

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

telephone companies: Cunningham Telephone, Co., LaHarpe Telephone Company, Mo-Kan Dial, Moundridge Telephone Company, People Telecommunications, Rainbow Telecommunications Association, S&A Telephone Company, Wamego Telecommunications Company, and Zenda Telephone Company.”²

4. The FCC’s Public Notice gave interested parties the opportunity to file comments by February 4, 2013, and reply comments by February 19, 2013, and explained absent action to the contrary, i-wireless’s Petition would be deemed approved on April 4, 2013. On April 4, 2013, the FCC approved the redefinition of the service areas by virtue of not taking any action to the contrary.³ The Commission takes administrative notice of the FCC’s Public Notice and approval of the redefined service areas.⁴

5. On June 4, 2015, almost three years after the Commission issued its Order Granting Eligible Telecommunications Carrier Status, Cunningham Telephone Company, Inc. (Cunningham); LaHarpe Telephone Company, Inc. (LaHarpe); Moundridge Telephone Company (Moundridge), Wamego Telecommunications Company, Inc. (Wamego), and Zenda Telephone Company, Inc. (Zenda) (collectively, the RLECs) filed a Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas (Motion).

6. On June 11, 2015, Commission Staff (Staff) filed its Response to Motion to Reopen Docket, opposing the RLECs’ Motion on grounds the RLECs: (1) have not cited to any provision of law entitling them to notice of this proceeding;⁵ (2) do not possess any due process

² FCC Public Notice, WC Docket No. 09-197, 28 FCC Rcd. 46, 28 F.C.C.R. 46, 2013 WL 74253 (Jan. 4, 2013).

³ *Wamego Tel. Co., Inc.*, at *5.

⁴ See K.S.A. 60-409(b); K.A.R. 82-I-230(h).

⁵ Staff’s Response to Motion to Reopen Docket, June 11, 2015, ¶ 8.

liberty or property right in the way service territories are drawn or to be free from competition;⁶ (3) are not entitled to intervene simply because Wamego was permitted to intervene in the 15-396 Docket;⁷ and (4) have not followed proper administrative procedure.⁸

7. On June 19, 2015, the RLECs filed their Reply to Staff's Response to Motion to Reopen Docket.

8. Before the Commission ruled on the Motion, on July 20, 2015, the RLECs filed their Petition for Reconsideration, asserting it is arguable that by not issuing a ruling on the Motion within thirty days, the Commission denied the Motion by operation of law.⁹ The RLECs did not wait for the Commission to rule on their Petition for Reconsideration, and prematurely filed their Petition for Judicial Review a day before the Commission issued its Order Denying Petition for Reconsideration. On August 3, 2015, more than two years after the FCC approved the redefinition of the identified service areas, and nearly three full years after the Commission's Order, the RLECs filed their Petition for Judicial Review of Final Agency Action and for Additional Relief, challenging the Commission Order issued on September 6, 2012.

9. On August 4, 2015, the Commission issued its Order Denying Petition for Reconsideration, explaining the Petition for Reconsideration cannot allege the Order was in any way unlawful or unreasonable as the Commission had yet to issue an order addressing the RLECs' Motion.

10. On August 13, 2015, the Commission filed its Motion to Dismiss with Prejudice alleging the Appellants: (1) lacked standing to bring the appeal; (2) failed to exhaust administrative remedies; and (3) failed to timely file their Petition for Judicial Review. On

⁶ *Id.*, ¶ 12.

⁷ *Id.*, ¶ 20.

⁸ *Id.*, ¶ 22.

⁹ Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas, July 20, 2015, ¶ 2.

February 3, 2016, the District Court issued a Journal Entry, granting the Commission's Motion to Dismiss with Prejudice, and finding the RLECs failed to exhaust their administrative remedies, lacked standing, and did not timely file a petition for judicial review.

11. On February 26, 2016, the RLECs filed their Notice of Appeal. On June 30, 2017, the Court of Appeals reversed and remanded the matter with directions to the District Court to return the Docket to the Commission to issue a final order on the Motion to Reopen Docket.¹⁰ In characterizing the case as a "procedural morass," the Court of Appeals concluded the District Court lacked jurisdiction because the Commission had not issued a final agency decision on the Motion to Reopen Docket.¹¹

12. Following the Court of Appeals' decisions, the RLECs filed for Supreme Court review. On October 27, 2017, the Supreme Court denied the RLECs' Petition for Review.

13. On December 19, 2017, the District Court remanded the matter to the Commission with instruction to issue a final order on the Motion to Reopen the Docket.

14. On February 8, 2018, the Commission issued an Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Reconsideration of Orders Redefining Certain Rural Telephone Company Study Areas, finding the RLECs failed to demonstrate good cause to reopen the Docket.¹²

15. On February 23, 2018, the RLECs filed a Petition for Reconsideration, claiming the Commission's February 8, 2018 Order was not a lawful order,¹³ and was arbitrary and capricious.¹⁴ In arguing the February 8, 2018 Order was not a lawful order, the RLECs claim the

¹⁰ *Wamego Tel. Co., Inc., v. Kansas Corp. Comm'n*, No. 115,406, 2017 WL 2838284, at *16. (Kan. Ct. App. Jun. 30, 2017).

