

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Shari Feist Albrecht, Chair
Jay Scott Emler
Pat Apple

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

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

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the files and records, the Commission finds:

1. On May 29, 2012, i-wireless, LLC (i-wireless) filed its Petition for Limited Designation as an Eligible Telecommunications Carrier pursuant to § 214(e)(2) of the Communications Act of 1934, §§ 54.101 through 54.207 of the Rules of the Federal Communications Commission, and K.S.A. 66-2008(b).

2. On September 6, 2012, the Commission issued its Order Granting Eligible Telecommunications Carrier Status.

3. On January 4, 2013, the Federal Communications Commission (FCC) released Public Notice, WC Docket No. 09-197, Wireline Competition Bureau Seeks Comment on I-Wireless, LLC's Petition for Commission Agreement in Redefining the Service Areas of Rural Incumbent Telephone Companies in Kansas.¹ The FCC's Public Notice provides in relevant part, "[i]n its petition, i-wireless requests the [FCC]'s agreement with the Kansas State

¹ *Wamego Tel. Co., Inc., v. Kansas Corp. Comm'n*, No. 115,406, 2017 WL 2838284, at *4. (Kan. Ct. App. Jun. 30, 2017).

Corporation Commission's conclusion to redefine the service areas of certain rural incumbent 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' 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. 82-1-230(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 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

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. 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.

10. 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.

11. 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.

12. 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

13. 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.

14. 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.

15. The RLECs have not demonstrated good cause to reopen the Docket.¹² As the Court of Appeals noted, the RLECs are attempting to reopen an administrative proceeding that concluded years ago.¹³ The RLECs waited almost 3 years to challenge the Commission's decision to grant i-wireless's application for ETC designation.¹⁴ The RLECs compounded the delay in filing a premature appeal, rather than wait for the Commission to rule on the Motion.¹⁵ By seeking Supreme Court review, the RLECs prevented the Commission from acting on their Motion for an additional three months.

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 See K.A.R. 82-230(k).

¹³ *Wamego Tel. Co., Inc.*, at *2.

¹⁴ *Id.*, at *5.

¹⁵ See *id.*, at 6.

16. The RLECs have not identified any legal authority requiring the Commission to reopen a Docket which was closed in 2012. Since the Commission granted ETC designation to i-wireless, the FCC approved the redefinition of the service areas covered in this Docket. The RLECs have not demonstrated the Commission should or even is able to ignore the FCC's redefinition of the service areas.

17. The RLECs simply waited too long to challenge the Commission's decision granting i-wireless ETC status. To grant the RLECs' Motion, the Commission would have to ignore K.S.A. 77-529, which sets a 15-day deadline to file a Petition for Reconsideration, as well as K.S.A. 77-613, which requires a Petition for Judicial Review to be filed within 30 days. The Legislature enacted those deadlines to impose some regulatory certainty. If the Commission were to ignore the statutory deadlines and allow its orders to be challenged years after being issued, utilities would never be able to rely on a Commission order as it would be subject to appeal forever, by any entity, even an entity that did not participate in the Commission proceeding. There is a reason the legislature enacted the process for judicial review and ensured that it was not completely open ended. The RLECs have failed to demonstrate why the Commission should ignore the judicial review process and reopen the Docket.

18. In their Brief to the Court of Appeals, the RLECs acknowledge they "do not contend their service areas cannot be redefined."¹⁶ In doing so, they admit the Commission acted within its authority in granting ETC designation to i-wireless. Therefore, there is no justification to reopen the Docket. As public utilities, the RLECs have "no right to be free of competition" and their local franchises confer no contractual property right to be free of

¹⁶ Brief of Appellants at. 9, *Wamego Tel. Co., Inc., v. Kansas Corp. Comm'n*, No. 115,406 (Kan. Ct. App. Jun. 21, 2016).

competition from other public utility corporations.¹⁷ Therefore, the RLECs cannot and have not asserted a legally protected interest affected by the Commission's Order granting ETC designation to i-wireless. If the RLECs are not claiming their monopoly interest as a protected interest, then there are no adverse effects of allowing i-wireless to offer limited service in their assigned territories. Accordingly, there is no reason to reopen the Docket to reevaluate the Commission's decision to grant ETC designation to i-wireless.

19. The RLECs have not provided good cause to reopen a Commission Docket that has been closed for more than 5 years. Reopening an old Docket to rescind a Commission Order would unduly prejudice i-wireless and its customers, who have acted in reliance on the Commission's order since 2012. It would also ignore the FCC's redefinition of the service areas and would not be in public interest as it would weaken regulatory certainty.

THEREFORE, THE COMMISSION ORDERS:

A. Cunningham, LaHarpe, Moundridge, Wamego, and Zenda's Motion to Reopen Docket, Petition for Leave to Intervene and Petition for Rescission of Orders Redefining Certain Rural Telephone Company Study Areas is denied.

B. The parties have 15 days from the date of electronic service of this Order to petition for reconsideration.¹⁸

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

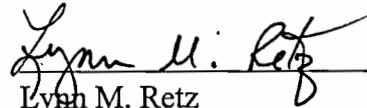
¹⁷ *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 139, 59 S. Ct. 366, 370, 83 L.Ed 543 (1939).

¹⁸ K.S.A. 66-118b; K.S.A. 77-529(a)(1).

BY THE COMMISSION IT IS SO ORDERED.

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

Dated: FEB 08 2018


Lynn M. Retz
Secretary to the Commission

EMAILED

BGF

FEB 08 2018

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 FEB 08 2018.

THOMAS E. GLEASON, JR., ATTORNEY
GLEASON & DOTY CHTD
PO BOX 6
LAWRENCE, KS 66049-0006
Fax: 785-856-6800
gleason@sunflower.com

JOHN WILLIS
I-WIRELESS, LLC
ONE LEVEE WAY STE 3104
NEWPORT, KY 41071-1661
Fax: 859-261-6639
john.willis@iwirelesshome.com

BRIAN G. FEDOTIN, DEPUTY GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3314
b.fedotin@kcc.ks.gov

MICHAEL NEELEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604-4027
Fax: 785-271-3167
m.neeley@kcc.ks.gov

LANCE J. M. STEINHART, ATTORNEY
LANCE J.M. STEINHART, P.C.
1725 WINDWARD CONCOURSE
SUITE 150
ALPHARETTA, GA 30005
Fax: 770-232-9208
lsteinhart@telecomcounsel.com

/s/ DeeAnn Shupe
DeeAnn Shupe

EMAILED

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