IN THE DISTRICT COURT OF NEMAHA COUNTY, KANSAS

CASE NO. 01 C 39
CASE NO. 01 C 40
CASE NO. 03 C 20
CASE NO. 2004 CV 19

STATE OF KANSAS
COUNTY OF NEMAHA } SS
Date 6-18-04
I hereby certify this to be a true copy of the original as filed in this office.
By
Jane Heinen, Clerk, District Court

BLUESTEM TELEPHONE COMPANY, BLUE VALLEY TELEPHONE COMPANY, COUNCIL GROVE TELEPHONE'COMPANY, CRAW-KAN TELEPHONE COOPERATIVE, INC., GOLDEN BELT TELEPHONE ASSN., INC., HAVILAND TELEPHONE COMPANY, INC., JBN TELEPHONE COMPANY, INC., KANOKLA TELEPHONE ASSN., INC., MADISON TELEPHONE, LLC., MOKAN DIAL, INC., MUTUTAL TELEPHONE COMPANY, PEOPLES TELECOMMUNICATIONS, LLC, PIONEER TELEPHONE ASSN., INC., RAINBOW TELEPHONE CO-OP ASSN., INC., RURAL TELEPHONE SERVICE COMPANY, INC., S & A TELEPHONE COMPANY, S & T TELEPHONE COOP ASSN., INC., SOUTH \CENTRAL TELEPHONE ASSN., INC., SOUTHERN KANSAS TELEPHONE COMPANY, INC., SUNFLOWER TELEPHONE COMPANY, INC., THE TRI-COUNTY TELEPHONE ASSN., INC., UNITED TELEPHONE ASSN., INC., WHEAT STATE TELEPHONE, INC. (STATE INDEPENDENT ALLIANCE) COLUMBUS TELEPHONE CO., INC., CUNNINGHAM TELEPHONE CO., INC., GORHAM TELEPHONE CO., INC., H & B COMMUNICATIONS, INC., HOME TELEPHONE COMPANY, INC., LAHARPE TELEPHONE CO., INC., MOUNDRIDGE TELEPHONE CO., INC., TOTAH TELEPHONE CO., INC., TWIN VALLEY TELEPHONE, INC., WAMEGO TELEPHONE CO., INC., WILSON TELEPHONE CO., INC., ZENDA TELEPHONE CO., INC.. (INDEPENDENT TELECOMMUNICATIONS GROUP), PLAINTIFFS,

vs.

KANSAS CORPORATION COMMISSION, DEFENDANT.

MEMORANDUM DECISION

NOW, on this 30th, April, 2004, this matter comes unto the Court for ruling on the Petition by various telecommunication entities in the State of Kansas. The parties have submitted legal authority and argument regarding their respective positions. The Court now

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announces the following Memorandum Decision.

FACTS

The facts have been accurately represented in the briefs of the parties and in the record. The Court incorporates by reference those facts in its Memorandum Decision.

CONTROLLING LEGAL AUTHORITY

1. The burden of proving invalidity of an agency action is on the party asserting invalidity. *K.S.A. 77-621(a)(1)*.

2. The validity of an agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken. *K.S.A. 77-621(a)(2)*.

3. Pursuant to *K.S.A. 77-621(c)*, the Court shall grant relief only if it determines any one of more of the following: (3) the agency has not decided an issue requiring resolution; (4) the agency erroneously interpreted or applied the law; (8) the agency action is otherwise unreasonable, arbitrary or capricious.

4. A Kansas Corporation Commission (KCC) order is lawful if it is within the statutory authority of the commission and if the prescribed statutory and procedural rules are followed in making the order. *Farmland Industries, Inc. v. Kansas Corporation Commission*, 24 Kan. App.2d 172, 943 P.2d 470 (1997).

5. A KCC order is reasonable if it is based on substantial competent evidence. *Farmland Industries, Inc., supra*.

6. A KCC action is arbitrary and capricious if it is unreasonable or without foundation in fact. *Farmland Industries, Inc. v. KCC*, 25 Kan.2d 849, 971 P.2d 1213 (1999).

7. Interpretation of a legislative act is a question of law. *Guardian Title, Co. v. Bell*, 248 Kan. 146, 805 P.2d 33 (1991).

8. Courts must construe all provisions of statutes *in pari matera* with a view of reconciling and bringing them into a workable harmony, if reasonably possible to do so. *Citizens' Utility Rate Payer Board v. KCC*, 264 Kan. 363, 956 P.2d 685 (1998).

