

Before the
KANSAS CORPORATION COMMISSION
1500 SW Arrowhead Road
Topeka, KS 66604-4027

STATE CORPORATION COMMISSION

JUL 07 2009

In the Matter of:)
)
Application of Community Wireless) Docket No. 09-CWCZ-976-VSA
Communications Filing for Kansas Video)
Service Authorization)

 Docket Room

PETITION TO DENY APPLICATION

I. INTRODUCTION AND SUMMARY.

The World Company d/b/a Sunflower Broadband (“Sunflower Broadband”) petitions the Kansas Corporation Commission (“Commission”) to deny the Application for Video Service Authorization (“Application”) filed by Community Wireless Communications, Co. (“CWC”).¹ The Commission should deny the Application because, on its face, the Application shows CWC fails to meet threshold requirements of the Kansas Video Competition Act (“KVCA”). In short, the Application represents little more than a pie-in-the-sky, speculative venture seeking fast-track, unconstrained access to rights-of-way in the City of Lawrence, and the Commission should reject it.

A brief review of the Application shows it fails to meet fundamental requirements of the KVCA in at least four respects:

- 1. CWC does not provide video service or video programming, and has submitted no evidence that it ever will.** Under the KVCA, Video Service Authorizations are limited to those that provide, or will provide “video service” or “video programming” as defined

¹ *In the Matter of the Application of Community Wireless Communications Filing for Kansas Video Service Authorization*, Docket No. 09-CWCZ-976-VSA (filed June 16, 2009).

by the statute. CWC does not provide video service or video programming, and has failed to submit any evidence showing that it will ever do so.

2. CWC does not provide local broadcast signals or emergency alert messages, and has submitted no evidence that it ever will. The KVCA obligates video service providers to provide local broadcast signals or emergency alert messages from the emergency broadcast system. CWC does not distribute local broadcast signals and does not provide emergency alert messages, and has failed to submit any evidence showing that it will provide either.

3. CWC does not comply with a range of federal laws and regulations applicable to video service providers, has submitted no evidence that it will, and has admitted in an FCC filing that it will not comply with the “must carry” laws. Under the KVCA, a video service provider must comply with all applicable federal laws and regulations. But CWC does not comply with a range of FCC regulations governing multichannel video program distributors, and has submitted no evidence that it will. Moreover, in a recent FCC filing, CWC stated that it will not provide any local broadcast signals in the City of Lawrence. This constitutes an admission that CWC will not comply with the “must carry” laws and regulations pertaining to carriage of local broadcast signals.

4. CWC has submitted no evidence that it can deliver on its promise to build a network throughout the City of Lawrence within five years. The KVCA requires video service providers to build out their entire service area in no more than five years. According to the sworn statement of CWC’s President and CEO, CWC attests to its ability to build out a wireline distribution system to 100% of the households in the City of Lawrence by June 14, 2014. CWC currently provides video service to zero households in the City of Lawrence and, upon information and belief, CWC has not even a small fraction of the resources necessary to

build out its claimed network. Moreover, CWC, a company with no video service operations and no wireline video network, fails to demonstrate that it has the managerial, technical and financial resources to build out its network.

For the reasons summarized above, CWC's Application is fundamentally defective and must be denied.

II. ANALYSIS.

A. The Commission's role in reviewing the Application: Effectuate the intent of the legislature.

The legislature expressly charged the Commission with implementing the Video Service Authorization application process.² But the statute contains scant specifics on how the Commission is to do so, especially in a case like this one, where a party challenges an application.

Here, the Commission must be guided by the fundamental rule governing agency action: An agency must act to effectuate the intent of the legislature.³ In the KVCA, the legislature established threshold requirements for obtaining a Video Service Authorization, requirements that an applicant should be readily able to demonstrate that it can meet. Moreover, the legislature felt certain requirements were so important that the applicant had to aver by affidavit that it would meet the requirements.⁴ These provisions evince the legislature's intent that a video service applicant was in fact able to provide video service, provide emergency messages to all customers, comply with applicable laws, and build out its network.

