

In the Matter of GCC License Corporation's Petition for Designation as an Eligible
Telecommunications Carrier

Docket No. 99-GCCZ-156-ETC

Kansas Corporation Commission

2004 Kan. PUC LEXIS 468

May 3, 2004, Dated

PANEL: [*1] Before Commissioners: Brian J. Moline, Chair; John Wine; Robert E. Krehbiel; Susan K. Duffy,
Executive Director

OPINIONBY: MOLINE; WINE; KREHBIEL; DUFFY

OPINION: ORDER GRANTING RECONSIDERATION

COMES NOW the above-captioned matter for consideration and determination by the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

1. This docket was initiated on September 2, 1998, when GCC License Corporation d/b/a Western Wireless (Western) filed an application for designation as an eligible telecommunications carrier (ETC) in Kansas for the purpose of receiving federal and state universal service support. On January 18, 2000, the Commission granted Western ETC designation in non-rural areas of Kansas for federal universal service support purposes. In accordance with Order No. 10, issued on July 24, 2000, Western then asked the Commission to approve its request for ETC designation based upon a filing of its basic universal service offering for certain designated rural telephone company exchanges in Kansas. This filing contained a description of the basic universal service [*2] (BUS) offering of Western's affiliate, WWC Holding Co., Inc., d/b/a Cellular One, which used "fixed" wireless technology. Order issued Sept. 15, 2000, PP 1, 6. Based upon a review of this offering, the Commission approved designation of Western for ETC status in certain rural telephone company exchanges. Order On Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, issued October 15, 2001.

2. On March 16, 2004, the Commission issued its Order Directing Investigation and Establishing Procedural Schedule in this docket, granting a motion filed by Commission staff (Staff) to reopen this docket and to issue a declaratory judgment regarding Western's ETC designation. In its motion for declaratory judgment, Staff asked the Commission to issue a declaratory judgment clarifying Western's status as an eligible telecommunications carrier (ETC) in Kansas pursuant to 47 U.S.C. § 214(e) and to address Western's continuing ability to recover federal and state universal service fund (FUSF) support in rural telephone company exchanges. After that Order was issued, several motions and responsive pleadings were received, which will [*3] be addressed in this Order. First, Western filed a Request for Reconsideration of the Commission's March 16, 2004, Order. Simultaneous with the filing of its request for reconsideration, Western filed a Petition for Stay to stop the March 16, 2004, Order from taking effect. Staff has filed a response to Western's request for reconsideration and petition for stay. In addition, Staff filed a Motion to Dismiss Western's request for reconsideration. Western has filed replies to each of Staff's responses and filed a response to Staff's motion to dismiss.

3. The Commission has jurisdiction pursuant to 47 U.S.C. §§ 214(e) and 254(e) and K.S.A. 66-2008. The Commission notes that, although Kansas rural telephone companies were actively involved in prior stages of this docket, none have offered a response to Western's interpretation of the Commission's prior orders.

BACKGROUND

4. On July 22, 2003, Staff filed a Motion to Reopen Docket asking the Commission to initiate an investigation to clarify the intent behind Commission orders that approve Western's ETC designation for FUSF support in rural exchanges of Kansas and to determine whether this ETC designation [*4] for Western should be revoked. At a prehearing conference on November 5, 2003, the parties agreed to conduct additional discovery to try to resolve the questions raised by Staff without a hearing. After the prehearing conference and submission of data requests, both parties filed a motion to compel the other party to answer some of the data requests, arguing the responses provided were inadequate.

5. Staff filed a Motion for Declaratory Judgment on February 27, 2004. In the motion, Staff asked the Commission to find (a) that Western unlawfully obtained FUSF support for Kansas customers in rural telephone exchanges that were not in the areas the Commission approved as part of Western's ETC designation and (b) that Western unlawfully obtained FUSF support for services beyond the scope of its ETC designation, arguing the Commission's approval of ETC designation was limited to Western's BUS offering using fixed wireless technology and did not include Western's conventional wireless service. Staff pointed out that Western took the position that the Commission's orders did not include language to limit Western's ETC designation to a specific technology, and, therefore, Western was permitted [*5] to obtain FUSF support for its conventional cellular service as well as for its BUS service. Motion for Declaratory Judgment, P 3.

