ordering Paragraph A without impact on the proceeding, the validity or the sufficiency of the remainder of the order.

14. Specifically, that portion of the Order setting the KUSF percentage assessment at 9.40%, to become effective March 1, 2020, is not affected by the presence or absence of the provisions related to RLEC cost recovery; the establishment of that percentage assessment should become effective as ordered.

WHEREFORE these carriers request reconsideration in part of the Commission's Order of January 23, 2020 herein, only to the extent of the finding in Paragraph 9 and the parallel verbiage in Ordering Paragraph A asserting the adoption of a KUSF cap "supersedes" the RLECs' rights to cost recovery. Such finding and order, as specified in Paragraph 4 hereof, may be and should be deleted without further modification of the Order.

Respectfully submitted,

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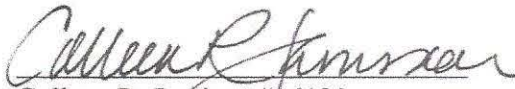
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VERIFICATION

STATE OF KANSAS)

) ss:

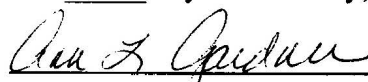
COUNTY OF DOUGLAS)

Thomas E. Gleason, Jr., of lawful age, being first duly sworn upon oath, states:

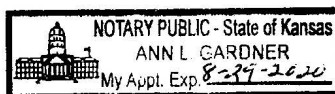
I am an attorney for the Independent Telecommunications Group, that I have read the above and foregoing Petition, and upon information and belief, state that the matters therein appearing are true and correct.


Thomas E. Gleason, Jr.

SUBSCRIBED AND SWORN to before me this 7th day of February, 2020.


Ann L. Gardner
Notary Public

My Commission Expires: 8-29-2020



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 7th day of February, 2020, a true and correct copy of the above and foregoing Petition was sent by electronic mail to the following reflected on the Commission's "Service List" for the subject Docket as of this date:

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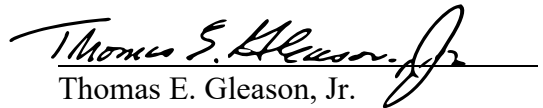
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