

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of)
Southwestern Bell Telephone Company d/b/a)
AT&T Kansas for an Order Confirming)
Relinquishment of its Eligible) Docket No. 17-SWBT-158-MIS
Telecommunications Carrier Designation in)
Specified Areas, and Notice Pursuant to K.S.A.)
2015 Supp. 66-2005(d) of Intent to Cease)
Participation in the Kansas Lifeline Service)
Program)

**STAFF'S RESPONSE TO AT&T KANSAS' RESPONSE TO STAFF'S SECOND
REPORT AND RECOMMENDATION**

The Staff of the Kansas Corporation Commission (Staff) states the following in response to *AT&T Kansas' Response to Staff's Second Report and Recommendation* (AT&T's Response) filed by Southwestern Bell Telephone Company d/b/a AT&T Kansas (AT&T) on May 18, 2017:

RELEVANT BACKGROUND

1. On May 4, 2017, Staff filed a second Report and Recommendation (R&R) in this docket. Staff recommended that the Commission take the following actions with respect to AT&T's Application in this matter:

- (1) Grant AT&T's request for Eligible Telecommunications Carrier (ETC) relinquishment for Lifeline purposes in all of the census blocks in the requested relinquishment area;
- (2) Grant AT&T's request for ETC relinquishment for its 47 U.S.C. § 214(e)(1)(A) voice obligations in all but 932 of the 116,282 census blocks in the requested relinquishment area, identified in Staff Exhibit 1 to its R&R;
- (3) Require the remaining ETCs to ensure that all customers served by AT&T will continue to be served in the wire centers/exchanges in which the Commission grants relinquishment. Lifeline-only ETCs are required to ensure that all Lifeline-eligible customers in their designated service area continue to be served, but are not required to ensure that non-Lifeline customers continue to be served; and

(4) Serve the final order upon all ETCs designated in AT&T's service area.

2. On May 18, 2017, AT&T responded to Staff's R&R in the form of AT&T's Response. It would appear from the response that AT&T only objects to Staff's recommendation (2), pertaining to the disallowance of ETC relinquishment in 932 census blocks. AT&T made six main arguments, which Staff summarizes as follows:

(1) The *only* test for ETC relinquishment is whether there is at least one other ETC present in the area at issue;¹

(2) 47 U.S.C. § 214(e)(4) does not distinguish between "Lifeline-only ETCs" and "high-cost" ETCs;²

(3) AT&T will not discontinue service to *any* customer, including those in the 932 census blocks, until discontinuance is sought;³

(4) There are other competitive providers in the relinquishment areas that can absorb customers if AT&T ultimately does discontinue service;⁴

(5) The Lifeline-only ETCs in the 932 census blocks have a common carrier obligation to provide service to non-Lifeline customers under the federal act;⁵ and

(6) Staff's reliance on the 2015 ETC Forbearance Order is misplaced because it pertains to 47 U.S.C. § 160(a) rather than 214(e)(4).⁶

RESPONSIVE ARGUMENTS

3. Staff will address each of AT&T's arguments in turn.

¹AT&T Kansas' Response to Staff's Second Report and Recommendation, p. 3, 5 (May 18, 2017) (AT&T's Response).

²AT&T's Response at 3, 5-6.

³AT&T's Response at 4, 6-10.

⁴AT&T's Response at 7-8.

⁵AT&T's Response at 11-12.

⁶AT&T's Response at 12-13.

(1) 47 U.S.C. § 214(e)(4) REQUIRES THE COMMISSION TO ENSURE CONTINUED SERVICE PRIOR TO GRANTING RELINQUISHMENT

4. AT&T argues that the *only* test for relinquishment under 47 U.S.C. § 214(e)(4) is whether there is at least one other ETC present in the area at issue.⁷ This is incorrect. The statute clearly has another condition precedent to granting relinquishment, and that is that the Commission must require remaining ETCs to ensure all relinquished customers will continue to be served. The relevant statutory text from 47 U.S.C. § 214(e)(4) is highlighted below:

(4) Relinquishment of universal service

A State commission (or the [FCC] in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. **Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed. (Emphasis added).**⁸

⁷AT&T's Response at 3.

⁸47 U.S.C. § 214(e)(4).