6. In the motion for declaratory judgment, Staff explained that, after the investigation was opened, Western and Staff had engaged in repeated conversations but had been unable to resolve the disputed issues and were at an impasse. According to Staff, the positions of both parties regarding the Commission's intent to limit, or not to limit, Western's ETC designation to its BUS service were fully set out in pleadings in this docket. Therefore, Staff urged the Commission to make a declaratory ruling to promote administrative efficiency by eliminating many months of process that would, in the end, accomplish nothing more than what the declaratory judgment would now. Motion for Declaratory Judgment, PP 7-8.

7. Western did not file a response to Staff's motion for declaratory judgment in the time allowed for responsive pleadings. After this time elapsed, the Commission on March 16, 2004, issued its Order Directing Investigation and Establishing Procedural Schedule. In the March 16, 2004, Order, the Commission clarified that the Commission had intended Western's [*6] ETC designation for specified rural exchanges to be limited to Western's BUS offering, which is the only offering Western asked the Commission to review pursuant to Order No. 10. The Commission further held that it did not intend this ETC designation to cover Western's conventional cellular service because Western has never sought approval of this type of offering in Kansas.

8. In the March 16, 2004, Order, the Commission noted numerous citations provided by Staff illustrate that Western has never sought ETC designation in Kansas for its conventional cellular service but, instead, sought ETC designation solely based upon its BUS offering. Western's BUS offering met the necessary criteria to qualify as a supported universal service offering. The Commission explained that it made no such review of Western's conventional wireless service because Western never asked for it. In fact, the Commission pointed out Western recognized its conventional cellular service did not meet all provisions of supported services required to qualify for designation as an ETC under the Federal Act. March 16, 2004, Order, PP 8-12.

9. Also in the March 16, 2004, Order, the Commission addressed the limitation [*7] of Western's ETC designation to the exchanges identified or listed in the Commission's prior Orders, specifically referring to Sprint/United service areas. Recently, Staff has filed testimony to the effect that an issue regarding possible overpayment of FUSF support to Western in Sprint/United service areas has been resolved and, therefore, will not be addressed further. Direct Testimony of Janet Buchanan (Staff), filed April 16, 2004 (Buchanan Dir.), 12-13. In addition, Staff stated it no longer seeks to revoke Western's ETC designation but, instead, asks the Commission to clarify the scope of Western's ETC designation in rural exchanges in Kansas. Buchanan Dir. 14.

WESTERN'S REQUEST FOR RECONSIDERATION

10. In its timely Request for Reconsideration of the March 16, 2004, Order, Western argued the Commission's decision is not supported by evidence in the record, is arbitrary and capricious, is contrary to law, denies Western due process, and exceeds the Commission's jurisdiction and authority. Western asked the Commission to allow oral argument. In discussing the background of this case, Western asserted that, after Staff filed its Motion for Declaratory Ruling on February 27, [*8] 2004, the parties reached an agreement that (1) Staff would no longer seek revocation of

Western's ETC designation, (2) Western was to provide an affidavit indicating resolution of the issue regarding improper receipt of FUSF support relating to Sprint/United exchanges, and (3) Western was permitted to respond to Staff's Motion for Declaratory Judgment thirty days after either Staff filed responses to Western's outstanding discovery or the Commission ruled on Western's pending motion to compel. Western's Request, p. 2-3.

11. Western presents four arguments in support of its Request for Reconsideration. First, Western argued that the Commission's March 16, 2004, Order contradicts prior Commission orders. Western noted that this Commission, as an arm of state government, speaks through its written orders and decisions. K.A.R. § 82-1-232. Western asserted that the Commission's orders addressing Western's ETC designation determine that the carrier, not a particular service offering, meets the criteria for designation as an ETC. Western argued the only limitation imposed by the Commission was on KUSF support for Western's BUS offering, not FUSF support. Western has summarized the Commission's [*9] orders addressing Western's ETC designation. Western Request, pp. 6-11.