² K.S.A. § 12-2023(a).

³ See *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004) (there is a presumption that the legislature expresses its intent through the language of the statutory scheme it enacts); see *American Trust Administrators, Inc. v. Sebelius*, 273 Kan. 694, 698, 44 P.3d 1253 (2002) (administrative agencies are creatures of statute and their power is dependent upon authorizing statutes; therefore, **any exercise of authority** claimed by the agency must come from within the statutes either expressly or by clear implication) (emphasis added).

⁴ K.S.A. § 12-2023(a).

In a case like this one, where a party challenges the ability of an applicant to meet the statute's threshold requirements, the Commission's role must go beyond mere processing of paperwork and issuance of an order. The Commission must scrutinize, to an appropriate level, to determine whether, in fact, the applicant satisfies the requirements of the KVCA. To not do so would upend the intent of the legislature, permitting *any* person to obtain a video franchise, regardless of lack of video programming, regardless of noncompliance with laws, and regardless of inability to build out a proposed network. No principle of administrative law supports that outcome.

As set forth below, when the Commission subjects the Application to the slightest scrutiny, it falls apart, and denial must result.

B. The Commission must deny the Application because CWC fails to meet the threshold requirements of the KVCA.

In at least four separate respects, CWC and the Application fail to meet the threshold requirements of obtaining a Video Service Authorization. Any one of these would be grounds to deny the Application. Taken together, they show the Application is fatally flawed and must fail.

- 1. The Commission must deny the Application because CWC does not, and will not, provide “video service” or “video programming.”**
 - a. To be eligible for a Video Service Authorization, an applicant must provide or be able to provide “video service” with “video programming” as defined by the KVCA.**

The first threshold requirement under the KVCA is that the applicant is, or will be, a provider of “cable service” or “video service.” Concerning the application process, Section 12-2023(a) limits eligible applicants to entities or persons “seeking to provide cable service or video service.”⁵ Concerning the authority ultimately granted in a Video Service Authorization, Section

⁵ K.S.A. § 12-2023(a).

12-2023(b) limits that to “a grant of authority to provide video service as requested in the application [and] a statement that the grant of authority is subject to lawful operation of the video service by the application. . . .”⁶ The very definition of “video service authorization” reflects the statute’s limited scope: “‘Video service authorization’ means the right of a video service provider to offer *video programming* to any subscriber anywhere in the state of Kansas.”⁷

The definitions section of the KVCA provides key guidance on the limited scope of the statute. Section 12-2022(h) defines "video service" as follows: “‘Video service’ means *video programming* services provided through wireline facilities located at least in part in the public rights-of-way. . . .”⁸ Section 12-2022(g) further defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station. . . .”⁹ incorporating the same definition of “video programming” as the federal Cable Act.¹⁰

In short, the statute only applies to the providers of “video service” or “video programming;” any other type of service falls outside the scope of the statute and is not eligible for a Video Service Authorization.

b. CWC does not provide video service or video programming, and has submitted no evidence that it ever will.

As discussed above, under the KVCA, a video service provider must actually provide video service with video programming as defined by the statute.¹¹ The problem here is that

⁶ K.S.A. § 12-2023(b).

⁷ K.S.A. § 12-2022(i) (emphasis added).

⁸ K.S.A. § 12-2022(h) (emphasis added).

⁹ K.S.A. § 12-2022(g).

¹⁰ *See id.*; *see also* 47 U.S.C. § 522(20) (“the term ‘video programming’ means programming provided by, or generally considered comparable to programming provided by, a television broadcast station”).

¹¹ *Id.*

CWC does not provide video service or video programming, and has submitted no evidence that it ever will.