(2) THE FEDERAL COMMUNICATIONS COMMISSION (FCC) RECOGNIZES DIFFERENT CATEGORIES OF ETCs

5. AT&T asserts that 47 U.S.C. § 214(e)(4) does not distinguish between specific types of ETC obligations or require that there be both Lifeline-only ETCs and high-cost ETCs in a given area when AT&T seeks to relinquish responsibilities under both programs.⁹

6. The FCC precedent regarding relinquishment does not comport with AT&T's argument, and because the Commission will be enforcing delegated federal authority in this matter, it should follow the FCC's guidance. The FCC has stated 47 U.S.C. § 214(e) accommodates ETC relinquishments specific to particular universal service mechanisms or programs:

Indeed, as we explain above, we interpret section 214(e) to accommodate ETC designations specific to particular universal service mechanisms or programs. Insofar as ETC designations can be obtained on a mechanism- or program-specific basis, **we likewise find it reasonable to interpret section 214(e)(4) as allowing ETC designations to be relinquished on a mechanism- or program-specific basis.**⁸⁴³ Thus, a High-Cost/Lifeline ETC would, for instance, be free to seek to relinquish just its ETC designation for Lifeline purposes without relinquishing its designation for high-cost purposes. (Emphasis added).¹⁰

7. AT&T tries to discount this FCC guidance in its Response by arguing in footnote 4 that 214(e)(4) and 47 C.F.R. § 54.205 were never amended to address this issue of “de-linking,” and that even if a carrier could relinquish fewer obligations than 214(e)(4) would allow, a state cannot limit the scope of an ETC's relinquishment request without the applicant's consent.¹¹

⁹AT&T's Response at 5.

¹⁰In the Matter of Lifeline & Link Up Reform & Modernization, 31 F.C.C. Rcd. 3962, ¶334 (2016).

¹¹AT&T's Response at fn. 4.

8. With respect to AT&T's argument that 214(e)(4) and 47 C.F.R. § 54.205 were never amended to address the issue of "de-linking" – it does not matter because the FCC's guidance indicates that the *current interpretation* allows for ETC designations to be relinquished on a mechanism or program-specific basis.¹² Therefore, no amendments are necessary. Furthermore, the FCC has stated that given its authority to interpret the federal act, its interpretation of section 214(e) governs all application of that provision, whether by the FCC or by a state.¹³

9. With respect to AT&T's argument that high-cost/Lifeline relinquishment separation or "de-linking" should only occur on a voluntary basis, this also goes against the FCC's guidance on the relinquishment process under 214(e)(4).

10. The FCC has stated:

Most fundamentally, the section 214(e)(4) relinquishment process **allows for the states** (or the Commission, if applicable) **to conduct an inquiry at a sufficiently granular level to ensure that the customers in that area 'will continue to be served.'** The relinquishment process not only entails an evaluation of what service providers are present in an area at a given point in time, but of the practical ability of those providers to take on additional consumers as might be needed once the relinquishing carrier is no longer an ETC subject to **associated obligations** in that area. Indeed, section 214(e)(4) not only involves an inquiry regarding the capabilities of other service providers, but, to the extent needed, includes a grant of authority to obligate remaining ETCs to acquire adequate facilities within a defined time period. (Emphasis added).¹⁴

¹²See *In the Matter of Lifeline & Link Up Reform & Modernization*, 31 F.C.C. Rcd. 3962, ¶334 (2016).

¹³See *Id.* at fn. 843.

¹⁴Memorandum Opinion and Order, *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, Lifeline and Link Up Reform and Modernization, Connect America Fund*, WC Docket Nos. 14-192, 11-42, 10-90, 31 FCC Rcd. 6157, ¶ 111 (Adopted Dec. 17, 2015) (USTelecom Order).

11. This guidance indicates that pursuant to 47 U.S.C. § 214(e)(4), states should conduct an inquiry at a granular level to ensure all customers will continue to be served. There is no qualification suggesting the inquiry should only be performed if an applicant agrees.

12. Finally, AT&T's argument that the Commission is not at liberty to consider different types of ETCs and their associated capabilities when determining whether relinquishment should be granted would lead to illogical results under 47 U.S.C. § 214(e)(4). The statute requires that the Commission, prior to permitting an ETC to relinquish in an area served by more than one ETC, "shall" require the remaining ETC or ETCs to ensure all customers continue to be served. The statute also requires the Commission to order remaining ETCs to purchase or construct facilities if necessary. Most Lifeline-only ETCs do not own facilities because they received forbearance from the facilities requirement from the FCC - they are "pure resellers" of service, generally from wireless carriers. Additionally, Lifeline-only wireline facilities-based ETCs, such as Cox Kansas Telecom, LLC, are not required to provide Lifeline service beyond the area equal to the provider's own service area in Kansas.¹⁵ Therefore, there are situations where it would not be legal to order a pure-reseller to purchase or construct facilities, or order a wireline facilities based Lifeline-only ETC to expand beyond its service area. The distinctions between different types of ETCs and their obligations should be recognized to avoid illogical – or illegal - outcomes.

