THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

Before Commissioners: Shari Feist-Albrecht, Chair
Pat Apple
Jay S. Emler

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

PETITION FOR RECONSIDERATION

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 "Petitioners") and request reconsideration of the Kansas Corporation Commission's February 8, 2018 Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas (the "Order"). In support thereof, the Petitioners and movants state as follows:

1. On June 30, 2017 the Kansas Court of Appeals concluded judicial review of previous proceedings before the Kansas Corporation Commission ("Commission") in this Docket. In its Memorandum Opinion of that date the Court reversed the Order of the District Court of Pottawatomie County and ordered remand of the matter to that District Court "with directions to remand the case to the Commission for its review of the merits of the Motion to Reopen Docket and to issue a final agency action on that motion."

2. Thereafter, on December 18, 2017 the District Court of Pottawatomie County filed its Journal Entry on remand from the Court of Appeals. That Journal Entry states:

> Thereupon the court having reviewed the opinion of the Kansas Court of Appeals herein dated June 30, 2017 and the mandate issuing therefrom remands this matter to the Kansas Corporation Commission for its review of the Merits of the Motion to Reopen Docket, Petition for Intervention and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas filed by the petitioners and to issue a final agency action on that motion.

3. The Petitioners' Motion and Petition requested the following relief:

> WHEREFORE these movants request that the Commission reopen this Docket, grant the movants' intervention, thereon review and rescind only so much of the Order of November 2, 2011 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.

There is neither judicial direction nor party request to reconsider the grant of Eligible Telecommunications Carrier status to i-wireless, or in any way otherwise to affect the rights, interests or operations of that carrier.

4. Thereafter, on February 8, 2018, the Commission summarily entered its Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas (" Order").

5. The Order was served electronically on counsel for the Petitioners on February 8, 2018. This Petition for Reconsideration is filed within fifteen days of such service and is therefore, pursuant to K.S.A. 77-529(a), timely filed.

I. SUFFICIENCY OF THE ORDER AND COMPLIANCE WITH JUDICIAL MANDATE

6. In *Citizens' Util. Ratepayer Board v. State Corporation Commission,* 28 Kan. App. 2d 313, 316-17, 16 P.3d 319, 323-24 (2000), The Kansas Court of Appeals considered and address the requirements for a lawful final Order of the Commission:

> K.A.R. 82-1-232 provides rules of form and content for orders of the Commission. K.A.R. 82-1-232(a)(3) states that each order of the Commission shall contain "[a] concise and specific statement of the relevant law and basic facts which persuade the commission in arriving at its decision."
>
> The purpose of findings of fact as mandated by K.A.R. 82-1-232(a)(3) is to facilitate judicial review and to avoid unwarranted judicial intrusion into administrative functions. The Commission must, therefore, express the basic facts upon which it relied with sufficient specificity to convey to the parties, and to the courts, an adequate statement of facts which persuaded the Commission to arrive at its decision. [Citations omitted.]" Ash Grove Cement Co. v. Kansas Corporation Commission, 8 Kan. App. 2d 128, 132, 650 P.2d 747 (1982).
>
> The Kansas Supreme Court has construed the Commission's procedural requirements to mean findings need not be rendered in minute detail. However, findings must be specific enough to allow judicial review of the reasonableness of the order. To guard against arbitrary action, conclusions of law must be supported by findings of fact which are in turn supported by evidence in the record. Zinke v. Trumbo, 242 Kan. at 475.
>
> To examine whether the Commission's action is supported by substantial competent evidence, K.S.A. 77-621(c)(7), the record must contain evidence "which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved." Southwestern Bell Tel. Co. v. Kansas Corporation Commission, 4 Kan. App. 2d 44, 46, 602 P.2d 131 (1979), rev. denied 227 Kan. 927 (1980).
>
> Where the trial court's (or the Commission's) findings of fact and conclusions of law are inadequate to disclose the controlling facts or the basis of the court's findings, meaningful appellate review is precluded. Tucker v. Hugoton Energy Corp., 253 Kan. 373, 378, 855 P.2d 929 (1993).

7. The Order's extended recitation of the procedural history of this matter, comprising the first fourteen of nineteen paragraphs, fails to address the merits of the Petitioners' requested relief.

