


BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

APR 26 2011

In the Matter of the Proceeding to Conduct a Financial )  
and Operational Audit of Kansas Relay Service, Inc.'s )  
("KRSI") Administration of the Dual Party Rely )  
Service and Telecommunications Access Program )  
("TAP") to Determine that Costs Recovered Through )  
the Kansas Universal Service Fund ("KUSF") for these )  
Programs and Reasonable and Appropriate. )

  
Docket No. 07-KRST-143-KSF

**KTIA'S PETITION FOR RECONSIDERATION AND REQUEST FOR HEARING**

COMES NOW Kansas Telecommunications Industry Association ("KTIA") and pursuant to K.S.A. 77-529 and K.A.R. 82-1-235 petitions the Kansas Corporation Commission ("Commission") for reconsideration of its order dated April 12, 2011, directing its Staff to go forward with a request for proposals ("RFP") process to select an administrator for the Telecommunications Relay Service ("TRS") and Telecommunications Access Program ("TAP"). In support of its petition KTIA states as follows:

**I. INTRODUCTION**

1. On August 10, 2006, the Commission opened this docket to allow the Commission Staff to conduct a financial and operational audit of the TRS and TAP programs governed by the Kansas Relay Service, Inc. ("KRSI") to determine whether the costs incurred in administering the TRS and TAP programs, which are paid out of the Kansas Universal Service Fund ("KUSF"), are reasonable. The Commission directed its Staff to determine (1) whether there has been compliance with previous Commission orders; (2) whether the TAP voucher system and outreach efforts have been efficient; and (3) whether the costs incurred in administering the programs are reasonable. See, **August 10, 2006, Order, page 12.**

2. On October 25, 2010, the Commission Staff issued a Report and Recommendation in

this docket setting forth the results of its audit ("Report and Recommendation").

3. The main concern raised in the Report and Recommendation with respect to the reasonableness of the costs incurred by KRSI to administer the TRS and TAP programs related to how the management fee between KRSI and KTIA was structured., i.e., the use of a fixed monthly management fee. Because of the structure of the management fee, the Commission Staff concluded it could not determine the reasonableness of said fee and suggested the Commission order KRSI to issue an RFP in order to select an administrator for the TRS and TAP programs. With respect to the efficiency of the programs, the Commission staff recommended applicants under the TAP program should be required to submit verification of income and residence and suggested the TAP Coordinator should order all equipment for all applicants and determine whether a volume discount on equipment purchases could reduce program costs.

4. On November 5, 2010, KRSI filed its response to the Report and Recommendation. KRSI pointed out the structure of the management fee used with KTIA was the one that had been recommended by the Commission in its November 1, 1989, Order, and if the Commission or its Staff believed a different management fee structure should be used KRSI was amenable to using a different structure. KRSI also raised its concern about the possibility of losing the intangible benefits customers receive under KTIA's administration of the TRS and TAP programs if an administrator is selected through an RFP process. Those benefits included KTIA's 20 plus years of experience in administering the programs and its local ties to Kansas and the customers who are served by the programs. KRSI raised a further concern about facing the unknowns that may come with the selection of an administrator through an RFP process, who would not have the benefit of having administered the programs for the past 20 years and who may not have the local ties to Kansas, and thus not have a special stake in the future success of the programs. KRSI also raised the concern that the use of an

RFP process could actually increase the cost to administer the programs and expressed specific concern about the additional cost of developing and conducting an RFP process every 3 to 5 years. KRSI raised a general concern about making changes to something it believed was working well and going down a path that might turn out to be detrimental to the two programs, which have served Kansans with special needs well for the last 20 years. KRSI also suggested there were ways to assure the reasonableness of the management fees charged by KTIA other than to use an RFP process to select the administrator and to run the risk of harming what are admittedly well run and successful programs. KRSI indicated to the Commission that it was willing to work with the Commission Staff regarding that issue. Finally, KRSI addressed the Staff's recommendations regarding the efficiency of the two programs.

5. On November 15, 2010, the Commission Staff filed its reply to the comments made by KRSI and reiterated its recommendation that issuing an RFP to select the administrator of the TRS and TAP programs in Kansas was the most prudent action the Commission could take in this matter to assure cost-based fees were being charged to administer the programs. The Commission Staff did not address the other concerns raised by KRSI.