The Commission knows that providing video programming requires infrastructure, personnel, and, ultimately, the rights to distribute video programming. The infrastructure includes reception facilities, processing facilities, a distribution network, and customer premises equipment. Technical, managerial and administrative personnel are necessary to operate the network, service customers and maintain the business. Finally, rights to distribute video programming must be secured, including retransmission agreements for off-air broadcasters (e.g. ABC, NBC, CBS, Fox) and programming contracts for satellite-delivered programming (e.g. CNN, ESPN, Lifetime, Discovery.)

CWC has absolutely none of this. For a simple reason: It does not provide video programming to a single household. Further, the Application contains no evidence that CWC will ever acquire the necessary infrastructure to actually deliver video programming. The Application merely contains some vendor spec sheets and a one page network schematic. There is no evidence that CWC actually has the equipment or the network, or has committed to purchase it. In short, there is no evidence of any capability to deliver video programming as required by the statute.

Moreover, in an application to the FCC, CWC has essentially stated that it will not provide any local television broadcast signals, and gave no evidence that it would provide *any* video programming as required under KVCA.¹²

¹² Exhibit 1 (Federal Communications Commission, *Cable Community Registration for Community Wireless Communications Co.*) at http://fjallfoss.fcc.gov/servlet/coals.formsPrint?reference_number=216130154&FCC_Identifier=KS0766&appType=CR&showMsg=False (last visited July 2, 2009) (“FCC Community Registration”).

Based on this, the Commission must deny the Application because CWC has provided no evidence that it will, in fact, provide video programming as required by the statute.

2. **The Commission must deny the Application because CWC does not, and will not, provide local broadcast signals or emergency messages.**
 - a. **To be eligible for a Video Service Authorization, an applicant must provide or be able to provide local broadcast signals or emergency alert messages.**

Section 12-2023 contains the second threshold requirement for video service providers.

It states:

a video service provider shall offer the concurrent rebroadcast of local television broadcast channels, or utilize another economically and technically feasible process for providing an appropriate message through the provider's video service in the event of a public safety emergency issued over the emergency broadcast system.¹³

The public safety concerns of this requirement are manifest and expressly stated in the statute.

Every cable operator and multichannel video programming distributor currently holding a Video Service Authorization meets this obligation by retransmitting all local broadcast signals, and further, by providing EAS messages on all video channels as required under FCC regulations.¹⁴

The statute makes clear that Video Service Authorization eligibility rests upon meeting the threshold obligation of providing local broadcast signals or EAS messages.¹⁵

- b. **CWC does not provide local broadcast signals or emergency messages, and has provided no evidence that it ever will.**

As explained above, the KVCA contains the express obligation that a video service provider delivers local broadcast signals or emergency messages “to alert customers to any

¹³ K.S.A. §12-2023(i).

¹⁴ K.S.A. § 12-2023 (i); 47 C.F.R. §§ 11.1- 11.62.

¹⁵ K.S.A. § 12-2023(i).

public safety emergencies.”¹⁶ In the City of Lawrence, this includes alerts of tornadoes, other severe weather, and the range of threats to safety covered by the emergency broadcast system. Without this information, a provider’s customers would be exposed to unnecessary risk of property damage, serious injury or death.

CWC has failed to submit any evidence that it will meet this requirement. Moreover, in an application to the FCC, CWC has essentially stated that it will not be providing any local television broadcast signals,¹⁷ the main source of emergency information for any legitimate video service provider.

Based on this, the Commission must deny the Application because CWC has provided no evidence that it will, in fact, provide all customers with emergency messages from local broadcasters or from the emergency broadcast system. Failure to deny the Application on these grounds would pose a serious risk to public health, safety and welfare, an outcome the Commission cannot permit.