9. In interpreting a statute, a Court must give effect to its plain and unambiguous language, without determining what the law should be. *Citizens' Utility Rate Payer Board v. KCC, supra.*

10. In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, of possible, to the entire act and every part thereof. To this end, it is the duty of the Court, as far as is practicable, to reconcile the different provision so as to make them consistent, harmonious, and sensible. *Syllabus 4, Citizens' Utility Rate Payer Board v. KCC, supra.*

11. The Doctrine of Operative Construction provides that the interpretation of a statue by an administrative agency charged with the responsibility of enforcing it is entitled to judicial deference. While the agency's determination is persuasive, it is not conclusive or binding on the Courts. *Cooper v. Werholtz*, 277 Kan. 250, ___ P.3d ___ (2004).

RATIONALE AND DECISION

Plaintiffs complained that the KCC order to make payments from the Kansas Universal Support Fund (KUSF) to carriers based upon per-line basis is unlawful. Plaintiffs acknowledge that the scope of review by this Court is consistent with *K.S.A. 77-621, et. seq.*, the Act for Judicial Review and Enforcement of Agency Actions. Plaintiffs claim that KCC acted unlawfully and arbitrarily in deciding portability of KUSF funds on a per-line basis. Plaintiffs

assert that the decisions of the KCC were not competitively neutral in violation of *K.S.A. 66-2008(b)* and unreasonable in that the KCC did not consider the costs of providing local services as opposed to the per-line access basis. Plaintiffs argue that the KCC couldn't and didn't perform its statutory duty to provide competitive neutrality, because wireless providers weren't required to provide cost information for evaluation the same as the Plaintiffs. Plaintiffs argue that the wireless communication providers gain a clear and competitive advantage and a potential windfall. Plaintiffs also allege the KCC unlawfully failed to address how Carriers of Last Resort (COLR) obtained cost recovery through KUSF for loss of an access line they must continue to provide.

Defendant KCC counters that the application of portability per access line is consistent with the federal legislation and is not prescribed by statute. Defendant contends that the law regarding rate of return regulated companies doesn't guarantee income when customers terminate service. Defendant further contends it properly construed the Kansas Telecommunications Act (*K.S.A. 66-6001, et. seq.*) to allow portability of KUSF support on an access line basis.

Western Wireless, a Defendant, joins the fray for a portion of the argument regarding per-line portability of KSUF support. Wireless argues that per-line portability complies with federal law as administered by the Federal Communications Commission (FCC). Western asserts that the RORR companies already have a competitive edge by statute and that to make wireless companies divulge costs would not impact competitive neutrality, but disadvantage the wireless company.

The State Independent Alliance (SIA) joins Plaintiffs in alleging the scheme of portability of KUSF payments based on a per-line access is not consistent with Kansas law. SIA challenged

the KCC order as unreasonable and arbitrary, the same as the other Plaintiffs.

In 1996, the State of Kansas enacted *K.S.A. 66-2001, et. seq.* as its public policy regarding telecommunication services. The first purpose of the policy is to assure every Kansan will have access to first class telecommunication facilities that provide excellent services at an affordable price. The goal of the legislation is to assure that competition will provide increased services and facilities at low cost. The policy promotes access to a full range of telecommunications services whether in Leawood, Wichita, McCune, Elkhart or Bird City, Kansas. The goal of the policy is to provide access to all in Kansas needing assistive technology and the public good. Finally, the policy is promulgated to protect telecommunications consumers from fraudulent and deceptive business practices of telecommunications providers.

With these stated intentions, the Kansas Legislature then enacted legislation involving the telecommunications statutes regarding Local Exchange Carriers (LEC's), Carriers of Last Resort (COLR), Rate of Return Regulations providers (RORR), and created the Kansas Universal Service Fund (KUSF), to which all carriers must contribute. Carriers may pass on the cost of contributions to their customers.

The conflict between Plaintiffs and Defendant centers around the construction of *K.S.A. 66-2008* involving local exchange carriers and those who buy access to local exchanges. When deregulation of the telecommunication industry occurred, local carriers who had financed the infrastructure in rural Kansas needed a compensating mechanism to counter FCC dictates that opened the local resources to all telecommunications providers. To balance the ordered reductions in some services, the FUSF – Federal Universal Services Fund and the Kansas Universal Services Fund were used to replace the income and assure financial resources of the LEC's and COLR's so that they could continue to provide services, especially in the more

sparsely populated rural areas where carriers must provide infrastructure and services.