6. On February 28, 2011, the Commission issued an order in this matter. In its order the Commission discussed the positions of Staff and KRSI regarding the structure of the management fee and the fact KRSI was in the process of completing a cost study relating to the monthly management fee. The Commission also identified the disagreement between Staff and KRSI as to two issues relating to the administration of the TAP program, although did not attempt to resolve the disagreements. The Commission identified KRSI's disagreement with Staff's assertion it is no longer essential for KSRI to have a connection to the telecommunications industry, but again the Commission made no attempt in its order to resolve this disagreement. Finally, the Commission concluded the cost

study being conducted by KRSI should be reviewed before the Commission determined whether an RFP process is the best method to select the administrator of the TRS and TAP programs for Kansas.

Specifically, the Commission ordered its Staff to review KRSI's 2010 cost of service study, to determine whether it demonstrated the fees assessed against KRSI by KTIA are cost based, and report its analysis to the Commission, and presumably to KRSI.

7. On March 15, 2011, the Commission Staff filed a petition for clarification or reconsideration of the Commission's February 28, 2011, Order. The Staff clarified its concern related to the way in which the management fee was structured (a monthly fixed fee) and the cost study being conducted by KRSI would not eliminate its concern. Staff concluded the RFP process was the only way to assure fees charged for the administration of the two programs were cost-based.

8. On March 25, 2011, KRSI filed a response to the Commission Staff's petition for clarification or reconsideration. KRSI reiterated its willingness to work with the Commission Staff to develop a reasonable cost structure to use regarding the management fee for the two programs and expressed again its policy concerns regarding the use of an RFP process to select the administrator of the two programs given the success KRSI has had with the two programs under its relationship with KTIA.

9. On April 12, 2011, the Commission issued an order in this docket directing the Commission Staff to go forward with the RFP process. It indicated KRSI had filed its cost study on March 14, 2011. Under the February 28, 2011, Order, the Commission had ordered its Staff to review the cost study and to report its analysis to the Commission and presumably to KRSI. There is no indication in the record as to whether the Staff conducted its analysis, and/or presented that analysis to the Commission and KRSI. The Commission made a finding in its April 12, 2011, Order that KRSI's cost study "is less than what the Commission anticipated." The Commission also made a

finding the cost study did not support all of the costs the KTIA charged to KRSI, but did not state whether the difference between the amount supported by the cost study and the total amount charged to administer the programs was material or not. The Commission concluded that the cost study failed to show that all costs recovered through the KUSF were reasonable and appropriate, and ordered the Commission Staff to proceed with an RFP process to select an administrator for the TRS and TAP programs. The Commission did not make any findings as to what costs were reasonable and which costs were unreasonable.

10. The Commission's April 12, 2011, order also did not address any of the policy issues raised by KRSI with respect to (1) whether there is the possibility of losing the intangible benefits customers receive under KTIA's administration of the TRS and TAP programs if an RFP process is used to select the administrator of the two programs; (2) whether those known and real intangible benefits outweigh facing the unknowns and uncertainties that may come with the selection of an administrator through an RFP process, who will not have the benefit of having administered the programs for the past 20 years and who may not have the local ties to Kansas that gives the administrator a "real" stake, or sense of pride in working for the continued success of these programs; (3) whether the use of an RFP process might actually increase the cost to administer the programs and whether the fees resulting from an RFP process are really "cost-based" as suggested by the Commission Staff; and (4) whether relying upon an RFP process to select an administrator could lead down a path that turns out to be detrimental to the two programs, which have served Kansans with special needs well for the last 20 years.

11. The Commission's April 12, 2011, order also did not address the disagreements (disputed facts) between the Commission Staff and KRSI, which were generally identified by the Commission in its earlier February 28, 2011, Order.

12. The Commission's April 12, 2011, order was issued based upon the pleadings filed by the Commission Staff and KRSI, and without the benefit of any evidentiary hearing despite a number of material factual issues being in dispute between the Commission Staff and KRSI. In addition, many of the pleadings, including the Report and Recommendation issued by the Commission Staff, and relied upon by the Commission in making its decision, were not verified.

