BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the Matter of the Application of i-wireless, LLC for Designation as an Eligible Telecommunications Carrier in the State of Kansas	) Docket No. 12-IWRZ-848-ETC

MOVANTS' REPLY TO STAFF RESPONSE TO MOTION TO REOPEN DOCKET

Come now Cunningham Telephone Company ("Cunningham"), LaHarpe Telephone Company ("LaHarpe"), Moundridge Telephone Company ("Moundridge"), Wamego Telecommunications Company ("Wamego") and Zenda Telephone Company ("Zenda," together the "Movants") and submit their Reply to the Response of Commission Staff ("Staff") to the Movants' Motion to reopen the subject proceeding, grant intervention and rescind a portion of a prior Order. In support of their original Motion and in opposition to Staff's Response the Movants state as follows:

1. Staff's claim, at ¶ 2 of its Response, ignores relevant and controlling action by the Federal Communications Commission. As noted in the Movants' original pleading (at ¶ 22, p. 9), the Federal Communications Commission ("FCC") has determined and stated that redefinition of an incumbent rural telephone company's study area is *not necessary* for the purpose of designating another carrier as an eligible telecommunications carrier for federal Lifeline-only purposes. See *Memorandum Opinion and Order*, WC Docket No. 09-197 and 11-42. April 8, 2013 at ¶ 8, p. 5. The applicant, i-wireless, may maintain its lifeline-only ETC status entirely unaffected by the relief requested by the Movants.

2. Staff's characterization, at paragraph 4 of the response, unreasonably and inaccurately characterizes the Movants' purpose in seeking relief. The impetus for the Movants' motion is not to avoid all competitive entry; instead it is the avoidance of unfair competition in which a carrier could "cherry pick" a service area having low costs of service while requiring the rural incumbent carrier to bear the continuing high costs of serving throughout originally defined study areas. The order at issue creates the possibility of such anti-competitive behavior, unnecessarily in the case of the relief requested by the applicant. The Movants further seek to retain their reasonable opportunity under traditional rate of return regulation (K.S.A. 66–2005) to recover their approved costs, investment and return on investment thereby enabling them to meet there statutory and regulatory obligations to serve all customers in the public interest.

3. Staff does not dispute that none of the Movants received notice of the application or of any proceeding or action in this Docket.

4. At paragraph 7 of its response staff claims the movements are not entitled to notice "of every proceeding before the commission that impacts them." This contention creates a strawman, in that the Movants claim no such right. Rather their present motion asserts a right to notice in the specific circumstances of this proceeding. Further, staff fails to site any controlling authority for its overbroad claim, relying instead only on Ohio and New Jersey case law.

5. Staff's contention that there is no statutory requirement for notice is addressed directly in the controlling judicial authorities (*Rydd v. State Board of Health*, 202 Kan. 721, 725-26, 451 P.2d 239 (1969); *Southwest Kan. Royalty Owners Ass'n v. Kansas Corporation Comm'n*, 244 Kan. 157, 171-1 74 (19891, 769 P.2d 1;

Suburban Medical Center v. Olathe Community Hospital, 226 Kan. 320, Syl 1 4, 596 P.2d 654 (1979)) cited in Movants' Motion: "...*where no express provision for notice is made in the statute,* if there be *nothing in the statute which prevents notice from being given,* the requirement of reasonable notice will be implied. [Citations omitted] In reality, the court simply reads the provision in the statute in order to uphold its validity as against the Fourteenth Amendment and Sections 2 and 18 of the Bill of Rights of the Constitution of Kansas.'" *Rydd,* supra.

6. Here Staff fails to find an express statutory requirement for notice, and there is nothing suggested by Staff to prevent notice from being given. The judicially imposed requirement of reasonable notice is therefore implied even under Staff's flawed statutory analysis. Staff's response simply chooses to ignore the rule of law expressed by the courts of this state addressing notice requirements of Kansas administrative agencies.

7. In fact statutory authority for notice exists even in the absence of the Kansas judicial imposition of an implied statutory right. Staff's superficial dismissal of express statutory authority for, and requirement of, notice in K.S.A. 66-1,193(b) flies in the face of settled law controlling statutory construction. Staff claims the requirement of K.S.A. 66-1,193(b) is inapplicable because "This proceeding was not initiated under K.S.A. 66-1,193(b). It was initiated pursuant to 47 U.S.C. § 214(e)" (Staff Response, ¶ 21). The statute in question, however, does not limit its express requirement to proceedings initiated pursuant to any specific authority, whether state or federal.