12. Second, Western asserted the Commission's March 16, 2004, Order is not supported by evidence in the record. Western pointed out that an agency's action must be based upon facts and it is invalid if based on a determination of fact that is not supported by substantial evidence when viewed in light of the record as a whole. K.S.A. 66-621(c)(7). Also, agency action may be set aside if it is "otherwise unreasonable, arbitrary or capricious." K.S.A. 66-621(c)(8). According to Western, the Commission's March 16, 2004, Order does not meet these standards. Western Request, pp. 12-13. Western claimed that its request for designation as an ETC was not limited only to its BUS offering. Western Request, pp. 13-16. Western further claimed that the Commission's discussion illustrates "a gross misreading of the record evidence in this proceeding" regarding Western's acknowledgement that its conventional cellular service did not include provision of supported service required to receive ETC designation. Western Request, pp. 16-19.

13. Third, Western argued the March 16, 2004, Order denied it due process of law because Western [*10] has had no opportunity to conduct discovery or respond to Staff's motion before the Commission made its ruling. To support its claim that the Commission's decision is egregious, Western pointed to its significant investment in its network in rural Kansas to provide universal services to unserved and underserved consumers. Western argued that the Prehearing Conference Order issued November 14, 2003, assured Western that a hearing would be conducted on the Motion to Revoke; instead, the Commission made its decision in the March 16, 2004, Order. Western argued it relied upon Staff's assertion that no response was required at that time. Western asserted issuance of this Order denied it due process of law by not allowing it to respond to Staff's arguments. Western Request, pp. 22-23. Western argued the interest in its ETC designation constituted a valuable property interest to which it was deprived without due process of law. Western Request, pp. 24-26.

14. Fourth, Western argued that this Commission has no authority to determine whether specific service offerings are eligible for universal service support; instead, this Commission only has authority to designate carriers as ETC without [*11] deciding funding issues, which are left to the Federal Communications Commission (FCC) and the Universal Service Administrative Company (USAC). Western argued FCC decisions preclude this Commission from distinguishing among cellular offerings when determining whether a company's technology or customer equipment used to receive wireless offerings is eligible for ETC designation. Western Request, pp. 26-31. Western argued the FCC has delegated management responsibility for distributing FUSF support to USAC. As a result, the Commission cannot purport to decide on a retroactive basis the eligibility of service offerings for FUSF support. Therefore, Western has claimed the Commission has no authority now to determine whether Western's service offerings provided to customers using conventional cellular handsets include the FCC's supported services and thus qualify Western for ETC designation. Western Request, pp. 31-33. Finally, Western has asserted the Commission has improperly amended its prior order regarding Western's ETC designation while the case is on appeal.

15. The Commission's March 16, 2004, Order contains extensive citations to the record in support of its clarification that [*12] prior orders approving Western's application for ETC designation were based on Western's filing of its BUS offering. As a review of these citations will confirm, the record shows that Western asked the Commission to review only its BUS offering, which was filed in response to Order No. 10. Although the Commission's ordering clauses may not have specifically referred to the BUS offering, the orders themselves do. *E.g.*, Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, issued October 15, 2001, beginning at P 7. The Commission's approval of Western's ETC designation was based upon Western's BUS offering. In fact, the Commission had no evidence before it upon which to make an ETC designation based on Western's conventional wireless service.