13. On April 22, 2011, KRSI filed a petition for reconsideration and hearing. KRSI asked the Commission to reconsider its decision directing its Staff to undertake an RFP process to select an administrator for the TRS and TAP programs. KRSI complained the Commission made findings related to material facts disputed by the parties without the benefit of an evidentiary hearing, and thus those findings were not supported by any substantial competent evidence and the Commission otherwise failed to follow prescribed procedure as required by K.S.A. 77-621(c). KRSI also complained the Commission had not decided issues requiring resolution as required by K.S.A. 77-621(c). Finally, KRSI asked the Commission to either allow KRSI and the Commission Staff to confer to determine whether an appropriate management fee structure could be agreed upon, or in the alternative, to allow for an evidentiary hearing so the material facts disputed by the KRSI and the Commission Staff (the reasonableness of the management fee; the efficiency of some of the methods used in administering the TAP program; whether the intangible benefits of continuing to use KTIA as administrator of the two programs outweigh any benefit of using an RFP process to select an administrator, etc.) could be decided by the Commission based upon verified testimony from witnesses, including cross examination of those witnesses.

## **II. KTIA'S REQUEST FOR RECONSIDERATION AND A HEARING**

14. KTIA asks the Commission to reconsider its decision directing its Staff to use an RFP process to select an administrator for the TRS and TAP programs. KTIA feels strongly the

Commission will be doing a dis-service to Kansans, if it does not, at the very least, take a step back and consider whether the "easy answer" or "government/bureaucratic answer" - let's just move forward with an RFP process to select an administrator for what are two very important life-changing programs for some Kansans - is the most prudent answer.

15. For the past 20 years, KTIA has had a real stake in the success of the TRS and TAP programs and wishes to continue its involvement in the success of those two programs. After all, it was the Commission that originally selected KTIA to be the administrator of these programs - presumably because the Commission understood the intangible benefits KTIA, and its many rural/local telephone company members, with their direct ties to Kansas and the Kansas customers who would be served by these programs could bring to the table.

16. In seeking reconsideration, KTIA is asking the Commission to take a closer look at whether there is the possibility of losing the intangible benefits customers receive under KTIA's administration of the TRS and TAP programs if an RFP process is used to select the administrator of the two programs. Those intangible benefits include KTIA's 20 plus years of experience in administering the programs and its local Kansas ties. Those intangible benefits may be lost if an RFP process is used to select the administrator.

17. KTIA's employees and association members take pride in the work and services they have provided to Kansans with special needs under the TRS and TAP programs for the last 20 years. A list of the work and services provided, and the extensive experience and knowledge of the KTIA employees who do that work and provide those services include:

- Routinely reviewing the efficiency and quality for TRS to Kansans
- Serve as the public face of the Commission through outreach and education
- Respond to consumer inquiries and complaints

- Perform outreaches to promote relay services and specialized equipment in Kansas
- Maintain collaborative partnerships with other state administrators in such critical areas as emergency preparedness and implementation of new technologies
- Attend and participate in yearly conferences, educational seminars and consumer and industry meetings to facilitate a dialogue on telecommunications issues and the Commission's rules, policies, programs and plans
- Maintain a working knowledge of matters pertaining to relay service in Kansas and nationwide
- Provide data to the KUSF fund administrator regarding cost studies, Relay state certification, annual data summaries, TRS minutes and other pertinent data
- Custodian of the corporate records of the Corporation
- Perform accounting/bookkeeping of Corporation finances, including disbursement of funds and preparation of annual budget
- Prepare the RFP to contract with an appropriate entity to provide TRS to Kansans
- Direct firsthand involvement in the establishment of KRSI and TAP
- The current staff has over 50 years of combined knowledge of relay
- Staff member who serves on the national 9-1-1 Committee for NENA for since 1994
- Two staff members fluent in ASL
- One staff member with over 20 years of interpreting (at level 5 [the highest level])
- Staff member with a lifelong disability
- Staff is knowledgeable of reporting requirements mandatory by the FCC
- Successful lobbying efforts to establish Relay and the Equipment Distribution Program in Kansas
- KTIA has over 100 years of telecommunications experience
- Direct connection with telephone directory publishers
- Direct access to telephone Executives throughout the state