¹¹ *Id.*, *3.

¹² Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Reconsideration of Orders Redefining Certain Rural Telephone Company Study Areas, Feb. 8, 2018, ¶ 15.

¹³ Petition for Reconsideration, Feb. 23, 2018, ¶¶ 46-47.

¹⁴ *Id.*, ¶ 48.

Order “fails to address the merits of Petitioners’ requested relief.”¹⁵ The RLECs appear to accuse the Commission of ignoring the “central issue on appeal: the Commission’s action or inaction on the Motion to Reopen Docket.” Reopening the Docket is a prerequisite to any of the relief sought by the RLECs. By listing their request to reopen the Docket as the first item in their Motion, the RLECs confirm the Commission cannot rescind its 2012 Order without first reopening the Docket.

16. In paragraph 15 of its February 8, 2018 Order, the Commission explained the RLECs failed to demonstrate good cause to reopen the Docket.¹⁶ By not identifying any legal authority requiring the Commission to reopen a Docket which was closed in 2012, the RLECs implicitly acknowledge the decision to reopen the docket is discretionary. In exercising its discretion, the Commission must determine whether the RLECs provided good cause to reopen the Docket. There is a high bar to demonstrate good cause to ignore the Kansas Administrative Procedure Act provisions governing reconsideration¹⁷ to reopen a Docket that has been closed for more than five years.

17. The RLECs have not provided good cause to reopen the Docket that has been closed for more than 5 years. In particular, the RLECs failed to address how reopening an old Docket to rescind a Commission Order would not unduly prejudice i-wireless and its customers, who have acted in reliance on the Commission’s Order since 2012. The RLECs also fail to address the Commission’s concerns that ignoring statutory deadlines and allowing its orders to be challenged years after being issued, would eliminate regulatory certainty to the detriment of

¹⁵ Petition for Reconsideration, Feb. 23, 2018, ¶ 7.

¹⁶ Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Reconsideration of Orders Redefining Certain Rural Telephone Company Study Areas, Feb. 28, 2018, ¶ 15.

¹⁷ See *id.*, ¶ 17.

both industry and consumers.¹⁸ The RLECs could not overcome these two factors to demonstrate good cause to reopen the Docket.

18. The Commission is not required to render its findings of fact in minute detail,¹⁹ nor is it required to discuss all of the evidence presented,²⁰ nor is it required to explain its decision for not accepting every piece of evidence presented.²¹ Instead, the Commission's findings only need to be specific enough to allow judicial review of the reasonableness of the order.²² Even if the Commission's findings were "of less than ideal clarity, if the agency's path may reasonably be discerned", the Commission's findings will be upheld.²³ The February 28, 2018 Order explains the RLECs did not provide good cause to reopen a Docket closed for more than five years because it could not overcome the Commission's concerns that reopening the Docket would unduly prejudice parties who have acted in reliance of the 2012 Order and would undermine regulatory certainty.²⁴ For these reasons, the Commission's Order provided an adequate basis for appellate review and is a lawful order under the standards of K.S.A. 77-526(c) and K.A.R. 82-1-232(a)(3).

19. The RLECs also criticize the Commission for not addressing its due process argument that they were denied notice of the Docket.²⁵ The RLECs raised this issue in their earlier appeal. The District Court of Pottawatomie County concluded:

The Order did not impact the RLECs' ability to offer service. The only party performing different services based on the Commission's Order is i-wireless, which was authorized to offer service to low-income Lifeline customers. K.S.A. 66-1,193 simply requires the Commission to serve its

¹⁸ See *id.*, ¶ 19.

¹⁹ *Zinke & Trumbo, Ltd. v. Kansas Corp. Comm'n*, 242 Kan. 470, 475 (1988).

²⁰ *In re Application of Southwestern Bell Tel. Co.*, 9 Kan. App. 2d 525, 535, *rev. denied* 236 Kan. 875 (1984).

²¹ *Southwest Kansas Royalty Owners Ass'n*, 244 Kan. 157, 190 (1989).

²² *Zinke*, 242 Kan. at 475.

²³ *Western Resources, Inc. v. Kansas Corp. Comm'n*, 30 Kan. App. 2d 348, 374, *rev. denied* 274 Kan. 1119 (2002).

²⁴ Order Denying Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Reconsideration of Orders Redefining Certain Rural Telephone Company Study Areas, ¶¶ 17, 19.

²⁵ Petition for Reconsideration, ¶ 38.