8. In its Memorandum Opinion on judicial review in this matter the Kansas Court of Appeals noted:

> …[W]e are not persuaded by the Commission's effort to interfuse the finality of the 2012 Commission Order with the issues presented in this appeal. At the agency level, the Commission handled the Motion to Reopen Docket as an independent matter on which it had not rendered a final decision. But the Commission's arguments on appeal asserting the RLECs failed to exhaust administrative remedies simply distract from what is the central issue on appeal: the Commission's action or inaction on the Motion to Reopen Docket.

9. Paragraphs 15 through 17 of the Order further fail to address the merits of the Petitioners' requested relief, addressing instead the passage of time since the Commission's redefinition – without notice – of the Petitioners' study areas, and addressing the separate independent issue of the Federal Communications Commission's separate and subsequent concurrence in that redefinition.

10. Paragraph 18 of the order attempts to sidestep the issue of the denial of due process raised by the Petitioners by means of a grossly out-of-context quote selectively excerpted from the Petitioners' brief to the Court of Appeals. The essence of the argument presented by the Petitioners is not in fact that the KCC can never redefine a service area, but instead that affected carriers "…have a right to be given notice of and the right to participate in such a proceeding before the KCC considering such redefinition." Brief of Appellants at 9., *Wamego Tel. Co., Inc. v Kansas Corp. Comm'n,* No 115,406 (Kan. Ct App. June 21, 2016). In the instant case the RLECs were given neither notice nor an opportunity to be heard. The Commission's order fails to give any

consideration of this argument or offer any rationale as to why the RLECs were not entitled to notice or the opportunity to be heard.

11. Paragraph 18 further fails to satisfy the judicial mandate, in that it denies relief that was neither requested nor otherwise at issue: "…there is no reason to reopen the Docket to reevaluate the Commission's decision to grant ETC designation to i-wireless." It is possible the Petitioners' plainly requested relief (see 5, *supra*.) was misunderstood by the drafter of the Order, and it is certain that relief was represented to Commissioners inaccurately in the Commission's business meeting of February 8, 2018. In that public meeting the Commission's counsel claimed expressly and erroneously that the Petitioners seek rescission of i-wireless's designation as a Lifeline-only Eligible Telecommunications Carrier ("ETC").

12. A review of the record reflects that at no time have the Petitioners sought rescission of the grant of Lifeline-only ETC status to i-wireless, nor has the Petitioners' actually requested relief included any action affecting i-wireless or its customers in the slightest degree. The portion of the Order asserting otherwise is without evidentiary foundation, is plainly unsupported except through mischaracterization, and should be set aside on reconsideration.

13. The Order's paragraph 19 opens with the wholly conclusory statement that the RLECs have not demonstrated good cause to reopen the docket. This paragraph cites "K.A.R. 82-230(k)" (*sic*). Presumably this refers to K.A.R. 82-1-230(k) which provides for reopening the *record* after the record of *testimony* has been closed. Reliance on this regulation is particularly misplaced in a proceeding in which no testimony or evidence was received, and in which the Petitioners were denied opportunity to challenge or present evidence due to failure of notice. The Order offers no facts upon which its conclusion is based, instead restating yet again the length of time between the

order and the challenge of the order, and again completely ignoring the underlying lack of notice by the Commission that is solely responsible for any claimed delay. This cannot in any way be construed to comply with the mandate of the Court of Appeals.

14. At paragraph 19 of the Order there is an attempt to provide a rationale for denial, relying wholly on a claim of prejudice to others and the need for "regulatory certainty." The record, however, provides neither legal nor factual support for this theory.

15. The Petitioners have established, from their initial pleading and throughout protracted proceedings, that "There is no need to review or modify the Commission's prior designation of i-wireless as an eligible telecommunications carrier for Lifeline-only support, apart from that limited and specific portion of the Order redefining study areas and affecting the movants' rights without notice." See Petitioners' *Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas*, at paragraph 23.

16. In factually unsupported contravention of the Petitioners' direct statements Commission Staff and the Order itself have asserted prejudice to i-wireless and/or its customers resulting from the Petitioners' request – a claim that not even i-wireless itself has asserted. At no time has the Commission, its Staff or any party offered any theory, nature or example of such claimed prejudice.