16. In spite of this record, Western has asked the Commission to reconsider its March 16, 2004, Order. Although Western has argued that its due process rights were violated because the Order was issued before it had a chance to respond, the Commission gives this argument little credence. Staff has no authority to extend the time for filing a responsive pleading. Western failed to notify the Commission [*13] of its desire to file a response or to receive an extension to respond to Staff's motion. All parties that appear before the Commission are required to follow the rules. Western cannot blame Staff for its failure to notify the Commission of its desire for additional time to respond. Furthermore, a purported agreement between a party and Staff does not bind the Commission, particularly when the Commission has no knowledge of the agreement. n1 If Western's concerns about Staff's Motion for Declaratory Judgment had been expressed in a timely manner, reconsideration may have been avoided. In addition, the Commission rejects Western's argument that this Commission has no jurisdiction to proceed because an appeal is pending challenging prior orders issued in this docket. That appeal filed by the rural telephone exchange carriers involves issues that are unrelated to those now raised in this proceeding regarding Western's ETC designation.

n1 The Commission notes that Staff denies an agreement as described by Western existed between the parties. Staff Response to Western Wireless' Request for Reconsideration, filed April 12, 2004, PP 19, 21.

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17. The Commission recognizes the issues raised in this docket are complex. This was the first docket in which this Commission approved an ETC designation for a carrier in Kansas. Staff's recently filed testimony makes clear that Western has received a sizeable contribution in FUSF support based upon the ETC designation this Commission made pursuant to 47 U.S.C. § 214(e). Given the clear authority under § 214(e) for state commissions to designate ETCs, this Commission has jurisdiction to consider whether it acted appropriately when it designated Western as an ETC in rural exchanges. In addition, this Commission has the power to revoke a carrier's ETC designation n2. Therefore, this Commission has authority to conduct an investigation of its prior designation of Western as an ETC.

n2 See, Declaratory ruling, CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, 15174, P 115.

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18. Furthermore, having made an ETC designation, this Commission has an additional obligation to ensure that an ETC receiving FUSF support is using that support on an ongoing basis to meet the requirements of 47 U.S.C. § 254(e). Pursuant to § 254(e), a carrier must use FUSF support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended." This Commission has authority to investigate whether support an ETC is receiving based upon its Kansas ETC designation is being used to fulfill its obligation under § 254(e).

19. Having decided to reopen this docket, the Commission has a responsibility to address two important questions regarding Western's receipt of FUSF support based upon its ETC designation in Kansas: First, was Western's receipt of FUSF support appropriate under 47 U.S.C. § 214(e)? Second, did Western expend its FUSF support in compliance with the requirements of 47 U.S.C. § 254(e)? The Commission concludes that it is in the best interests of the parties involved in this docket, as well as the public generally, to grant [*16] reconsideration of its March 16, 2004, Order to allow the parties to fully address these two key questions, as well as any other issues the parties believe should be discussed.

20. By granting reconsideration, Western will have an opportunity to present its additional arguments regarding this Commission's intent at the time Western's ETC designation was initially approved. Although the Commission has expressed its view on this argument, it is willing to consider whatever further argument Western wants to make regarding this issue. In addition, the parties are asked to address how this Commission can fulfill its obligation to assure that the requirements of 47 U.S.C. §§ 214(e) and 254(e) are met. Because this Commission has the responsibility to designate ETCs for FUSF support, it must also have the ability to enforce and determine the rights and responsibilities associated such an ETC designation. Furthermore, if the Commission is to assure on an ongoing basis that an ETC is using its FUSF support in an appropriate manner, the Commission must have authority to evaluate how a carrier is using its universal service support to be sure this subsidy [*17] is being spent on services for which it is intended.

21. In a related issue, the Commission notes that in Exhibit JB-3, which is attached to Staff's testimony filed on April 16, 2004, local counsel for Western stated that the company will not answer discovery requests relating to the company's filing of reports submitted to USAC or the FCC for purposes of receiving federal universal service support. Counsel noted that such filings are treated as confidential by USAC. The Commission points out that a Protective Order was issued in this docket on September 21, 2000. Western has given no indication that it has information indicating this Order has not been effective in protecting confidential information in this or any other docket. Therefore, the Commission finds the Protective Order should resolve any concerns about confidentiality.