Order on i-wireless, which the Commission did upon issuance of the Order. Since the Order did not alter or modify the service to be performed by the RLECs, K.S.A. 66-1,193 does not require the Commission to serve the RLECs, which were not parties to the 12-848 Docket. As K.S.A. 66-1,193 is the only authority offered by the Appellants to support their claim that notice was required, the Commission was not required to serve the RLECs with the Order.²⁶

In their appeal of the District Court's Journal Entry, the RLECs argued, "the District Court erred in finding the Appellants were not entitled to notice of the proceeding redefining their respective service areas."²⁷ In remanding the matter to the District Court to rule on the RLECs' Motion to Reopen the Docket, the Court of Appeals limited its holding to concluding the District Court lacked jurisdiction over the appeal because there was no final agency decision before the court.²⁸ The Court of Appeals could have remanded with instructions to vacate the Order because of inadequate notice, but chose not to.

20. The Commission agrees with the District Court's legal conclusions that since the 2012 Order did not alter or modify the service to be performed by the RLECs, K.S.A. 66-1,193 does not require the Commission to serve the RLECs. The Commission's 2012 Order is lawful.

21. Lastly, the RLECs argue the February 8, 2018 Order is arbitrary and capricious. The RLECs appear to argue the Commission's February 8, 2018 Order is arbitrary and capricious because it is inconsistent with Docket No. 15-COXT-396-ETC (15-396 Docket). There are two fatal flaws in the RLECs' argument. First, appellate courts have generally recognized an agency may change policies if supported by substantial competent evidence and if it explains the basis for its change in policy.²⁹ But the RLECs have neither plead nor demonstrated the Commission has a policy in place governing intervention. Similarly, the

²⁶ Journal Entry, *Wamego Tel. Co. v. Kansas Corp. Comm'n*, Case No. 15CV47, Feb. 3, 2016, p. 7.

²⁷ Brief of Appellants, *Wamego Tel. Co. v. Kansas Corp. Comm'n*, No. 16-115406-A (July 21, 2016), p. 10

²⁸ *Wamego Tel. Co., Inc., v. Kansas Corp. Comm'n*, No. 115,406, 2017 WL 2838284, at *3.

²⁹ *Western Resources*, 30 Kan. App. 2d at 360.

RLECs have failed to demonstrate a change in policy. More importantly, the Commission has a clear explanation for why intervention was granted in the 15-396 Docket, but not in the present Docket. On March 10, 2015, Cox Telecom filed an application for Designation as an Eligible Telecommunications Carrier. Just one week later, on March 17, 2015, Wamego filed a Petition to Intervene. In the 15-396 Docket, Wamego timely filed for intervention. In the present Docket, the RLECs did not attempt to intervene until June 4, 2015 -- more than three years after i-wireless filed its application and nearly three years after the Commission issued its order granting i-wireless's ETC designation. The 15-396 Docket did not establish any precedent requiring the Commission to grant intervention filed more than three years after a final order had been issued.

22. The RLECs also appear to allege the Commission's February 8, 2018 Order was arbitrary and capricious because it engaged in speculation as to how the FCC would act if the Commission rescinded its 2012 Order. The RLECs improperly attempt to shift the burden of proof to the Commission. It is the RLECs' responsibility, not the Commission's, to demonstrate good cause exists to reopen the Docket. The RLECs propose to resolve the purported improper speculation by engaging in rampant speculation of their own.

23. The Commission is not aware of an instance where a state commission has suggested the FCC rescind a redefinition already approved by the FCC. The RLECs can only speculate that the FCC would be receptive to reversing the redefinition, in spite of the FCC's stated policy favoring competition. Since the FCC's stated policy is to encourage competition, the RLECs bear an even greater burden to demonstrate a likelihood that the FCC would consider reversing a redefinition it has already approved. The RLECs cannot meet that burden. They offer nothing more than mere speculation as to how the FCC might act. Mere speculation is not

sufficient to demonstrate good cause to reopen the Docket. Accordingly, the Commission did not act arbitrarily or capriciously when it determined there was not sufficient likelihood that the FCC would rescind its redefinition order to support reopening the 12-848 Docket.

THEREFORE, THE COMMISSION ORDERS:

A. Cunningham, LaHarpe, Moundridge, Wamego, and Zenda's Petition for Reconsideration is denied.

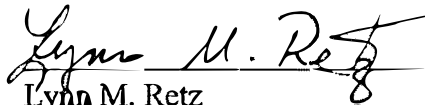
B. This Order constitutes final agency action. Any request for review of this action shall be filed in accordance with K.S.A. 77-607 and K.S.A. 77-613. Lynn M. Retz, Secretary of the Commission is the proper party to receive service of a petition for judicial review on behalf of the agency.³⁰

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner (recused); Apple, Commissioner

Dated: 03/22/2018


Lynn M. Retz
Secretary to the Commission

BGF

³⁰ K.S.A. 77-613(e).

CERTIFICATE OF SERVICE

12-IWRZ-848-ETC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of
electronic service on 03/22/2018.

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