- 3. The Commission must deny the Application because CWC does not, and will not, comply with an array of applicable FCC regulations governing multichannel video programming distributors.**
 - a. To be eligible for a Video Service Authorization, an applicant must comply or be able to comply with all applicable federal laws and regulations.**

Section 12-2023(a)(3) contains the third threshold requirement for a video service provider - compliance with all applicable federal statutes and regulations.¹⁸ For a video service provider, this leads to the federal Cable Act and FCC regulations and the array of obligations therein. A sample of video service provide compliance obligations include: (i) designation of a

¹⁶ K.S.A. § 12-2023(i).

¹⁷ Exhibit 1 (FCC Community Registration).

¹⁸ K.S.A. § 12-2023(a).

principal headend for the video service provider's system;¹⁹ (ii) carriage on the video service provider's system of all local commercial and noncommercial broadcast stations;²⁰ (iii) closed captioning of substantially all video programming transmitted by the video service provider's system;²¹ (iii) installation and testing of emergency alert system equipment on the video service provider's system;²² (iv) maintenance of equipment and technology for processing requirement information contained in digital programming signals;²³ (v) providing set-top boxes with separable conditional access;²⁴ and (vi) maintenance of equipment and technology in the video service provider's system to process copyright protection coding in digital programming.²⁵ And this is just a sample.

The statute makes clear that Video Service Authorization eligibility rests upon complying with these and all other applicable FCC regulations. The legislature found this requirement so important that the KVCA requires an affidavit from an applicant attesting to compliance.²⁶

b. CWC does not comply with multiple applicable FCC regulations and has provided no evidence that it ever will.

As explained above, the KVCA contains the express obligation that a video service provider will comply with all applicable federal laws and FCC regulations. As the regulations cited above suggest, for a multichannel video programming distributor today, FCC compliance is no simple matter. While regulatory compliance may be complicated, the legislator clearly expressed the importance of full compliance by video service providers.²⁷

¹⁹ 47 C.F.R. §§ 76.1607, 76.1708

²⁰ See 47 U.S.C. §§ 534, 535; see also 47 C.F.R. §§ 76.55- 76.57

²¹ See 47 C.F.R. § 79.1

²² See 47 C.F.R. §§ 11.1- 11.62

²³ See 47 C.F.R. § 76.640

²⁴ See 47 C.F.R. §§ 76.1200- 76.1206

²⁵ See 47 C.F.R. §§ 76.1901- 76.1909

²⁶ See K.S.A. § 12-2023(a)(3).

²⁷ *Id.*

CWC currently does not comply with any of these regulations and has provided no evidence that it will. Moreover, in an application to the FCC, CWC has essentially stated that it will not be providing any local television broadcast signals. This amounts to an admission that CWC will not comply with the “must carry” laws and regulations applicable to all multichannel video programming distributors.²⁸ These laws and regulations give local broadcaster signals the right to obtain carriage on video distribution systems in their markets. The U.S. Supreme Court has upheld “must carry” as advancing the important government interest of making diverse information available from a multiplicity of sources.²⁹

So not only has CWC submitted no evidence of compliance with, or ability to comply with, an array of applicable FCC regulations, we provide evidence here of CWC’s plans to disregard fundamental legal obligations pertaining to local broadcast signal carriage.

Based on this, the Commission must deny the Application due to CWC’s lack of compliance with federal laws and regulations.

²⁸ See 47 U.S.C. §§ 534- 535; see also 47 C.F.R. §§ 76.55- 76.57.

²⁹ See *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997) (“requirement of Cable Television Consumer Protection and Competition Act, mandating carriage of local broadcast television stations on cable television systems, Congress' interests of preserving benefits of free, over-the-air local broadcast television, promoting widespread dissemination of information from multiplicity of sources, and promoting fair competition in market for television programming were important governmental interests”).