22. Generally, in Kansas a party may obtain discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending action. Even if not admissible, evidence may be discovered if it could reasonably lead to discovery of admissible evidence. K.S.A. 2002 Supp. 60-226(b)(1). Before the Commission, discovery is limited to matters [*18] that "are clearly relevant to the proceeding involved." K.A.R. 82-1-234a(a). Reports submitted by Western to USAC or the FCC for the purpose of receiving FUSF support are clearly relevant to this proceeding. Because Western can protect any confidential information contained within those reports by complying with the Protective Order, the Commission advises Western that this is not grounds to refuse to provide such reports in response to the data requests propounded by Staff.

23. The Commission notes that Western's Request contains several assertions that are erroneous. For example, Western asserted that the March 16, 2004, Order granted Staff's motion to revoke Western's ETC designation. Western's Request, p. 3. This is incorrect. In fact, as noted above, Staff is no longer asking the Commission to revoke Western's ETC designation. The Commission emphasizes that it has granted Staff's motion to reopen this docket and to conduct an investigation. On reconsideration, the Commission is willing to consider the parties' recommendations about how the Commission should address the concerns expressed by this Commission regarding Western's ETC designation and its continuing receipt of FUSF [*19] support based upon this ETC designation.

24. The Commission directs the parties to discuss how best to address the two questions set forth above and any other issues that parties believe should be considered in this proceeding. The Commission designates Martha J. Coffman, or other Advisory Counsel, 1500 SW Arrowhead, Topeka, KS 66604, telephone number (785) 271-3105, to act as the presiding officer in this docket. K.S.A. 2003 Supp. 77-514. The presiding officer shall consult with the parties about the need to schedule a prehearing conference, the filing of briefs, the setting of oral argument, or any other proceedings. The Commission notes that a prehearing conference remains scheduled for July 14, 2004, and a technical hearing remains scheduled for July 20, 2004, in this docket.

WESTERN'S MOTION TO STAY

25. On April 2, 2004, Western filed a Petition for Stay to prevent the March 16, 2004, Order from taking effect. Due to the granting of Western's Request for Reconsideration, the Commission finds that it is not necessary to enter a stay. The March 16, 2004, Order will not go into effect while the Commission reconsiders the rulings contained therein.

STAFF'S MOTION TO DISMISS [*20] REQUEST FOR RECONSIDERATION

26. On April 6, 2004, Staff filed a Motion to Dismiss Request for Reconsideration arguing Western failed to comport with Commission rules because it did not number paragraphs as required by K.A.R. 82-1-219(a)(3). Staff pointed out that rules and regulations of state agencies, such as the Commission, have the force and effect of law, K.S.A. 77-425, and that K.A.R. 82-1-219 requires that all pleadings contain numbered paragraphs. Numbered paragraphs allow parties to provide a clear reference to a specific point.

27. The Commission, as well as most other administrative agencies, adopts rules and regulations to assure a uniform procedure for the handling of administrative proceedings. Rules, such as those contained in K.A.R. 82-1-219(a)(3), guarantee a level playing field for all parties that appear before the Commission. Furthermore, the Commission must be diligent in enforcing its rules and regulations to be sure all parties are treated fairly and consistently. Nevertheless, the Commission denies Staff's motion to dismiss. All pleadings filed since Staff pointed out that Western failed to number the paragraphs in its Request have complied with K.A.R. 82-1-219(a)(3). [*21] Dismissal of a pleading would be appropriate only in extreme cases after a party has repeatedly failed to comply with requests to follow K.A.R. 82-1-219(a)(3).

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission grants Western's Request for Reconsideration, denies Western's Petition to Stay, and denies Staff's Motion to Dismiss, as set forth above.

(B) The Commission appoints Martha J. Coffman, or other Advisory Counsel, to act as presiding officer in this proceeding. The presiding officer will consult with the parties about the best procedure to use to address reconsideration and pending questions identified in this Order.

(C) The decisions in this Order are procedural and constitute non-final agency action. K.S.A. 77-607(b)(2). A party has fifteen days, plus three days if service is by mail, from service of this Order to seek reconsideration. K.S.A. 66-118b; K.S.A. 2003 Supp. 77-529(a)(1).

(D) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Wine, Com.; Krehbiel, Com.

Dated: May 3, 2004

Susan K. Duffy

Executive [*22] Director