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

MOTION TO REOPEN DOCKET,
PETITION FOR LEAVE TO INTERVENE
AND
PETITION FOR RESCISSION OF ORDERS REDEFINING CERTAIN RURAL TELEPHONE COMPANY STUDY AREAS

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/petitioners") and move that the Commission reopen its Docket No. 12-IWRZ-848-ETC for the limited purpose of reviewing and rescinding its order redefining the study areas of each of the movants. In support thereof the movants state as follows:

1. Each of the movants is a rural telephone company as defined in K.S.A. 66-1,187(l) and an incumbent local exchange carrier certificated by the Commission. The rights and interests of each are at issue in this proceeding, no other party is able to protect such rights and interests, and upon reopening the proceeding each should be granted the right to intervene.

2. None of the movants received notice of the application or of any proceeding or action in this Docket.

3. Redefinition of the study area of a rural company serving multiple exchange areas (like Cunninghm, Moundridge and Wamego) affects that

company's rights and interests. If a company's study area is redefined generally, albeit only in a proceeding seeking ETC designation only for federal Lifeline-only support, the redefinition allows other potential (including non-Lifeline only) carriers to request certification and/or broader ETC designation, evading the pre-redefinition requirement that such applicant propose to serve the entire original study area of the incumbent rural company. Such an applicant may choose to "cherry pick" and serve only a limited and lower-cost area of the incumbent's service area, thereby creating an unfair, governmentally originated, biased competitive advantage to the applicant and an unreasonably discriminatory disadvantage to the incumbent.

4. The subject Order creates, unlawfully and unnecessarily, an incentive for anticompetitive behavior by requiring less burden, investment and cost of a competitor than is required of an incumbent provider. The order redefining the study areas of Cunningham, Moundridge and Wamego therefore affects each of their respective interests adversely. The record reflects this action was taken without due notice to the movants in violation of the due process protections afforded to them by the 14th amendment to the United States Constitution. Each of these carriers, and LaHarpe and Zenda, are additionally adversely affected by the Commission Order in that it purports to assert authority to change existing policy without notice, explanation or good cause.

5. As to movants/petitioners LaHarpe, Moundridge, Wamego and Zenda, redefinition of the study area was unnecessary and not properly at issue, at the time it was ordered or thereafter, for the reason that the applicant i-wireless LLC requested designation as an Eligible Telecommunications Carrier ("ETC") for federal Lifeline support in all exchanges of each of these companies.

6. In the Commission's Docket No. 10-VMBZ-657-ETC an applicant (Virgin Mobile) requested Lifeline-only ETC status and redefinition of certain rural telephone companies' study areas. The Commission considered (at ¶ 21 of the Order of November 2, 2011) the study areas of LaHarpe, Moundridge, Wamego and Zenda and recognized redefinition of the same to be unnecessary, for the reason that the applicant in that proceeding proposed service throughout the service area of each such carrier. In the instant proceeding the applicant likewise proposed to offer service in all exchanges of each of these carriers. Neither the law nor the facts differ as to these carriers in the instant proceeding and there is no basis in the record of the instant proceeding justifying a change from that prior determination; such justification is required under *Home Telephone. Co. v. State Corporation Commission*, 31 Kan. App. 2d 1002; 76 P.3d 1071; review denied, *Home Telephone. Co. v. State Corporation Commission*, 277 Kan. 923, January 6, 2004.

7. Reopening the subject docket for the limited purpose requested by the movants is warranted for the reason that none of the movants/petitioners received notice that redefinition of their respective study areas was under consideration. They were therefore denied the constitutionally required reasonable opportunity in the docket to be heard and to present evidence in relation to that request. Additionally, the Order stating that these carriers' respective study areas were redefined was not served on the respective carriers, either when issued or thereafter.

8. Adequate and timely notice is a well-settled element of due process of law. The due process clause of the United States Constitution requires that notice be reasonably calculated to inform parties of proceedings which may

directly and adversely affect their legally protected interests. *Walter v. City of Hutchinson*, 352 U.S. 112, 115, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956).

9. 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. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S.Ct. 437, 442, 84 L.Ed. 656 (1940). See *North Alabama Exp., Jnc. v. United States*, 585 F.2d 783, 786 (5th Cir. 1978). The adequacy of notice must be evaluated with "due regard for the practicalities and peculiarities of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). "The notice must be of such nature as reasonably to convey the required information." Id. "The operative test is that 'the Notice must reasonably apprise *any interested person* of the issues involved in the proceeding.'" *North Alabama Exp., Inc.*, 585 F.2d at 787. (Emphasis added.) "Failure to provide adequate notice is a *jurisdictional defect that invalidates administrative action* until the defect is cured." Id. at 786. (Emphasis added.)