- Staff has an Understanding of the industry regulatory process on a state and national level
- Actively involved in national and state associations
- KTIA has a diverse staff
- Working relationship with state agencies and organizations that provide related services
- Ability to communicate telecom trends to KRSI and TAP consumers and trends in disability services to Telco's
- Cooperation from Telco's for outreach activities (i.e. the inserting of TAP advertisement in telephone bills at no costs to TAP)
- Cooperation from Telco's to provide efficient line installation or equipment troubleshooting
- Network of community agencies serving as Demo Sites at no cost to TAP
- Provide effective training to Demo Site staff so they can assist Kansas consumers in their community
- Oversees inventory of equipment at all Demo Sites
- Proficient in negotiations with specialized equipment vendors and manufacturers
- Knowledge of local telephone providers and the areas they serve
- KTIA is proactive in meeting the needs of its constituents whether it be a Telco or individual
- Established a successful wireless EDP, which several other states are using as a model
- Successfully implemented the CapTel program in Kansas
- Worked with vendors to establish extended equipment warranties
- Staff personally investigated and recovered thousands of dollars from fraudulent equipment vendors
- Established user groups for various disabilities
- Per certified accountants, KTIA is very organized with record keeping

- Staff is flexible, has longevity and integrity

18. In seeking reconsideration KTIA is also asking the Commission to take a closer look at whether the above-mentioned known and real intangible benefits outweigh facing the unknowns and uncertainties that may come with the selection of an administrator through an RFP process, who will not have the benefit of having administered the programs for the past 20 years and who may not have the local ties to Kansas that gives the administrator a "real" stake, or sense of pride in working for the continued success of these programs.

19. The Commission Staff is very knowledgeable and has extensive experience in auditing all types of public utilities operating in Kansas and determining the reasonableness of the expenses those utilities incur in providing service to their customers. KTIA is confident the Commission Staff is capable of determining the reasonableness of what KTIA charges KRSI to run the two programs. Given the expertise the Commission Staff has in auditing public utilities operating in Kansas to determine whether the costs incurred by those public utilities to serve their customers are reasonable, and the fact the Commission Staff has the expertise and capability to accomplish that task without requiring the utility to issue RFP's for the majority of the expenses its incurs in providing services to their customers, KTIA is confident that the Commission Staff can determine the reasonableness of what KTIA charges KRSI to run the two programs without requiring an RFP process to be used to select an administrator for the two programs. In this case there are only four KTIA employees providing the work and services, and the management expenses that need to be audited and determined whether they are reasonable or not are less than \$30,000 a month. That is significantly less than the hundreds of employees that do work for many of the utilities, and the hundreds of thousands of dollars in expenses incurred by those utilities that are routinely audited by the Commission Staff and determined to be reasonable. Certainly, if the Commission Staff can determine the reasonableness of

those expenses without requiring the utilities to issue RFPs for all of the work done internally by the utilities, it can do the same in this case. The Commission Staff, KRSI and KTIA should be able to confer and reach agreement on a reasonable fee structure and fee amount so KTIA can continue to administer the two programs. KTIA requests the Commission reconsider its decision and issue an order in this matter directing the Commission Staff, KRSI and KTIA to confer and see if an agreement can be reached so the administrator does not need to be selected using an RFP process.

20. In seeking reconsideration, KTIA is asking the Commission to consider whether there are other ways to assure the reasonableness of the management fees charged by KTIA other than to use an RFP process to select the administrator, which process might result in disrupting or even harming what are admittedly well run and successful programs. KTIA is asking for reconsideration so the Commission will allow an opportunity for KTIA to work with KRSI and the Commission Staff to come up with a way to determine the reasonableness of the management fee, so Kansans with special needs will not be negatively impacted if a new administrator selected through an RFP process does not work out for whatever reason. KRSI has indicated in its pleadings it is willing to work with Staff to come up with a way to determine the reasonableness of the management fee. KTIA is likewise willing to work with the Commission Staff to come up with a method to determine the reasonableness of the management fee. For example, one way the Commission could determine whether the existing management fee was reasonable would be to compare the costs incurred by KRSI to administer the TRS and TAP programs with the costs being incurred to administer the TRS and TAP programs (on a per customer basis) in other similarly situated states.