17. A similar fatal flaw underlies the Order's contention that past action taken by the Federal Communications Commission must control this Commission's actions. It is factually incorrect and unsupported to claim the Petitioners seek a state agency order countermanding a federal agency's action; instead the Petitioners have sought – and continue to seek – correction of an unlawful state action. It is not material to that effort

that the FCC, in a separate proceeding, ratified, this Commission's unlawfully accomplished redefinition of the Petitioners' respective study areas.

18. Speculation about subsequent review by the FCC, following corrective state action requested herein, is immaterial. The Petitioners assert their right to the state's correction of its own action. The Petitioners further, but separately, seek a request to the federal agency that it concur in that correction. This Commission could in fact control a federal result, but only by wrongfully refusing to acknowledge its error and refusing to allow a request for correction to be made to the FCC.

19. A factual, rather than wholly speculative, determination of FCC action can be achieved only if the Petitioners' requested relief is granted. The Petitioners recognize and accept the possibility that the FCC could decline to concur in a restoration of their original study area definitions; it does not follow that they should be denied the opportunity to seek redress merely because of state speculation about future results of subsequent federal action.

20. There is, and can be, no evidence in the record that would warrant a predictive finding as to what the FCC might or might not do. The Commission can cite no comparative case of a request to the FCC for restoration of a prior RLEC study area in which the original state redefinition had been accomplished in contravention of due process of law.

21. At paragraph 6 of the subject order the Order makes note of Commission Staff's Response to Motion to Reopen Docket, dated June 11, 2015. Among other issues argued in that response is Staff's contention that the Petitioners "are not entitled to intervene simply because Wamego was permitted to intervene in the 15-396 Docket;" (*sic*, indicating the Commission's 15-COXT-396-ETC docket) A review of that issue as addressed in Staff's Response shows Staff's opposition was not well taken, and in fact

there is no factual or legal basis in this proceeding that would support differing action from the intervention granted to Wamego Telecommunications Company, one of the Petitioners herein, in Docket No. 15-COXT-396-ETC.

22. This Commission's Order granting intervenor status to Wamego in Docket No. 15-COXT-396-ETC rested on a finding that the company had "…met the requirements of K.A.R. 82-1-225 and K.S.A. 77-521 and should be granted intervention…." Wamego's petition for leave to intervene included no differing facts, and no assertion, that is not equally applicable to the instant proceeding. The record contains nothing to support Staff's mere speculation that there could have been some other basis to grant intervention

23. It is arbitrary and capricious to conclude the Petitioners were not entitled to notice in light of the contrary holding in Docket No. 15-COXT-396-ETC. In one preceding involving identical questions of law and fact specifically relating to the applicant's requirement to serve throughout a rural telephone company study area, this Commission found that Wamego – one of the Petitioners herein – was entitled to intervene as a party. That finding necessarily required a conclusion that Wamego's rights and interests were at issue in the proceeding under relevant statute and regulations. This conclusion cannot be reconciled with the contention in the present order that Wamego was not entitled to notice or effective opportunity to participate. Such directly contradictory findings and conclusions likewise cannot be reconciled with the Commission's claimed interest in "regulatory certainty" cited at ¶ 19 of the February 8, 2018 Order denying relief.

24. Taken as a whole the Order consists of (1) recitation of claimed procedural developments, which developments have been deemed judicially to "simply distract" from consideration of the merits, (2) conclusory statements unsupported by findings of

fact, (3) denial of relief never requested and (4) complete failure to address the merits of the relief actually requested by the Petitioners. The Order fails to satisfy either the judicial mandate or the established requirements for final agency action on the Petitioners' Motion and Petition, and therefore the Order must be reconsidered.

II. DUE PROCESS OF LAW – PROTECTED INTERESTS

25. At paragraph 18 the Order chooses to ignore, rather than fairly address and resolve, the protected interest asserted and supported by the Petitioners throughout this proceeding. The Order takes the expedient, but improper, approach of addressing only a different ("monopoly") interest *never asserted by the Petitioners*, and then denying that imaginary claim's validity. Thereupon the Order concludes, "Accordingly, there is no reason to reopen the Docket…." The Order thereby denies relief by ignoring, rather than addressing, the record claims of the Petitioners. K.S.A. 77-526 requires that a valid final Order of an administrative agency:

> …include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings.