8. To limit the statutory notice requirement in the manner argued by Staff would require the Commission to read additional words into the plain language of K.S.A. 66-1,193(b). Plainly the Legislature could have added the

words "in any proceeding *under this section*" if such limitation had been intended; rather, the statute is broadly written and without limitation, indicating a legislative intent broadly to require notice. This is true generally, but particularly true when the proceeding in question is a request by a third party to impose changes in the terms under which a regulated carrier carries out its State-mandated service obligations; such a proceeding is at a minimum the functional equivalent of a complaint proceeding, whether or not expressly designated as such.

9. The qualifying language, requiring notice in case of "any rates, joint rates, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by any telecommunications public utility for the public" is so broad as to evidence a legislative intent to cover virtually any Order affecting a KC-regulated telecommunications carrier's regulated operations. Here in particular, the classifications of the Movants' respective study areas are undeniably affected by being "altered, changed, modified [and] fixed," and their "practices [and] acts relating to" the provision of local exchange services for the public are similarly affected.

10. Staff's contention that the Movants have no legally protected interest rests on Staff's refusal to recognize interests created by Kansas statute. That contention is supported largely by selective quotation from non-precedential opinions plainly distinguishable on their facts.

11. The First and Fifth Circuits' general view of the impact of competition (cited by Staff in ¶ 14 of its Response) are not precedent in the Tenth Circuit, and Staff's highly selective excerpt from cited decisions are at odds even

with the controlling principles cited in the cases from which selective rules are claimed to be found.

12. In *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), relied upon and cited by Staff in footnotes at page 5, the Court notes:

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are **defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.** Thus, the welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. *The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility.* But we held that they had a right to a hearing at which they might attempt to do so. (Emphasis supplied)

13. Staff's reliance on *Fireside Nissan, Inc. v. Fanning,* 30 F.3d 206, 218-219 (I st Cir. 1994), is entirely misplaced, in that such reliance isolates a portion of a limited holding based on a specific Rhode Island statute. The First Circuit made it undeniably clear that its opinion was fact-specific:

> Fireside does not have a protectable property interest in being free from *excessive intrabrand competition or from participating in Rhode Island's new dealership hearings because R.I. Gen. Laws § 31-5.1-4.2 does not confer any protections or rights of participation on out-of-state dealers.* As we have already found, Rhode Island's *dealership licensing statute* only applies to dealerships within the state of Rhode Island and does not have, nor has it ever had, any application to out-of-state dealers like Fireside. (Emphasis supplied).

14. Similarly, Staff's reliance on *Wells Fargo Armored Service Corp. v. Georgia Public Service Comm'n*, 547 F. 2d 938, 940 (5th Cir. 1977) is misplaced, both because a Fifth Circuit opinion lacks precedential value in Kansas and because the facts and legal context at hand differ markedly from those in *Wells Fargo*. It is emblematic of the weakness of Staff's position that such remote and distinguishable "authorities" are employed for its support.

15. Contrary to Staff's implied claim at ¶ 14 of the Response, Movants do not rely on a claim of right to a generalized "hope of being free from competition" deemed insufficient in *Wells Fargo*. Instead the Movants rely on specifically applicable state statutes and Commission Orders providing protection – both to the Movants and to the public – from biased and unfair "competition" in which certain costly burdens are imposed solely on incumbent local exchange carriers while other providers are granted state favoritism. In fact the Movants' interests are among those cited as requiring due process protection in *Fireside, supra.*, as being "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985), in turn quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709.

16. At pp. 4–5 of its Response Staff cites *Landmark National Bank v. Kesler*, 289 Kan. 528, 545 (2009) in arguing for a standard that would require interested parties to quantify the dollar value of future harm, as if only purely monetary / property interests are entitled to the protections of due process of law. *Landmark* involved a set of facts that had already caused undisputed and known financial consequences to the interested parties. The question at issue was whether a different entity could demonstrate it too had ben harmed materially.