21. In seeking reconsideration, KTIA is also asking the Commission to take a closer look at whether the use of an RFP process might actually increase the cost to administer the programs and whether the fees resulting from an RFP process are really "cost-based" as suggested by the

Commission Staff. There has been no evidence included in the record in this docket regarding the costs to develop and issue an RFP every 3 to 5 years and whether those costs might exceed any benefits derived from an RFP process. There is no evidence that bids received under an RFP process would be less than what it is currently costing to administer the two programs. There is also no evidence included in the record to suggest a winning bid under an RFP process would be "cost-based."

22. In seeking reconsideration, KTIA is also asking the Commission to take a closer look at whether relying upon an RFP process to select an administrator could lead down a path that turns out to be detrimental to the two programs, which have served Kansans with special needs well for the last 20 years.

23. KTIA does not believe the Commission or its Staff have taken a close enough look at the above-mentioned issues based upon its review of the pleadings and orders filed in this case to date. KTIA truly believes in the programs and the benefits those programs provide, and does not want to see any degradation of those programs. KTIA believes a closer look and discussion, and perhaps even a hearing, regarding the above-mentioned issues is prudent before making any final decision on how to select an administrator for the TRS and TAP programs.

### **III. BASIS FOR RECONSIDERATION**

24. The Kansas Act for Judicial Review ("KJRA"), K.S.A. 77-601, *et seq.*, which is based in large part on the federal Administrative Procedures Act ("APA"), identifies on a general basis where the Commission's April 12, 2011, Order is deficient and where reconsideration is required. The KJRA mandates that relief from agency action should be granted when the following deficiencies exist:

the agency action.... is unconstitutional ... as applied;

the agency has acted beyond the jurisdiction conferred by any provision of the law;

the agency has not decided an issue requiring resolution;

the agency erroneously interpreted or applied the law;

the agency has engaged in an unlawful procedure or otherwise failed to follow prescribed procedure;

the agency was not properly constituted as a decision-making body or was subject to disqualification;

the agency action was based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole ("the substantial evidence test") ; or

the action was otherwise unreasonable, arbitrary, or capricious.

K.S.A. 77-621(c). KTIA claims the Commission's April 12, 2011, Order runs afoul of several of the proscriptions against agency action identified in the KJRA, and therefore, asks the Commission to reconsider its order to correct those deficiencies.

25. First, the Commission failed to decide several issues requiring resolution. K.S.A. 77-621(c)(3). The Commission failed to address (1) why the structure of the management fee for the two programs that was approved by the Commission in its order establishing the two programs was reasonable at the time the programs were established, but is no longer a reasonable way to structure the management fee; (2) what portion of the fees charged to administer the two programs were unreasonable and why those amounts were unreasonable; (3) whether the two programs were being administered efficiently and resolution of the disputed facts between KRSI and the Commission Staff with respect to this issue (this was actually one of the three issues specifically mentioned by the Commission that it wished to consider in its August 10, 2006, Order opening this docket); (4) whether there is the possibility of losing the intangible benefits customers receive under the current administration of the TRS and TAP programs if an administrator is selected through an RFP process and whether the loss of those intangible benefits outweigh any benefit gained from selecting the

administrator through an RFP process; (5) if the loss of the intangible benefits outweigh any benefit gained from selecting the administrator through an RFP process, is there a way in which the Commission can determine whether the cost to administer the programs is reasonable; (6) whether the use of an RFP process could actually increase the cost to administer the two programs; and (7) whether an RFP process really results in "cost-based" rates.

26. Second, the Commission's findings were not supported by substantial evidence. In making its decision in this case as to whether the administration costs relating to the two programs were reasonable, the Commission must fairly and reasonably weigh the evidence. Its determination must be based on evidence in the record as a whole and reasonable inferences therefrom ("the substantial evidence test"). K.S.A. 77-621(c)(7). The substantial evidence test "has been among the most stable and satisfactory features of our system of administrative law." Davis, Administrative Law Treatise, Vol. II, §11.2, p. 176 (3rd Ed., 1994). Davis' treatise explains that the meaning of the test was clarified by the *United States Supreme Court in Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) where the Court stated "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement...[in APA §706] that courts consider the whole record." The KJRA contains equivalent language requiring the existence of substantial evidence be determined "in light of the record as a whole." K.S.A. 77-621(c)(7). Davis further explains the *Universal Camera* clarification means that "the evidence in support of an agency finding must be sufficient to support the conclusion of a reasonable person after considering all of the evidence in the record as a whole, not just the evidence that is consistent with the agency's finding" and that affirmation of an agency finding is precluded where the evidence detracting from the finding is "disproportionate to the evidence that supports the finding, e.g. a finding based on the testimony of one obviously biased witness that is contradicted by ... powerful