26. Nowhere in the Order, or in the record, is there support for the misrepresentation and mischaracterization of the Petitioners' assertion of a protected interest. Instead, the Order merely avoids addressing the specific interest that has been identified expressly by the Petitioners and supported by relevant authority.

27. Commission Staff was not incorrect in its 2016 general assertion about the standard applicable to interests subject to due process protection: ""To generate a due

process claim, [petitioner] must first demonstrate that it holds an interest arising out of some understanding with the [State] that transcends 'an abstract need or desire' or 'a unilateral expectation' and qualifies as 'a legitimate claim of entitlement.'" (citing *Wells Fargo Armored Service Cmp. v. Georgia Public Service Comm 'n*, 547 F. 2d 938, 940 (5th Cir.1977); citing *Board of Regents v. Roth*, 408 U.S. at 577 (1972)) A fair and accurate identification of the actual interest asserted by the Petitioners produces an inescapable conclusion that this interest meets the *Roth* test urged by Staff:

> 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.* [Emphasis supplied]. *Roth* at 577.

28. Contrary to Staff's implied claim at paragraph 14 of its Response, and contrary to the misdirected analysis of the Order, Petitioners do not rely and have never relied on a claim of right to a generalized "hope of being free from competition" like that deemed insufficient in *Wells Fargo*. Instead the Petitioners rely on specifically applicable state statutes and Commission Orders providing protection – both to the Petitioners 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 Petitioners' interests are among those cited as requiring due process protection in *Wells Fargo Armored Service Corp. v. Georgia Public Service Comm'n*, 547 F. 2d 938, 940 (5th Cir. 1977) 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, supra*.

29. The 1996 Kansas Legislature, in its adoption of the Kansas Telecommunications Act (K.S.A 66-2001 *et seq.*), recognized the potential for *unfair and biased* competition against rural telephone companies, in particular due to the rural companies' state mandated obligation to serve all requesting customers in their respective rural, high-cost service areas. See K.S.A. 66-2009. To balance this concern with the Act's new policy support for telecommunications competition, the legislature ordered the Commission to: "initiate a proceeding to adopt guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers[.] K.S.A. 66-2002(c).

30. The Act further specified, at K.S.A. 66-2004 (b-d), certain steps to prevent competitive carriers from abusing competition by unfairly "cherry-picking" lower-cost portions of a rural company's service area and anti-competitively forcing the RLEC alone to serve all customers in higher-cost areas.

31. In response to this legislatively originated government mandate the Commission conducted the ordered proceeding and issued its own guidelines any competitive carrier must meet in order to compete with a rural telephone company. The objective and effect of these guidelines, like the cited statutes, was (and is) not to preclude competition but rather to assure rural competition is fair and even-handed, free from bias resulting from the governmental burdens imposed uniquely on rural carriers including the Petitioners.

32. In its Docket No. 94-GIMT-478-GIT the Commission issued Orders on December 27, 1996 and again on February 3, 1997, articulating the rural entry guidelines required by statute to be adopted. Relevant to the instant proceeding are the following requirements:

"• Applicant must meet the requirements to qualify as an "eligible telecommunications carrier" (Federal Act section 214(e)(1); State Act section 5(c)

- Must offer to provide service to all customers in the rural Telephone Company study-area as defined by the FCC."

33. It cannot be denied therefore that one element of the state-created restriction on rural competitive entry rests directly and explicitly on the definition of an incumbent rural company's study area. In reliance on this reasonable state-created restriction the Kansas rural telephone companies, including the Petitioners, have invested extensive resources necessary to meet state service mandates and provide reliable, affordable universal telecommunications service throughout their original study areas.

34. Likewise it cannot be denied that a redefinition (by subdivision) of an RLEC study area creates increased opportunity for selective, biased and unfair competition in which a competitor elects to serve only in the incumbent's lowest-cost study area and forces the incumbent to bear the disproportionate cost and unequal burden of serving throughout each of its higher-cost redefined study areas. Such a result would contravene both statutory public policy and the incumbent rural carrier's right to invest and operate in reliance on the original government-created conditions for competitive entry.

