

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Application of Cox Kansas Telcom, LLC for)
Waiver of Requirement to Offer Equal Access) Docket No. 18-COXT-057-MIS
to Interexchange Carriers.)

REPLY BRIEF OF COX KANSAS TELCOM, LLC

COMES NOW, Cox Kansas Telcom, LLC (“Cox”), by and through its undersigned counsel and, pursuant to the December 7, 2017 Order Establishing Briefing Schedule (“Order”) issued by the State Corporation Commission of the State of Kansas (“Commission”), respectfully submits its Reply Brief. Cox states as follows:

I. ARGUMENT

A. *There is no statutory conflict between K.S.A. 66-1,187(p) and K.S.A. 66- 2002.*

1. In an about-face from Staff’s Report & Recommendation, “Staff’s Brief on Commission Questions” no longer asserts that K.S.A. 66-1,187(p) and K.S.A. 66-2002 are “in conflict,” as Staff now agrees with Cox that “[g]eneral and special statutes should be read together and harmonized whenever possible,” but “the more specific statute governs when two statutes may be applicable.” *In re N.A.C.*, 299 Kan. 1100, 1107, 329 P.3d 458, 464 (2014) (quotations omitted). However, Staff appears to newly argue, without citing any authority in support, that K.S.A. 66-1,187(p) is more specific than, and thus controls, K.S.A. 66-2002(a) and (k). Staff’s latest argument is untenable. A statutory *definition* simply cannot and does not impede the Commission’s statutory *authority* to “adopt,” “review,” and/or “modify” such very definition. Staff’s form-over-substance approach would vitiate the Commission’s legislated power and nullify K.S.A. 66-2002(a) and (k), which is not a permissible statutory interpretation under longstanding Kansas law. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa*

Ana, 472 U.S. 237, 249 (1985) (elementary canon of statutory construction is that statute should be interpreted so as not to render one part inoperative); *State ex rel. Stephan v. Martin*, 641 P.2d 1011, 1016 (Kan. 1982) (a statutory interpretation must “give life to the statute rather than . . . nullify it.”).

2. In a non-sequitur, and again without citing to any authority, Staff then concludes that “[t]he Commission harmonizes the two statutes by interpreting K.S.A. 66-2002 broadly to mean that the Commission may enact a proceeding to seek input about potential changes to the universal service definition, issue an order making recommendations, and then communicate those changes to the appropriate legislative committees in order to enact the changes.” Staff Brief at 4. But the actual words of K.S.A. 66-2002 contain no such requirements. Staff has merely offered its own procedural suggestion rather than the statutory resolution requested by the Commission.

3. Further, Staff’s procedural suggestion would only pertain to a situation not present here. Cox is not and has never requested that the Commission change, modify, amend, or re-interpret the universal service definition in K.S.A. 66-1,187. Rather, Cox requests that the Commission recognize and utilize its broad authority, under a plain reading of K.S.A. 66-2002, to waive the requirement that Cox provide equal access to long distance providers, based on the particular facts and circumstances presented. Indeed, the fact that Cox requested a *waiver* of the requirement to provide equal access to long distance services demonstrates that Cox is not seeking to change, modify, amend, or re-interpret the current definition of universal service. Stated another way, if Cox were seeking to modify the definition of universal service, it would not have asked for a waiver.

4. Therefore, the only interpretation that is relevant to Cox’s actual requested relief, that “gives life” to all the statutes in question, and that is consistent with the Commission’s statutory power, is that the more specific provisions of K.S.A. 66-2002(a) and (k) — allowing the Commission to exercise its nearly limitless authority over the definition of universal service in K.S.A. § 66-1,187(p) when advances in telecommunications so warrant — are controlling and permit the Commission to grant Cox’s application.

B. *The Commission has nearly limitless authority under both K.S.A. 66-1,188 and K.S.A. 66-2002(a) and (k) to consider Cox's waiver request.*

5. The portion of Staff’s Initial Brief allocated to this question again misses the point. Staff does not dispute that the Commission possesses nearly limitless authority over telecommunications public utilities doing business in Kansas, or nearly limitless authority to “adopt,” “review,” and/or “modify” “the definition of universal service and enhanced universal service.” K.S.A. 66-1,188; K.S.A. 66-2002(a) and (k). However, Staff continues to labor under a misunderstanding of Cox’s actual application in this case. Cox has not asked the Commission to “rewrite” or “amend” any statutes. On the contrary, Cox asks the Commission to afford individualized, specific relief pursuant to the undisputed, plain words of the statutes that create the Commission’s broad powers.