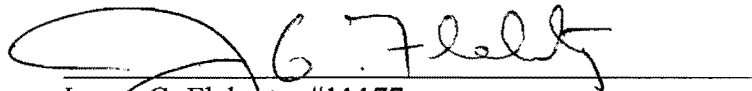
documentary and circumstantial evidence." Davis, *supra*, at § 11.2, pp. 176-177. See also *Citizens' Utility Ratepayer Bd. v. State Corp. Commission of the State of Kansas*, 28 Kan. App.2d 313, 16 P.3d 319 (2000) (to examine whether the Commission's action is supported by substantial competent evidence, the record must contain certain evidence, which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issued tendered can reasonably be resolved.) In the present case, the record consists of an unverified report and recommendation issued by the Commission Staff; responses and replies between KRSI and the Commission Staff relating to the unverified report and recommendation and raising disputes about some of the material facts; a cost study provided by KRSI (that the Commission ordered its Staff to analyze); nothing in the record regarding the analysis of that study by Staff; and no evidentiary hearing. Because of those deficiencies in the record, KTIA submits the Commission's decisions in this matter regarding the reasonableness of the administration costs relating to the TRS and TAP programs were not supported by substantial evidence.

#### **IV. CONCLUSION**

27. KTIA has had a real stake in the success of the TRS and TAP programs for the past 20 years and wishes to continue its involvement in the success of those two programs. When these programs were started the Commission invited KTIA to be the administrator of the programs and KTIA accepted that invitation. The Commission, in selecting KTIA to administer the programs, presumably recognized that KTIA was well suited to carry out the duties of administering the programs for the customers who depend on those life-changing programs. KTIA and its members have taken pride in providing those services for the past 20 years. KTIA feels very strongly the Commission will be doing a dis-service to Kansans, if it does not, at the very least, take a step back and reconsider whether the intangible benefits provided by KTIA's administration of the TRS and TAP

programs outweigh any benefit derived by selecting the administrator through an RFP process. KTIA is confident that if the Commission reconsiders its decision, KTIA can work with the Commission Staff and KRSI to come up with a method to determine the reasonableness of the administration costs relating to the two programs.

WHEREFORE, based upon the statements contained herein, KTIA requests that its Petition for Reconsideration and Hearing be granted, and for such other relief that would be necessary in granting the request set forth herein.

A handwritten signature in black ink, appearing to read "G. Flaherty", is written over a horizontal line.

James G. Flaherty, #11177

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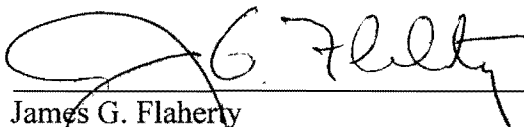


## VERIFICATION

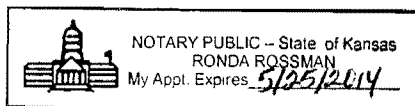
STATE OF KANSAS            )  
  )ss:  
COUNTY OF FRANKLIN    )


James G. Flaherty, of lawful age, being first duly sworn on oath, states:

That he is the attorney for Kansas Telecommunications Industry Association, named in the foregoing Petition for Reconsideration and Request for Hearing, and is duly authorized to make this affidavit; that he has read the foregoing Petition and knows the contents thereof; and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
James G. Flaherty

SUBSCRIBED AND SWORN to before me this 26<sup>th</sup> day of April, 2011.



  
\_\_\_\_\_  
Notary Public

Appointment/Commission Expires:

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 26<sup>th</sup> day of April, 2011, addressed to:

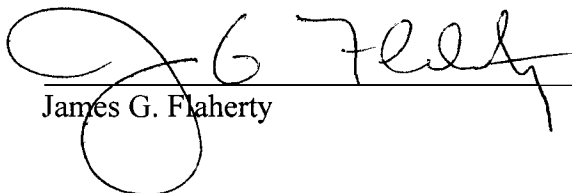
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