Such a standard, if applied to Commission proceedings, would require a carrier in all cases first to suffer a specific amount of financial harm and then quantify its extent, as a precondition to action that would prevent the harm from occurring. The facts upon which the *Landmark* standard was enunciated are inapplicable to Movants' protected interests in the statutorily created limitations on unfair and biased competition.

17. The Movants' rights at issue are as much liberty interests as property interests. Staff attempts to assert a highly restrictive scope of liberty interests, claiming (at ¶ 14) "Movants are as free as they always have been to conduct their business." In fact as private entities bound by specific State-imposed service requirements, the Movants are less free. They bear the same service obligations, but have been deprived of specific state-established protections in the conduct of that service. The right to be heard on a proposal to affect adversely a carrier's state-created protections is a protected interest whether or not the ultimate dollar extent of harm can be known in advance. Staff's proposed requirements for a course of action for relief, that the dollar value of deprivation be known with certainty, further would be possible only long after the proceeding at issue had concluded, giving rise to Staff's separate argument of a failure to take timely action toward an administrative remedy.

18. Staff's extremely constricted view of protected rights and due process of law would have regulated carriers deprived of a right to notice in virtually all Commission general investigation proceedings. Such proceedings, typically prospective in nature, ordinarily consider changes in policy that would have calculable financial impact only after the fact. Further, under Staff's theory of right to notice an affected party would effectively be denied the opportunity

even to assert the existence of a protected interest. Staff alone would decide what entities were and were not entitled to notice of a proceeding, and those not provided notice would be generally unable to assert disagreement with Staff's unilateral conclusion. Only a potential party learning by chance of the pendency of such a Commission proceeding would have any ability to assert, support and protect its claimed interests. As Staff takes an increasingly adversarial posture toward rural local exchange carriers its approach to the carriers' rights amounts to "stacking the deck," impeding the carriers' opportunities even to be heard on matters that significantly affect their operations in the public interest.

19. Staff contends the Legislature's authorization of telecommunications competition is alpha and omega, precluding any interest in the manner in which competition comes to be conducted. A generalized authorization of competition, however, does not resolve the issue of the Movants' interests. It is not the role of Commission Staff, nor in fact the proper role of this Commission, to choose which elements of enacted state policy should be recognized and given priority over concurrent public policy. Staff, or even the Commission, might prefer a policy giving priority to the interests of potential competitors over all other public policy, but the law does not provide any authority to make such a policy judgment superseding that of the Legislature. The Legislature has directed the creation and maintenance of limitations on unfair, biased competition and it is at least this recognized statutory interest that has been affected adversely by the Order redefining the Movants' study areas without notice.

20. If the Commission believes the encouragement of multiple service providers alone, under any circumstances, warrants abrogation of the protections

previously required by the Legislature the Commission should undertake a general investigation toward that end. Potentially affected entities could then be heard on the legality and propriety of any such proposed action.

21. Even if the record includes evidence to support a finding that a specific party's application will not result directly in unfair competition, the Movants have a sufficient interest to be heard and the opportunity to challenge such evidence. Even more, the Movants have a cognizable interest because any study area redefinition facilitates not only a specific applicant seeking to compete in a certain portion of a Movant's study area; it also facilitates subsequent competitive entry more biased and unfair than that of a current applicant. Lack of notice denies to the Movants any effective opportunity to assert this adverse effect on the public interest and on their own ability fairly to meet state-imposed obligations.

22. Staff's Response fails to explain how the Commission's Order granting intervention to Wamego Telecommunications Company in Docket No. 15-COXT-396-ETC ("Cox") differs factually or legally from the intervention requested in the instant proceeding. In Cox, Wamego asserts as the incumbent provider of local exchange and exchange access, its rights and interests are affected and it should be allowed to intervene.

23. In the Cox Order granting Wamego's intervention the Commission noted as its basis intervention may be granted "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 and privileges, immunities or other legal interests may be substantially affected by the proceeding," and (at ¶5) "The Commission finds and concludes Wamego

has met the requirements of K.A.R. 82-1-225 and K.S.A. 77-521 and should be granted intervention in this docket." (Emphasis supplied)

24. It is facially contradictory, and would be grossly arbitrary and capricious, to assert Wamego's rights and interests were sufficiently at issue to justify intervention in the Cox proceeding while simultaneously claiming those same interests did not warrant notice in the i-wireless proceeding on the same issue. Since the interests of the other Movants coincide with those of Wamego under common issues of fact and law it would likewise be arbitrary and capricious to deny their intervention.