6. Cox’s request for a waiver from the provision contained in the definition of universal service, which requires equal access to long distance services, falls squarely within both the Commission’s general authority and specific authority to regulate telecommunications public utilities. K.S.A. 66-1,188; K.S.A. 66-2002(a) and (k). Staff has not rebutted this.

C. *The potential ramifications of the Commission granting Cox's request is de minimis.*

7. Contrary to Staff's Initial Brief, Cox does not seek for the Commission "to modify the definition of universal service," nor to "create" or "revise" "an existing regulation." Staff Brief at 7. Instead, Cox has applied only and simply for an individualized waiver from the current definition. The Commission's ability to grant such a case-specific waiver flows from its legislated "full power, authority and jurisdiction to supervise and control the local exchange carriers" and "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction" per K.S.A. § 66-1,188, as well as its unrestrained authority to "[a]dopt a definition of 'universal service' and 'enhanced universal service,' pursuant to subsections (p) and (q) of K.S.A. 66-1,187" and to periodically "review and, to the extent necessary, modify the definition of universal service and enhanced universal service, and KUSF, taking into account advances in telecommunications and information technology and services" per K.S.A. § 66-2002(a), (k). *See Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 138 P.3d 338, 350 (Kan. Ct. App. 2006) (nearly identical statute granting the Commission "full power, authority and jurisdiction to supervise and control the electric public utilities," K.S.A. 66-101, has been ruled "a constitutional delegation of legislative authority" by the Kansas Supreme Court); *see also Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 720 P.2d 1063, 1075 (Kan. 1986) ("The KCC's expertise in the field is vast, and the Commission must, of necessity, have considerable discretion in order to regulate utilities in the public interest.").

8. It is not disputed that Cox's requested waiver relief would have no effect on other companies. As a result, there are no present ramifications other than to Cox and Cox's two customers stemming from Cox's application. Moreover, even for these two customers, the

impact is minimal as they still will have the ability to receive long distance service from Cox from one of its suite of long distance calling plans.

9. Further, while Cox's two existing customers would be the only entities impacted by granting Cox's waiver request, failure to grant Cox's request would pose significant ramifications to all 700 of its Lifeline customers. As explained in its Application, when Cox first commenced service in 1999, it utilized only circuit-switch technology. Now, Cox utilizes two types of technologies to provide service — circuit-switched and VoIP — but only provisions new customers on its current VoIP network. In continuing to upgrade its IP platform, it becomes unduly costly to continue to provide equal access, particularly given how few Cox customers currently use that functionality. Application at 8. Therefore, if the Commission does not grant Cox's waiver request, at the point the Company fully transitions to the new IP technology, Cox will have to withdraw from Lifeline because it will not be able to provide equal access, affecting 700 Lifeline customers in Kansas.

D. *The policy implications of granting Cox's request for a waiver will not stress the Commission's resources.*

10. Staff maintains that it is not “philosophically opposed” to Cox's request because "Staff agrees that the long distance market has dramatically changed in the decades since the definition was established." Staff Brief at 7. Nonetheless, Staff asserts, without relying on *any* legal authorities, that a Cox-specific waiver from the universal service definition is somehow “an improper use of agency resources.” Staff Brief at 8.

11. Staff speculates that other companies could “inundate” the Commission with similar waiver requests, despite the fact that Cox's request is unique. However, even if other companies also seek a waiver from the equal access requirement in the future, Staff has cited no

reason disputing that the Commission can make a determination of such other requests on a case-by-case basis, considering the attendant facts and circumstances, just as it does in this case. Further, assuming Staff is correct that other companies seek a waiver of the open access (or other) requirement, where is the harm? Stated another way, why would the Commission or its Staff be opposed to considering reasonable requests for waiver from regulatory requirements, particularly in those instances where the facts and circumstances so warrant and the statutory framework so allows? Staff has stated no policy implication for granting Cox's waiver request except for the potential for increased work load. The Commission should not seriously countenance the argument that Cox's waiver request be denied so that Staff is not burdened by similar requests in the future.

12. Staff also argues that "[i]f each company seeks to tailor the definition around its unique business, market or infrastructure goals, the Commission would be inundated with litigation relating to these applications and the resulting definition would lose meaning." Staff Brief at 8. The fallacy of this argument is that the definition in question has already lost meaning. As stated above, Staff recognizes that the long distance market has dramatically changed in the decades since the definition was established, which is why Staff is not theoretically opposed to Cox's waiver request.

13. Staff again offers its own procedural suggestion for the Commission to "modify" the statutory definition. Staff says the correct mechanism for modifying the definition of universal service as outlined in K.S.A. 66-2002(k) is for the Commission to review the definition "presumably" in the form of a docket and then issue an order recommending the legislature "modify" the statutory definition of universal service. Staff Brief at 8. First, Staff's proposed procedural recommendation is not found anywhere in statute. Further, and more significantly,

Cox is not requesting this relief from the Commission, and Staff has failed to explain why the Commission's indisputably broad statutory powers should be so inhibited, much less offer any legal support. As discussed above, Staff's procedural suggestion is not borne out in the plain language of K.S.A. 66-1,188 or K.S.A. 66-2002(a) and (k).