35. It is immaterial whether the specific competitive presence of i-wireless by itself contravenes state policy. First, as a wireless carrier under federal law, i-wireless is not required to obtain KCC certification as a condition of offering service anywhere in this State. More importantly, the harm at issue comes not from i-wireless's presence but from the Commission's action redefining study areas. That redefinition is imposed generally on the rural company, not just as to the service of i-wireless; as a result,

wireline carriers that would otherwise be required to serve throughout the original study area are incented and aided by the state action to engage in anticompetitive "cherry picking" or "cream skimming," whether or not these types of unfair anticompetitive behavior might be conducted by i-wireless.

36. Additionally, redefinition of study area imposes further risk and adverse consequence to Petitioners because their amounts of federal universal service support – a governmentally created and recognized interest – are determined based in part on their study area definitions. Modification of the definitions affects the amounts of this governmentally established revenue mechanism to which Petitioners are otherwise eligible to receive.

37. The record establishes that the Petitioners have a government-originated interest their government-established study areas, and in remaining free from government action that hampers their fair and even-handed ability to invest and operate throughout those areas. Any proceeding that affects their respective study areas therefore is subject to a due process obligation of notice and the opportunity to be heard.

III. DUE PROCESS OF LAW – RIGHT TO NOTICE

38. In the Response of Commission Staff noted in Paragraph 6 of the Order it is claimed that the Petitioners "have not cited to any provision of law entitling them to notice of this proceeding…." In fact the Petitioners' consistent assertion of the right to due process encompasses, *inter alia*, a right to notice. Staff's theory appears to be that only a *statutory* requirement of notice can be effective to afford rights to those affected by administrative agency action.

39. The redefinition of a rural telephone company study area affects its operations by altering, changing and modifying that company's practices and acts relating to telecommunications service performed or to be performed by the company for the public. Redefinition of the study area necessitates modification of the rural telephone company's investment, network design and operational practices and acts, all in order to respond to the increased risk of "cherry-picking" and otherwise unfair, biased competitive entry facilitated and encouraged by the redefinition. For this reason alone there was a statutory duty of the state agency to give notice to the Petitioners at least of its initial Order, if not of all proceedings herein, under K.S.A. 66-1,193(b).

40. Superseding any question of statutory notice obligations is the Constitutional right to effective and timely notice as an element of due process of law. Addressing the duty of a Kansas administrative agency to give notice to those affected by its proceedings, even in the absence of a specific statutory directive, *Rydd v. State Board of Health*, 202 Kan. 721, 725-26, 451 P.2d 239 (1969) states the requirement succinctly as a matter of protection under both the state and federal Constitutions:

> "…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.'"

41. The nature and extent of notice to which the Petitioners have been entitled cannot be a legitimate issue herein because it is undisputed the Commission failed to provide any notice whatever. Should there be any question, though, there is ample authority regarding the sufficiency of notice:

> Here, appellants correctly assert that under the Due Process Clause, the notice used by KCC must inform interested parties of proceedings which may directly or adversely affect legally protected interests. See *Walker v. Hutchinson City*, 352 U.S. 112, 1 L. Ed. 2d 178, 77 S. Ct. 200 (1956). In

Walker, the City of Hutchinson instituted condemnation proceedings against a landowner, but the only notice given was publication in the official city newspaper. Referring to its decision in *Mullane*, the Court recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions." 352 U.S. at 115. But in *Walker*, no compelling or persuasive reason existed for not giving direct notice, particularly since the City knew the landowner's name and address. 352 U.S. at 116. *Farmland Indus. v. State Corp. Comm'n*, 24 Kan. App. 2d 172, 177-78, 943 P.2d 470, 479 (1997) [In the instant proceeding the Petitioners were expressly identified in the proceeding, and their addresses are undeniably well known to the Commission responsible for their ongoing regulation]

Appellants cite to the Kansas Supreme Court decision in Suburban Medical Center v. Olathe Community Hosp., 226 Kan. 320, 597 P.2d 654 (1979), where the court summarized procedures needed to comply with due process as follows: An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence." 226 Kan. 320, Syl. P 4. *Farmland Indus. v. State Corp. Comm'n*, *supra.*

