

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'S RESPONSE

The Staff of the Kansas Corporation Commission (Staff) states the following in response to *AT&T Kansas' Response to Staff's Third Report and Recommendation*¹ (AT&T's Response)²:

Introduction

1. AT&T incorrectly asserts that “the only test” for ETC³ relinquishment under 47 U.S.C. § 214(e)(4) is whether another ETC serves the relinquishment area.⁴

2. AT&T ignores the second half of 47 U.S.C. § 214(e)(4) which states: “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... shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served...”⁵

¹Southwestern Bell Telephone Company d/b/a AT&T Kansas (“AT&T”).

²AT&T Kansas' Response to Staff's Third Report and Recommendation (Oct. 15, 2018) (AT&T's Response).

³Eligible Telecommunications Carrier

⁴See AT&T's Response at 1.

⁵47 U.S.C. § 214(e)(4).

3. This “second test” or “condition precedent” must also be fulfilled in order to grant ETC relinquishment. According to Staff’s investigation, there are 1,323 census blocks in which AT&T seeks ETC relinquishment that this condition precedent cannot be fulfilled.⁶ This is due to the service obligations and operating characteristics of the “Lifeline-only” ETCs that are the only ETCs in the 1,323 census blocks.⁷

Specific Counter-Arguments

Type-by-type Matching

4. AT&T argues that: (1) 47 U.S.C. § 214(e)(4) does not distinguish among “types” of ETCs, therefore, Staff is reading additional language into the statute by delineating between “types;” and (2) the FCC does not allow high-cost or “full” ETCs to opt out of Lifeline obligations, therefore, Staff’s attempt to de-link and let AT&T out of its federal Lifeline obligations is inconsistent with federal law.⁸

5. With respect to AT&T’s first argument, Staff would simply re-iterate that according to the FCC, which is the federal administrative agency charged with interpreting 47 U.S.C. § 214(e)(4), the statute envisions delineation between types. The FCC has stated:

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. 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).⁹

6. Furthermore, the FCC has explained:

⁶See Notice of Filing of Staff’s Third Report and Recommendation (Oct. 1, 2018) (Staff’s Third R&R).

⁷See Staff’s Third R&R at 14.

⁸See AT&T’s Response at 5-9.

⁹In the Matter of Lifeline & Link Up Reform & Modernization, 31 F.C.C. Rcd. 3962, ¶ 334 (2016).

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.”³⁷³ 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.¹⁰

7. Finally, it should be noted that the FCC’s interpretation is controlling in this case:

Given the Commission's authority to interpret the Act, our interpretation of section 214(e) governs all application of that provision, whether by the Commission or by a state. *See, e.g.*, 47 U.S.C. §§ 154(i), 201(b), 303(r).¹¹

8. With respect to AT&T’s second argument - if AT&T believes it is not possible to de-link federal Lifeline obligations from high-cost obligations, then Staff would recommend the Commission deny ETC relinquishment in its entirety in the 1,323 census blocks.

Interpretation of the Third Sentence of 214(e)(4)

9. AT&T argues that the manifest intent of Section 214(e)(4) is for a state commission to ensure that customers in a relinquishment area “will continue to be served.”¹² Furthermore,

¹⁰In the Matter of Petition of Ustelecom for Forbearance Pursuant to 47 U.S.C. 160(c) from Enft of Obsolete Illec Legacy Regulations That Inhibit Deployment of Next-Generation Networks, 31 F.C.C. Rcd. 6157, ¶ 111 (2015).

¹¹In the Matter of Lifeline & Link Up Reform & Modernization, 31 F.C.C. Rcd. 3962, fn. 843 (2016); *see also* Louisiana Pub. Service Comm’n v. F.C.C., 476 U.S. 355, 369 (1986) (stating “[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (stating “if the FCC has resolved to pre-empt an area of cable television regulation and if this determination ‘represents a reasonable accommodation of conflicting policies’ that are within the agency’s domain... we must conclude that all conflicting state regulations have been precluded.”).

¹²AT&T’s Response at 9.

AT&T asserts that the record reflects all customers in the relinquishment area will continue to be served by AT&T itself, and other ETCs having “common carrier obligations” in those areas.¹³

10. This argument is a red-herring. While the Commission must make sure customers will continue to be served, 47 U.S.C. §214(e)(4) states that this duty must be met by the “remaining ETCs.” If AT&T’s Application is granted, it would no longer be an ETC and would be unable to fulfill this portion of the statute. Furthermore, as Staff has explained in earlier pleadings, AT&T’s assertions about reliance on the discontinuation process and “common carrier obligations” are not sufficient to “ensure” continued service.¹⁴

AT&T’s Request for Oral Argument

11. Staff respectfully requests that the Commission deny AT&T’s request for oral argument. AT&T has pointed to no statutory entitlement to oral argument and its request to hold oral argument over its entire Application is overly broad.

12. The Supreme Court of the United States has held that due process under the Fifth Amendment does not require oral argument in every case.¹⁵ The Court indicated that it is up to Congress to prescribe the procedures that will be used by an administrative body.¹⁶ Here, under the Kansas Administrative Procedures Act (KAPA), oral argument is only referenced in the context of an “initial order” being appealed to an agency head for review.¹⁷ There does not appear

¹³AT&T’s Response at 10.

¹⁴See Staff’s Response to AT&T Kansas’ Response to Staff’s Second Report and Recommendation, p. 7-8 (May 25, 2017); Staff’s Response to Additional Commission Questions, p. 3-6 (July 21, 2017).

¹⁵Fed. Communications Comm’n v. WJR, The Goodwill Station, 337 U.S. 265, 276 (1949) (stating: “the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.”).

¹⁶See *Id.*

¹⁷See K.S.A. 77-527(e).

to be any other statutes governing this proceeding that implicate oral argument, as distinguished from an evidentiary hearing on the factual issues.

13. The legal briefing performed by the parties to this proceeding has been exhaustive. As is evident from reviewing the filings in this case, the parties have consistently made the same arguments. Oral argument will further delay this proceeding by requiring the parties to make the same arguments yet another time.

14. “Oral argument on the Application,” as requested by AT&T is also so broad that it does not give other parties, including Staff, the ability to prepare for and know the legal issues that need to be addressed. From Staff’s perspective, the only statute that needs to be interpreted in this case is 47 U.S.C. § 214(e)(4). Analysis of this particular provision of law has already been extensively briefed.

WHEREFORE, Staff respectfully requests that the Commission approve the recommendations made by Staff in its Third Report and Recommendation filed October 1, 2018, and deny AT&T’s request for an oral argument.

Respectfully Submitted,



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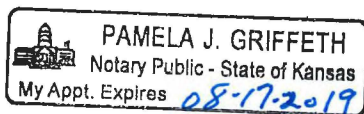
VERIFICATION

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's Response* 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
State of Kansas

Subscribed and sworn to before me this 22nd day of October, 2018.



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's Response was placed by electronic service on this 22nd day of October, 2018, to the following:

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