4. **The Commission must deny the Application because CWC has provided no evidence that it has the ability to build a wireline network passing 100% of the households in the City of Lawrence in five years.**
 - a. **To be eligible for a Video Service Authorization, an applicant must have the ability to serve 100% of the households in its proposed service area within five years.**

Section 12-2023(a)(5)(A) states the fourth threshold requirement of a video service provider - actually making video service available throughout the proposed service area within no more than five years.³⁰ Put another way, to receive a Video Service Authorization, the video service provider must have the technical, managerial and financial ability to build out and operate a network in the requested service area, all within five years. The legislature found this requirement so important that the KVCA requires an affidavit from an applicant attesting to the capability of the applicant to build out its network and provide service to all households in the service area.³¹

- b. **CWC has no existing video network or infrastructure and has provided no evidence that it has the ability to build a wireline network passing 100% of the households in the City of Lawrence in five years.**

The KVCA contains the express obligation that a video service provider makes service available to all households in its service area within five years of receiving a Video Service Authorization. CWC has applied for a Video Service Authorization for the entire City of Lawrence. CWC has sworn under penalty of perjury that it will provide video service throughout the City of Lawrence in five years. But nothing in the Application, or any other information available about CWC, provides even a scintilla of evidence that the company can deliver on this promise.

³⁰ K.S.A. § 12-2023(a)(5)(A).

³¹ K.S.A. § 12-2023(a).

By conservative estimate, Sunflower calculates that it will take approximate \$32 million for CWC to build a headend and fiber-to-the-home network throughout the City of Lawrence. No information in the Application, nor any other available information, supports CWC's ability to fund such a project.

The KVCA clearly evinces the legislature's intent that an applicant for a Video Service Authorization can actually build out its proposed network. This requires at least some showing of the managerial, technical and financial ability to back up the Applicant's promise to build out a network. CWC's pie-in-the-sky claim of building out the entire City of Lawrence falls far short of any minimum showing.

Based on this, the Commission must deny the Application due to CWC's lack of managerial, technical and financial ability to build out its proposed network within five years.

C. Denying the Application will uphold the letter and intent of the KVCA and fall well within the authority of the Commission.

With the KVCA, the legislature sought to advance video competition by implementing a state franchise process for video service providers. In doing so, the legislature established a streamlined franchise process and directed the Commission to implement it.

At the same time, the legislature imposed clear threshold requirements for any entity seeking a Video Service Authorization. As set forth above, CWC falls far short of at least four of these requirements.

In administering the KVCA, the Commission's baseline legal obligation is to effectuate the intent of the legislature.³² By denying CWC's application, the Commission will uphold the importance of the threshold application requirements in the KVCA, and deter applications by speculative, fly-by-night ventures seeking fast-track access into the rights-of-way.

³² See *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004); see *American Trust Administrators, Inc. v. Sebelius*, 273 Kan. 694, 698 44 P.3d 1253 (2002).

III. CONCLUSION AND REQUESTED RELIEF.

For the reasons stated above, Sunflower Broadband requests the Commission deny the Application.

Respectfully submitted,



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Attorneys for The World Company d/b/a
Sunflower Broadband

Before the
KANSAS CORPORATION COMMISSION
1500 SW Arrowhead Road
Topeka, KS 66604-4027

In the Matter of:

Application of Community Wireless
Communications Filing for Kansas Video
Service Authorization
Request for Waiver of

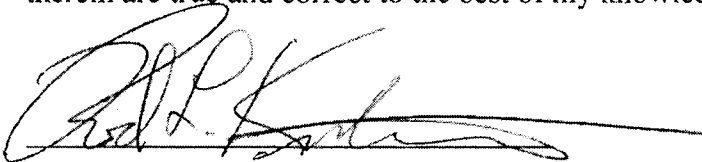
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Docket No. 09-CWCZ-976-VSA

PETITION TO DENY APPLICATION

**Declaration of Rod L. Kutemeier
General Manager
Sunflower Broadband**

1. I serve as the General Manager of Sunflower Broadband.
2. I have read the Petition to which this Declaration is attached, and the facts contained therein are true and correct to the best of my knowledge, information, and belief.