13. To further elaborate on this point, Lifeline-only ETCs do not have the same capabilities or obligations as high-cost ETCs. Consider the following statement from the FCC:

Moreover, many carriers designated as Lifeline-only ETCs do not offer service over their own facilities, or over a combination of their own and a third-party's facilities. It is not at all clear that these Lifeline-only ETCs will be in a position to undertake the materially different obligations that ETCs must satisfy in areas

¹⁵See K.S.A. 66-2006(c).

where they receive Mobility Fund Phase I support. We do not have a basis in this record to conclude that states that have designated Lifeline-only ETCs have evaluated the capability of such applicants to meet the obligations associated with the receipt of high-cost support. Consequently, we cannot draw a blanket conclusion that a party designated as a Lifeline-only ETC would be qualified to expand or deploy network facilities to meet a Mobility Fund recipient's public interest obligations and thus we require designation as an ETC generally. (Internal citations omitted).¹⁶

Because AT&T's interpretation cannot be harmonized with the FCC's guidance regarding relinquishment, it should be rejected. The Commission must conduct a granular level inquiry and consider different ETC obligations and capabilities when necessary to ensure all customers will continue to be served by remaining ETCs.

(3) IT IS IRRELEVANT WHETHER AT&T WILL CONTINUE TO SERVE UNTIL DISCONTINUANCE IS SOUGHT, BECAUSE THE 214(E)(4) RELINQUISHMENT PROCESS ASKS WHETHER ALTERNATIVE ETCs ARE PRESENT

14. AT&T argues that Staff's concerns regarding ETC relinquishment are illegitimate because AT&T is not discontinuing any legacy wireline services as a result of ETC relinquishment.¹⁷ This is not the standard under the relinquishment statute. 47 U.S.C. § 214(e)(4) states the Commission shall require the *remaining ETCs* to ensure customers will continue to be served. The question of whether AT&T will continue to serve is a red herring because AT&T would no longer be an ETC.

15. Furthermore, the FCC has indicated that the 47 U.S.C. § 214(a) discontinuation analysis is different than the 47 U.S.C. § 214(e)(4) ETC relinquishment analysis:

In evaluating an application for discontinuance authority, the existence, availability, and adequacy of alternatives is one of five factors the Commission typically considers. This balancing that the

¹⁶In the Matter of Connect Am. Fund, 27 F.C.C. Rcd. 8814, 8821–22 (2012).

¹⁷AT&T's Response at 8.

Commission undertakes in evaluating section 214(a) discontinuance applications differs from the section 214(e)(4) relinquishment process, where Congress made clear that the sole focus is whether all consumers that were served by an ETC would continue to be served if that ETC were to relinquish its ETC designation.¹⁸

16. Finally, relying on AT&T to continue to provide service, rather than ensuring remaining ETCs provide service, could lead to a situation where AT&T does seek discontinuation and there will be no remaining providers in certain census blocks. AT&T will likely argue that this is a “theoretical” situation that would be unlikely to occur, but it is one that could occur; especially considering the FCC is opening a proceeding to shorten the discontinuation process.¹⁹

(4) THE FCC HAS DETERMINED THAT IN THE 932 CENSUS BLOCKS THERE ARE NO ALTERNATIVE PROVIDERS SUFFICIENT TO WARRANT FORBEARANCE OF ETC OBLIGATIONS

17. With respect to AT&T’s argument that customers in the 932 census blocks have access to alternative providers, especially those in the 748 census blocks that are associated with the Topeka or Wichita exchanges; the FCC has already determined that there is insufficient evidence to conclude that those customers will have access to competitive providers. The FCC stated:

Second, we are not convinced based on the evidence presented that a consumer living in high-cost or extremely high cost census blocks where we have not granted partial forbearance will continue to have access to voice service at reasonably comparable rates if we forbear from the federal high-cost ETC voice obligation in all census blocks where the price cap carrier does not receive high-

¹⁸USTelecom Order at ¶ 119.