25. Staff's claim that "Wamego's intervention could have been approved based upon something other than a protected due process property or liberty interest" is wholly speculative and unsupported by the record. The only basis for intervention in the Cox proceeding asserted by Wamego – and accepted by the Commission – is the effect of the proceeding on Wamego's rights and interests. The Commission states no finding or conclusion warranting intervention on any other basis, and the record of Docket No. 15-COXT-396-ETC contradicts Staff's theory. The effects on rights and interests at issue in Cox are identical to those at issue in the instant proceeding.

26. Staff appears to suggest the existence of a hypothetical set of facts in which a rural telephone company's interests are sufficient to warrant intervention in a proceeding, but insufficient to require notice of the proceeding. No explanation of such a narrow distinction has ben offered, and speculation as to the mere existence of such a state of facts is insufficient to justify denial of the requested relief. In any event, the Commission's actual prior finding (not what it "could have found") is that Wamego had demonstrated impact to its rights and

interests sufficient to warrant intervention and notice of all subsequent proceedings in the Cox proceeding addressing issues and interests identical to those in the instant proceeding.

27. Finally, as to Movants LaHarpe, Moundridge, Wamego and Zenda, Staff attempts only circularly to dismiss the effect of the Commission's undisputed change of policy, without explanation or justification, from findings on an identical issue, as to identical parties, in Docket No. 10-VMBZ-657-ETC. In that earlier Docket the Commission found redefinition of these carriers' study areas was *unnecessary* in an application for Lifeline-only ETC status because the applicant proposed to provide service in all of those same incumbent carriers' respective study areas. In the instant case, without differentiating explanation or record support, the Commission ordered redefinition in spite of the fact that i-wireless proposed to serve in all of the incumbents' exchange areas, thereby rendering service area redefinition likewise unnecessary as to these specific Movants on the present application.

28. Staff now claims that the Commission's change of treatment and reversal of practice can have no present effect for the reason that these Movants "did not exhaust its [*sic*] administrative remedies in seeking to have the order overturned." If this claim has any effect, it is to establish that the Movants have been denied a liberty interest in being free from Commission action that violates an express judicial mandate – the requirement of *Home Tel. Co. v. State Corp. Comm'n*, 31 Kan. App. 2d 1002; 76 P.3d 1071 (2003) that "when an administrative agency deviates from a policy it had adopted earlier, it must explain the basis for the change." With each additional indication of adverse effect on a carrier's

ability effectively to protect its interests, the importance of providing notice becomes more evident.

CONCLUSION

29. The Movants have interests based on state law including at least the right to rely on statutorily instituted existing protections against biased, unfair competition in the services the Movants are required by law to provide. Such interests are sufficient to afford them due process protections, at least to the extent of notice and the opportunity to be heard.

30. Granting the relief requested creates no adverse consequence to the original applicant for federal lifeline-only ETC status, as redefinition of an incumbent's study area is not required as a condition of maintaining the applicant's lifeline-only ETC status. Rescission of the Commission's Order, to the extent only of redefining the Movants' study areas, in no way bars any subsequent applicant for competitive LEC status to seek redefinition of a Movant's study area subject to established law and due process considerations, including the affected Movant's rights to notice and to be heard. The requested relief is no impediment to competition consistent with established state law.

WHEREFORE these Movants renew their request that the Commission reopen this Docket, grant the Movants' intervention, thereon review and rescind only so much of the Order of September 6, 2012 as redefines the respective study areas of the Movants, and thereupon forward to the Federal Communications Commission notice of such rescission with the request that the FCC concur therein by restoring the prior study area definition of each of the Movants.

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 Movants identified herein; that he has read the above and foregoing Reply; that the statements, allegations and matters contained therein are true and correct.

Thomas E. Gleason, Jr.

Subscribed and sworn to before me this 19th day of June, 2015.

Notary Public

My Appointment Expires: 3-7-19

NOTARY PUBLIC STATE OF KANSAS EMILY BAUCOM My Appt. Exp. 3/7/19

CERTIFICATE OF SERVICE

Thomas E. Gleason, Jr. certifies that the above and foregoing Reply was served on the following by mailing a copy thereof to each on the 19th day of June, 2015:

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