Rod L. Kutemeier

July 6, 2009

CERTIFICATE OF SERVICE

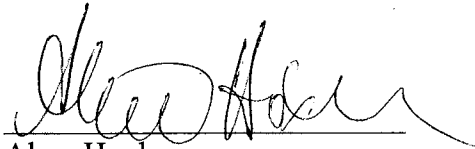
I, Alma Hoxha, paralegal in the offices of Cinnamon Mueller, certify that a true and correct copy of The World Company d/b/a Sunflower Broadband Petition to Deny Application, Docket No. 09-CWCZ-976-VSA, was served on the following individuals by first class mail on July 6, 2009:

Bob Lehr
Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027

Joshua Montgomery
President
Community Wireless Communications Co.
4105 W. 6th St. P.O. Box 3
Lawrence, KS 66047

Guy McDonald
Senior Telecommunications Analyst
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027

David Corliss
City Manager
City Manager's Office
P.O. Box 708
Lawrence, KS 66044-2268



Alma Hoxha
Paralegal
July 6, 2009

EXHIBIT 1

FCC Cable Community Registration



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

CABLE COMMUNITY REGISTRATION
FCC Form 322

Approval Date: June 8, 2009 Confirmation Number: CB42371631

KS0766

1. Indicate the name, mailing address, and telephone number of the cable system operator.

Legal Name COMMUNITY WIRELESS COMMUNICATIONS CO.		FCC Registration No. (FRN) 0018799361	
Assumed/ doing business as (dba) name LAWRENCE FREENET			
Mailing Address 4105 W. 6th St.P.O. Box PO BOX 3532	City Lawrence	State KS	Zip Code 66047
Telephone No. ()	Email (optional)		

2. Indicate whether the operator is an individual, private association, partnership, corporation, or government entity.

Individual Private Association Partnership Corporation Government Entity

3. Indicate the name, telephone number, and e-mail address (if any) of the person responsible for questions regarding this form.

Name of Contact Joshua Montgomery	Telephone No. 785 B31-2086	E-mail Address joshua.montgomery@civicwifi.com
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4. Indicate the Physical System Identifier (PSID) if the community will be served by an existing system 021424

5. Provide a date (MM/YYYY) when this community began service. 07/2013

6. Indicate the community name, county, state, and type code of the community from the list provided in the instructions.

Name of Community LAWRENCE	County DOUGLAS	State KS	Type Code 5
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7. Indicate the local television broadcast signals (i.e. call signs) to be carried on this system.

NA								

8. Certification

By signing below, the operator also certifies that neither the operator nor any other "party" to the notification is subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862. For the definition of a "party" for this purpose, see 47 C.F.R. § 1.2002(b).

Type or Print Name Joshua Montgomery	Title President
Signature	Date 6/08/2009

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (18 U.S.C. § 1001) AND/OR REVOCATION OF ANY STATION LICENSE (47 U.S.C. § 312 (a) (1)), AND/OR FORFEITURE (47 U.S.C. § 503).

CM CINNAMON MUELLER

A Professional Limited Liability Company

307 North Michigan Avenue, Suite 1020
Chicago, Illinois 60601
Telephone: 312-372-3930
Facsimile: 312-372-3939

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Christopher C. Cinnamon
Admitted in Illinois, Kansas, and Michigan

July 6, 2009

Bob Lehr
Litigation Counsel
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1500 SW Arrowhead Road
Topeka, KS 66604-4027

Via Federal Express
Confirmation #: 796751965431

**Re: Application of Community Wireless Communications;
Docket No. 09-CWCZ-976-VSA;
Petition to Deny Application**

Dear Mr. Lehr:

On behalf of Sunflower Broadband, we enclose an original and seven copies of the Petition to Deny Application in the above referenced docket.

Please contact us with any questions.

Sincerely,



Christopher C. Cinnamon

Enclosures

cc: Patrick Knorr
Rod Kutemeier