The KCC has ruled that in order for KUSF funds to comply with federal law, they must be portable. KUSF funds must be portable based on a per-line access basis. *K.S.A. 66-2008(e)* provides that prior to June 30, 2006, for LEC's electing to be traditional RORR providers (all Plaintiffs have so elected) "all KUSF support, including any adjustment thereto pursuant to this section shall be based on such carriers embedded costs, revenue requirements, investments, and expenses." Plaintiffs assert that the KCC order making portability on a per-line basis violates this portion of the statue. The Court agrees with the argument Plaintiffs have put forward.

The Court must look at the plain and unambiguous language of the statue. Although recognizing that the KCC opinion and decision must be given deference, the Court ultimately determines all questions of law. The Court must read and harmonize portions of the statue to carry out the legislative intent. In this instance, it is the sweeping statements of *K.S.A. 66-2001* that must be enacted. The overall intent of the legislation is to provide the broadest range of quality telecommunication services at a competitively affordable rate to consumers while providing protection from unscrupulous service providers.

The plain language of *K.S.A. 66-2008(e)* codifies prior common law and practices of Kansas regulated telecommunications providers. Until June 30, 2006, the legislature dictates "<u>all KUSF support, including any adjustments</u> pursuant to this section, *K.S.A. 66-2008*" <u>shall</u> be based on such carriers embedded costs, revenue requirements, investments, and expenses." This language is not equivocal. Any adjustment in support means an increase or decrease. It appears the legislature acknowledges that there must be recognition of the cost factors in addition to the per-line access issues. This requirement also acknowledges the limitations and requirements of the telecommunications utilities to provide the broad range of services to sparely populated

areas.

In *K.S.A. 60-2008(f)* the legislature has provided for a permissive methodology for LEC's to request supplemental funding in addition to the fundamental support provided from KUSF if the requested funding is required for infrastructure to serve additional customers within their service area. This requested supplemental funding may be requested with a showing of a percentage increase in access lines on the 12 month period prior to the request. This subsection did not change the requirement of *K.S.A. 66-2008(e)* that any adjustment be based on the embedded costs *et cetera*. *K.S.A. 66-2208(d)* provides a discretionary vehicle based upon a percentage increase in access lines. If there is an increase in access lines, the embedded costs, investments, and expenses relative to extension of services after the determination of the original funding level from the KUSF are necessary. This supplemental funding, if allowed, is targeted to services for new (additional) customers. Additionally, this supplemental request has an expedited filing and review process, which allows response for the additional needs of the LEC's. There must be consideration of the costs of the provider to prevent an arbitrary determination of support level. Using per-line evaluation prevents the evaluation of costs required by statue. The funding must still be based on embedded costs, revenue requirements, investments, and expenses, since it must be used for infrastructure costs. This statute merely supplements the initial KUSF support with a responsive evaluation system geared at an expedient and timely answer to the request. The Court notes that these requests are not mandatorily required of the provider. This interpretation is consistent with the language of *K.S.A. 66-2008(e)* which requires all KUSF support, including any adjustment thereto pursuant to this section (including supplemental funding under *K.S.A. 66-2008(d)*, must consider the costs. It is also consistent with *K.S.A. 66-2008(c)* which also requires a periodic review to determine

the costs of qualified providers to justify modification of the KUSF. The Court finds that the Defendant, KCC erroneously interpreted and applied the law in requiring KUSF funding to be portable according to per-line access disregarding the 2002 legislative requirements of the four (4) factors as set forth in *K.S.A. 66-2008(e)* – embedded costs, revenue requirements, investments, and expenses.

II.

Plaintiffs allege that the orders from which they appeal fail to consider the Carrier of Last Resort (COLR) when making its orders regarding per-line portability. Plaintiffs allege that having to request funds from KUSF will require new, additional costs to get what should have been paid as cost recovery. Defendant counters that KUSF support payments for COLR's in *K.S.A. 66-2009* is for different support and not related to the support required in *K.S.A. 66-22078*.

K.S.A. 66-2009(a) requires LEC's that provide switched local exchange services in the state prior to June 1, 1996, and their successors, to serve as the Carrier of Last Resort in their exchanges. By statute they received KUSF funding and "shall be entitled to recover the costs of serving as a COLR." Consistent with the statutory language, the COLR must show its costs for maintaining an infrastructure which may or may not provide actual services to citizens of the LEC's area. Nonetheless, the COLR must maintain the facilities in order to provide the mandated services to potential customers. Making the basis for funding support on a per-line basis ignores the special problems unique to the COLR. The costs cannot reasonably be divided on a per-line basis. The COLR cannot reduce its size or capacity to provide universal, reasonable services just because a customer begins using wireless phone service in lieu of the traditional service. The COLR, by statute, must provide the potential for services whether used

or not. The legislature dictated that COLR's would recover their costs for providing this service. It is only logical that costs under *K.S.A. 66-2209* equate to embedded costs, revenue requirements, investments, and expenses as allowed in *K.S.A. 66-2008(e)*. This interpretation brings the statutes into harmony. Treating them relevant to costs consistently should allow the regulatory agent to treat them equally. The Commission's orders failing to account for the costs of the COLR are unreasonable, unlawful, and arbitrary.