10. The Kansas Supreme Court has recognized the constitutional requirement of notice in proceedings before the KCC:

> "This court has on several occasions held that legislation is not rendered constitutionally invalid because of omission of certain procedural safeguards which may be supplied, by rule or otherwise, by the agency administering the law (see *Brankley v. Hassig*, 130 Kan. 874, 289 Pac. 64). In *Cities Service Gas Co. v. State Corporation Commission*, 192 Kan. 707, 391 P.2d 74, it was stated: . . . . [t]his court has recognized the rule that 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.'" (p. 713.) *Rydd v. State Board of Health*, 202 Kan. 721, 725-26, 451 P.2d 239 (1969).

See also, *Southwest Kan. Royalty Owners Ass'n v. Kansas Corporation Comm'n*, 244 Kan. 157, 171-l 74 (19891, 769 P.2d 1.

11. The Kansas Supreme Court has further recognized that due process requires notice of the issues involved:

> "An administrative hearing . . . 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. . . .'I *Suburban Medical Center v. Olathe Community Hospital*, 226 Kan. 320, Syl 1 4, 596 P.2d 654 (1979). (Emphasis added.)

12. In discussions with Staff counsel, counsel for movants is advised Commission Staff opposes the relief requested herein on the theories that (a) there is no specific and explicit statute or regulation requiring that the movants be given notice, and (b) rescission would be contrary to Commission policy in support of telecommunications competition.

13. In its Order Granting in Part, Denying in Part Petition for Reconsideration, dated January 20, 2015 in Docket No. 15-MRGT-097-AUD, this Commission stated (at ¶ 10, p. 3) "To prevail on a due process claim, a party must show it possesses a definite liberty or property interest, which was abridged, under color of state law, without appropriate process," citing *Kansas Racing Management Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 354 (1989), citing in turn *Board of Regents v. Roth*, 408 U.S. 564, 569-79, 92 S.Ct. 2701, 2705-10, 33 L.Ed.2d 548 (1972).

14. The movants have a property and/or liberty interest in the lawful definition of their respective study areas, as that definition directly affects the fairness or unfairness of circumstances under which they may be required to

compete with other carriers in the required provision of local telecommunications services throughout their respective service areas. The Commission has accepted in its Docket No. 15-CXKC-396-ETC (Order Granting Wamego Telecommunications Company, Inc.'s Petition to Intervene, March 31, 2015) Wamego's verified assertion that an application for authorization to provide service, competitive to that of an incumbent rural telephone company, places at issue the rights and interests of the incumbent, warranting the intervention of the incumbent rural telephone company. Intervention was granted even though no notice of the proceeding had been given to the incumbent carrier, and even though Wamego became aware of the proceeding only inadvertently upon Staff's reference to the instant proceeding (Docket No. 12-IWRZ-848-ETC) in a pleading in the course of Docket No. 15-COXT-396-ETC.

15. While movants LaHarpe and Zenda serve respective study areas consisting of single exchange areas the Order at issue affects their liberty interests as public utilities regulated by the Commission, by subjecting them to orders changing Commission policy and to unnecessary orders without notice, and departing from prior Commission findings without explanation or justification.

16. An Order redefining an incumbent rural telephone company's study area to an area less than its entire service area creates incentive for another carrier to provide competitive service in less than the incumbent carrier's service area, including an area in which service can be provided on average at a lower cost than would be borne to serve the entire area. The incumbent carrier, meanwhile, is required to continue service throughout the entire service area, imposing a higher cost per customer on the incumbent than on the putative

competitor. An order redefining an incumbent carrier's study area therefore imposes on the incumbent a competitive disadvantage concurrent with the continuing mandate to provide service. This combination of competitive disadvantage and governmentally mandated service adversely affects each movant in both its property interests and its liberty interests. Each carrier has a liberty interest in the observance of applicable law by the administrative agency having broad regulatory control over the carrier's provision of service to the public.