Also, appellants rely upon a decision by the United States Court of Appeals for the Fifth Circuit to support their argument that notice was inadequate. In North Alabama Exp., Inc. v. U.S., 585 F.2d 783 (5th Cir. 1978), the court found that notice published in the Federal Register by a motor common carrier was misleading and was jurisdictionally defective because it failed to give opposing carriers, or members of the public, proper notice and a chance to be heard. The court stated: "In the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them." 585 F.2d at 786. The court held that because *adequate notice goes to the very jurisdictional validity of the proceeding*, the Interstate Commerce Commission could not rescue the notice by arguing about what one could or did infer from the notice. The court ordered the agency action stayed pending republication in the Federal Register and an opportunity for interested persons to be heard. 585 F.2d at 790 and n.5. *Farmland Indus. v. State Corp. Comm'n*, *supra.;* emphasis supplied.

42. Any theories of constructive notice, by any means, cannot survive consideration of K.A.R. 82-1-216. The Commission has adopted rules giving parties, and

itself, multiple methods of serving valid notice. Nowhere is there a valid or reasonable requirement that all entities that *may be* subject to Commission action must be on constant speculative lookout for any indication of such action.

IV. TIMELINESS

43. Sufficiency of notice, beyond its Constitutional dimension, further disproves as a matter of law the Order's contention (at Paragraph 17) that "[t]he RLECs simply waited too long to challenge the Commission's decision granting i-wireless ETC status." Setting aside yet again the fact that the RLECs have never challenged the grant of ETC status itself to i-wireless, the Order's citations of K.S.A. 77-529 and 77-613 are inapplicable to the Petitioners due to the undisputed failure of service. It is the Order, not the Petitioners, that ignores the provisions of the statutes cited.

44. The full text of the relevant portion of K.S.A. 77-529 specifies that the 15-day period for reconsideration commences only on "*service* of a final order." As is undisputed in the record, the original order redefining the Petitioners' respective study areas *has never, to this day, been served on any of them*. The fifteen-day limitation not only has not ended; it has not even begun. Likewise, the 30-day limitation of K.S.A. 77-613 for a petition for judicial review commences only upon the *service* of the subject Order if a Petition for Reconsideration is not required, or upon the issuance of an Order on a Petition for Reconsideration. Again, in the absence of any such service in either circumstance, the statutory period has yet to commence and thus cannot have expired.

45. The selective characterizations and attempted ascriptions to the Petitioners of blame for any delay appearing in the Order are arbitrary and capricious, being unsupported in the record, The Order thereby refuses to acknowledge a single underlying fact: had the Commission given lawful notice of the initial proceeding, or at

least timely notice of the Order redefining their respective study areas, the Petitioners would have had fair and reasonable opportunity to seek relief even under the standards and purported requirements retroactively urged in the Order.

V. CONCLUSION

46. The Commission's Order of February 8, 2018 herein is unlawful in its failure to satisfy the mandates of the Kansas Court of Appeals and the District Court of Pottawatomie County on judicial review of proceedings herein.

47. The Order is further unreasonable and unlawful in its failure to meet controlling requirements for specific findings of fact and record support for its conclusions.

48. The Order is arbitrary and capricious in its ordering provisions unsupported by and/or contrary to the Record in this proceeding, in concluding there is no good cause to revisit its prior Orders issued without notice to the affected Petitioners and in purporting to deny relief other than that requested by the Petitioners and in failing to address the relief actually sought.

49. For the reasons discussed throughout this petition the Commission should reconsider and set aside in its entirety the Order Denying Motion to Reopen Docket, Petition for Leave To Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas herein; in lieu thereof, the Commission should either grant the relief expressly requested in the Petitioner's initial pleading herein or entertain such further proceedings as may be necessary to comply lawfully with the aforesaid judicial Mandates.

Respectfully submitted,

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF DOUGLAS)

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

I am an attorney for the Petitioners herein, that I have read the above and foregoing document, 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 23rd day of February, 2018.

Ann L. Gardner
Notary Public

My Commission Expires:

8-29-2020

NOTARY PUBLIC - State of Kansas
ANN L. GARDNER
My Appt. Exp. 8-29-2020

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 23rd day of February, 2018, a true and correct copy of the above and foregoing document was sent by electronic mail to the following:

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