III

The final issue to be addressed by the Court is the argument by Plaintiffs that the orders of the commission do not make distributions from the KUSF in a "competitively neutral manner" in accordance with *K.S.A. 66-2008(b)*. Plaintiffs claim that while the KCC has reviewed and determined their costs and expenses relating to local services, the Commission refuses to review the costs of the wireless carriers resulting in a windfall or potential windfall to the wireless telecommunications providers. Western Wireless and the KCC counter that the KCC decision is consistent with recent KCC decisions. Neither Defendant addresses the issue of an alleged windfall to the carriers who are not LEC's or COLR's and thus bound by those requirements.

K..S.A. 66-2008(b) states as follows:

> "Pursuant to the federal act, distributions from the KUSF shall be made in a competitively neutral manner to qualify telecommunications public utilities, telecommunications carrier, and wireless telecommunication providers that are deemed eligible both under Section (e) (1) of Section 214 of the Federal Act and by the commission."

The complaint of Plaintiffs about the Commission's s order on a per-line basis cost is that the order doesn't treat those LOC's who have had the Commission determine their cost the same as a wireless utility who have not. They argue that there cannot be a rationale determination of competitive neutrality under the statue if a portion of the providers do not disclose their costs.

The purpose of the KUSF is to assist the LEC's remain viable and provide universal services to its customers at competitive rates. If the Commission audits the LEC's to make sure that the KUSF distributions are being applied for provision of services, maintenance, and upgrading of facilities in services required by the state and federal acts, how can the Commission assure that the wireless providers are doing the same without requiring them to demonstrate their costs for providing these same services. If there is a significant difference in the costs providing services because the LEC's are covering a larger, less densely populated area, then using the costs of the LEC without measuring and factoring in the cost of the non-LEC's is unreasonable. The Commission does not have the necessary information with which to make a sound rationale decision unless they have the cost and expense information from all telecommunication providers.

Although the record does not reflect an actual windfall to those wireless telecommunications companies providing services the same as the LEC's, it is not necessary to be shown for the Court to make its decision. The order of the Commission violates the statutory requirement to make distributions in a "competitively neutral manner," because the Commission has failed to evaluate all the necessary costs/expense information from all providers. The LEC's are different in structure and treatment as to rates then the wireless providers. Attempting to establish competitive neutrality without evaluating all providers' costs and expenses, means that the Commission has compared apples and oranges. In order that its orders are competitively neutral, the Commission must compare the same units of measurement.

For the reasons stated herein, the orders of the Kansas Corporation Commission regarding KUSF support based on per-line access are unlawful and unreasonable and are rescinded to an effective date of March 1, 2003.

THE COURT FURTHER ORDERS that the Kansas Corporation Commission examine the costs of all qualified telecommunications entities providing local service to determine that distributions from the KUSF are competitively neutral.

All other issues raised by the Plaintiffs are considered and the Court finds that the ruling of the KCC should not be overturned. The ruling herein applies to Cases 01 C 39, 01 C 40, 03 C 20, and 2004 CV 19 in the District Court of Nemaha County, Kansas.

IT IS SO ORDERED.

James A. Patton
District Judge, Div. 1

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing Memorandum Decision was mailed this 30th day of April, 2004, by United States Mail with postage prepaid thereon to the following: Mark E. Caplinger and James M. Caplinger, Attorneys at Law, James M. Caplinger, Chartered, 823 West 10th Street, Topeka, KS 66612; Thomas E. Gleason, Jr., Attorney at Law, Gleason & Doty, Chartered, P.O. Box 6, Lawrence, KS 66044; Susan K. Duffy, Executive Director, Kansas Corporation Commission, 1500 SW Arrowhead Road, Topeka, KS 66604; Bruce Ney, Attorney at Law, Southwestern Bell Telephone, 220 East 6th Street, Room 515, Topeka, KS 66603; Lisa Creighton Hendricks, Attorney at Law, Sprint, Mail Stop KSOPKJ0502, 5454 West 110th Street, Overland Park, KS 66211; Eva Powers, Attorney at Law, Kansas Corporation Commission, 1500 SW Arrowhead Road, Topeka, KS 66604; and Jane F. Heinen, Clerk of the District Court, Nemaha County Courthouse, P.O. Box 213, Seneca, KS 66538.

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