17. Whether or not there was evidence that would support the Commission's Order redefining study areas, and whether or not the Commission made specific findings thereon, the failure to provide notice to the movants that such an Order was under consideration denied to the movants the ability to present evidence on the question. This failure of notice and the resulting Order abridged the rights of the movants under color of state law without appropriate process.

18. The Order redefining the respective study areas of the movants is an order "whereby 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 are altered, changed, modified, fixed or established." K.S.A. 66-1,193(b). Accordingly that statute requires that such Order "shall be reduced to writing, and a copy thereof, duly certified, shall be served on the telecommunications public utility affected thereby" (emphasis supplied.)

19. K.S.A. 66-1,193(b) further specifies the effectiveness of an order is dependent on the order's service: "Such order and decision shall become

operative and effective within 30 days after such service." The failure to effectuate such statutorily mandated service renders the Order statutorily insufficient and ineffective as to the individual movants/petitioners in the absence of service.

20. It is immaterial whether Commission Staff believes the Order advances public policy in support of competition, or whether such policy is consistent or inconsistent with the legislative mandate to preserve and enhance universal service (K.S.A. 66- 2002(c)). The Order is invalid as issued. Competition is lawfully fostered only though respect for, and observance of, all laws, regulations and lawful Orders affecting the authority of a proposed provider to provide a competitive telecommunications service. Any proposed carrier that wishes to offer a service, competitive to a service required to be offered by any of the respective movants, retains the right to make lawful application and receive lawful consideration by the Commission. Rescission of the redefinition Order unlawfully entered does not preclude lawful, fair and unbiased competition.

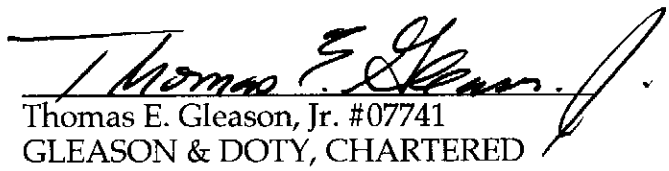
21. There have been no applicants known to movants for authority to provide a competitive service in any of the movants' service areas in the period since the Order at issue was entered, save an application in Docket No. 15-CXKC-396-ETC that is to be withdrawn following Staff's Motion to Dismiss. There is no evidence that the Order at issue advanced competition in fact, nor that its rescission will preclude another communications service provider's actual effort to offer a competitive service. Rescission will, however, assure that any such competitive effort complies with all lawful requirements and that such competitive effort will be fair, nondiscriminatory and even-handed rather than being biased through the actions of the Commission.

22. The request for rescission of the Commission's order redefining the movants' study areas is not adverse to the interests of i-wireless, to the interests of any party or to the public interest. 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 relief requested will have no effect on i-wireless's status as an ETC for federal Lifeline support

23. Rescission would restore the movants to their prior lawful circumstances without adversely affecting the interests of any other party. 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.

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

Respectfully submitted,



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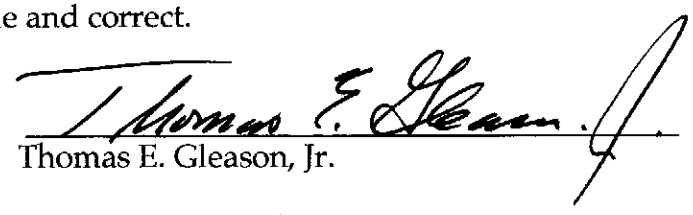
VERIFICATION

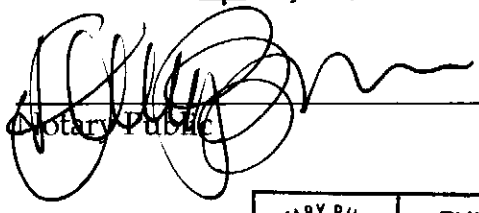
STATE OF KANSAS, DOUGLAS COUNTY, ss:

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 Motion and Petition; that the statements, allegations and matters contained therein are true and correct.



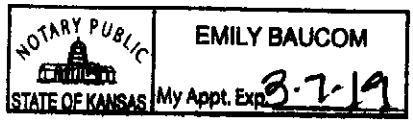
Thomas E. Gleason, Jr.

Subscribed and sworn to before me this 4th day of June, 2015.



Notary Public

My Appointment Expires: 3-7-19



CERTIFICATE OF SERVICE

Thomas E. Gleason, Jr. certifies that the above and foregoing Motion and Petition was served on the following by mailing a copy thereof to each on the 4th day of June, 2015:

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