14. Staff ultimately does not dispute that: (a) Staff is not "philosophically opposed" to the merits of Cox's requested relief, and only raised a now-resolved procedural matter; (b) granting the waiver only impacts two existing Cox customers at this time; and (c) the pertinent statutes allow for the Commission to "consider" the definition of universal service, without requiring a generalized modification or legislative amendment. Accordingly, public policy weighs in favor of the Commission granting Cox's requested waiver.

III. CONCLUSION

15. Cox requests a waiver of the requirement to provide equal access to interexchange carriers to its Lifeline customers. As stated in its Application, requiring Cox to maintain its obligation to offer equal access to interexchange carriers would be economically and technologically burdensome, and would place Cox at a competitive disadvantage with similarly situated carriers. In contrast, granting Cox's request is consistent with recent FCC decisions, will ensure that providers utilizing VoIP technology to provide Lifeline service will be treated in the same manner, regardless of their regulatory status, is technologically- and competitively-neutral, and is, therefore, in the public interest.

16. Moreover, the impact of Cox's request is *de minimis*. Granting Cox's request will have little to no impact on existing or future Lifeline customers. Currently, only two customers out of Cox's approximately 700 Lifeline customers use an interexchange carrier for long distance service other than Cox, which represents less than one percent of Cox's Lifeline subscribers.

Therefore, the order of magnitude in granting Cox's request is minimal to non-existent. Conversely, the impact of not granting Cox's request ultimately will impact all 700 of Cox's Lifeline customers.

17. Further, granting Cox's request will have little or no impact on other telecommunication public utilities subject to the equal access requirement in the definition of universal service. Cox is not seeking to modify or legislatively amend the definition of universal service. Instead, Cox seeks a waiver of the requirement to provide equal access to long distance services, which is a provision contained in the definition of universal service. Cox's request is confined strictly to Cox and its two customers presently affected by Cox's request. While granting Cox's waiver request could open the door to other similarly situated carriers seeking a waiver from the equal access requirement, the Commission can make determinations on such other requests on a case-by-case basis, considering the attendant facts and circumstances, just as it does in this case.

18. Importantly, Staff does not fundamentally disagree with Cox's request or the rationale underlying such request; rather, Staff's hesitation to recommend approval of Cox's application is based on procedural concerns. While Staff now agrees that K.S.A. § 66-1,187(p) and K.S.A. § 66-2002(a) and (k) can be read together and harmonized, Staff nonetheless believes that granting Cox's waiver request would require a legislative revision to K.S.A. § 66-1,187(p). Cox does not seek a legislative amendment, nor does Cox believe one is required. Instead, Cox believes its requested individualized relief — a waiver of the requirement to provide equal access to interexchange carriers within the local calling area when Cox offers Lifeline service — is permissible pursuant to the Commission's "full power, authority and jurisdiction to supervise and control the local exchange carriers" and "to do all things necessary and convenient for the

exercise of such power, authority and jurisdiction” per K.S.A. § 66-1,188, as well as its unrestrained authority to consider the definition of “universal service” as it deems appropriate per K.S.A. § 66-2002(a), (k).

19. Finally, to be clear, Cox does not seek a waiver of the requirement to provide equal access to interexchange carriers within the local calling area when offering Lifeline service because it no longer desires to provide equal access; rather, Cox seeks a waiver because compliance with the requirement will not be possible once it fully transitions to IP technology.

WHEREFORE, based on the legal and policy arguments set out herein, Cox respectfully requests that the Commission grant Cox’s Application for a waiver of the requirement to provide equal access to interexchange carriers within the local calling area when offering Lifeline service.

Respectfully submitted,

/s/ Susan B. Cunningham

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VERIFICATION
K.S.A. 53-601

STATE OF KANSAS)
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COUNTY OF SHAWNEE) ss:

I, Susan B. Cunningham, verify under penalty of perjury that I have caused the foregoing Reply Brief of Cox Kansas Telcom, LLC, to be prepared on behalf of Cox, and that the contents thereof are true and correct to the best of my knowledge, information, and belief.

/s/ Susan B. Cunningham

Susan B. Cunningham

January 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply Brief of Cox Kansas Telcom, LLC, was electronically served this 26th day of January, 2018, to the parties appearing on the Commission's service list as last modified on January 12, 2018.

/s/ Susan B. Cunningham

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