¹⁹Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-94, FCC 17-37 (Rel. Apr. 21, 2017). Specifically, the FCC stated the following: “Among other things, Section 214(a) requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing service to a community or part of a community. With respect to Section 214(a)’s discontinuance provision, generally, and the Commission’s implementing rules specifically, carriers have asserted “that exit approval requirements are among the very most intrusive forms of regulation.” In this section, we seek comment on targeted measures to shorten timeframes and eliminate unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue.” Id. at ¶ 71.

cost support. Unlike the census blocks where we previously granted partial forbearance, here we cannot reasonably predict based on the totality of circumstances that consumers will continue to have a reasonably priced voice option in the high-cost and extremely high-cost census blocks where price cap carriers continue to have a federal high-cost ETC voice obligation. Unlike the census blocks in which we already granted partial forbearance, where the price cap carrier will be replaced by, for example, a Phase II auction recipient, we cannot make a blanket determination that absent an ETC obligation, there will be a provider able to provide voice service at reasonably comparable rates to all fixed locations in the remaining high-cost and extremely high-cost census blocks. Also, the census blocks where we have not granted partial forbearance are not low-cost or served by an unsubsidized provider. Due to the challenges of serving such areas, we cannot reasonably predict that the price cap carrier or another provider would have a business case to maintain voice service at reasonably comparable rates absent support as we could for the areas subject to forbearance in the *December 2014 Connect America Order*. Given that the high-cost and extremely high-cost census blocks at issue lack these conditions, we conclude that closer scrutiny is required to ensure that all consumers living in the remaining high-cost and extremely high-cost census blocks retain reasonable access to voice services, and we find such evidence lacking here.²⁰

AT&T did not receive forbearance in the 932 census blocks in which Staff recommends ETC relinquishment denial. Rather, the 932 census blocks were deemed by the FCC to be high-cost, extremely high-cost, or lacking an unsubsidized competitor. Staff will take the FCC at their word in this regard, notwithstanding AT&T's arguments to the contrary.

(5) COMMON CARRIER OBLIGATIONS ARE NOT RELEVANT TO THE ETC RELINQUISHMENT INQUIRY

18. AT&T argues the Lifeline-only ETCs in the 932 census blocks have a common carrier obligation to provide service to non-Lifeline customers under the federal act.²¹ This is also a red herring.

²⁰US Telecom Order at ¶ 114.

²¹AT&T's Response at 11.

19. The fact remains that the Lifeline-only ETCs in the 932 census blocks do not have an ETC obligation to serve non-Lifeline customers. 47 U.S.C. § 214(e)(4) does not ask whether there are entities with common carrier obligations in the relinquished areas, it asks whether there are alternative ETCs that are able to ensure that all customers will continue to be served. Since there are no alternative high-cost ETCs in the 932 census blocks, relinquishment should be denied for high-cost obligations.

(6) THE 2015 ETC FORBEARANCE ORDER IS RELEVANT TO UNDERSTANDING HOW THE FCC INTERPRETS 47 U.S.C. § 214(E)(4)

20. Finally, AT&T argues that the 2015 ETC Forbearance Order²² is not instructive because it deals with 47 U.S.C. § 160(a), rather than 47 U.S.C. § 214(e)(4).²³ Staff disagrees with this assessment of relevance of the Forbearance Order.

21. USTelecom (a telecommunications trade association of which AT&T is a member) filed a Petition pursuant to 47 U.S.C. § 160(a) to forbear “all remaining 47 U.S.C. § 214(e) obligations, where a price cap carrier does not receive high cost universal service support...”²⁴ After much discussion and analysis of 47 U.S.C. § 214(e) and the ETC landscape, the FCC declined to grant the forbearance as requested. While the Petition was technically a request for forbearance under 47 U.S.C. § 160(a), the Petition requested forbearance from 47 U.S.C. § 214(e) obligations. In its Order, the FCC included detailed analysis and discussion of 47 U.S.C. § 214(e)(4), some of which Staff has cited in this response and other pleadings in this docket. FCC analysis of the statutes it is charged with enforcing is certainly relevant to this proceeding.

²²US Telecom Order.

²³AT&T’s Response at 12.


²⁴USTelecom Order at ¶3.

CONCLUSION

22. Based upon the foregoing, Staff does not find AT&T's arguments compelling and asks that the Commission reject the same.

WHEREFORE, Staff requests that the Commission adopt the recommendations contained in its May 4, 2017, R&R.

Respectfully Submitted,



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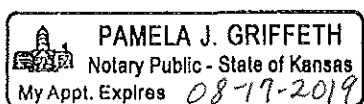
VERIFICATION

Michael Neeley, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing *Staff's Response to AT&T Kansas' Response to Staff's Second Report and Recommendation* and that the statements contained therein are true and correct to the best of his knowledge, information and belief.



Michael Neeley # 25027
Kansas Corporation Commission of the
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Subscribed and sworn to before me this 25th day of May, 2017:


Notary Public

My Appointment Expires: August 17, 2019

CERTIFICATE OF SERVICE

17-SWBT-158-MIS

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Response to AT&T Kansas' Response to Staff's Second Report and Recommendation was served by electronic service on this 25th day of May, 2017, to the following:

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