

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.                                    )

**INITIAL 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 Initial Brief. For its Initial Brief, Cox states as follows:

I.     BACKGROUND

1.     On August 1, 2017, Cox filed an Application requesting a waiver of the requirement to provide access to interexchange carriers within the local calling area when offering Lifeline service.<sup>1</sup> Cox stated it will continue to provide long distance service to its customers, only seeking permission to cease offering its customers the option to presubscribe to long distance service offered by a different provider. Application of Cox Kansas Telcom, LLC (Aug. 1, 2017), at 1 ("Application").

2.     Cox explained that its request is justified in light of the Federal Communications Commission ("FCC") not including access to interexchange carriers in the definition of federal Lifeline and the decline of the stand-alone residential interexchange market, including Cox's own customer base. Application at 1-2.

3.     Cox further explained requiring it 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. Application at 2, 8-9,

---

<sup>1</sup> The access requirement is found in the definition of "universal service" at K.S.A. § 66-1,187(p).

10. 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. Application at 8-10.

4. On November 6, 2017, Staff submitted its Report and Recommendation ("Report") recommending that the Commission deny Cox's Application. Significantly, Staff did not recommend denial of Cox's waiver request on substantive grounds. In fact, Staff stated it is not "philosophically opposed to Cox's request." Report at 5. Rather, Staff based its recommendation on the procedural argument that the Commission is unable to waive a statutory requirement. Report at 1, 5.

5. On November 16, 2017, Cox filed its Response to Staff's Report ("Response"). Cox addressed Staff's argument regarding potential statutory conflict, stating Staff's concern may be resolved by applying the long-established principle of statutory construction in Kansas, wherein general and special statutes should be read together and harmonized whenever possible, but the more specific statute governs when two statutes may be applicable. Cox also addressed Staff's mistaken belief that Cox seeks modification of an existing statute. Cox does not seek a legislative amendment, nor does Cox believe one is required. Rather, Cox seeks a waiver of an existing statute's definition of universal service based on the Commission's nearly limitless authority to define, review, and/or modify the definition of universal service. *See* K.S.A. §§ 66-1,188, 66-2002(a), and 66-2002(k).

6. In addition to responding to Staff's legal concerns, Cox's Response also provided context for its request. Of Cox's nearly 120,000 customers in Kansas, approximately 700 are Lifeline subscribers. Of these 700 Lifeline subscribers, only two customers have not selected

Cox as their long distance provider. It is for these two customers that Cox seeks a waiver of the equal access requirement. If the Commission grants Cox's waiver request, Cox will notify these customers of the discontinuation of access to their chosen interexchange carriers and provide them options from Cox's suite of long distance calling plans. Given that less than one percent of Cox's Lifeline subscribers avail themselves of the option to utilize an interexchange carrier for long distance service other than Cox, Cox maintains that the requested waiver likewise will have a minimal to non-existent impact on future Lifeline customers. To be clear, Cox will continue to provide long distance service to its customers, and only seeks permission to cease offering its customers the option to presubscribe to long distance service offered by a different provider. Cox's request, therefore, does not violate the public interest and should be granted. *See* Response at 4.

7. On December 7, 2017, the Commission issued its Order, stating that "[s]ince Cox and Staff both view the central question in this Docket as one of statutory interpretation, the Commission believes legal briefs are appropriate." Order at 3. To that end, the Commission requested legal briefs on the following issues:

- a) Is there a statutory conflict between K.S.A. 66-1,187(p) and K.S.A. 66-2002? If so, how should the conflict be resolved?
- b) What if any limits are there on the Commission's authority to "modify the definition of universal service and enhanced universal service" under K.S.A. 66-2002(k)?
- c) What are the potential ramifications of the Commission modifying the definition of universal service in K.S.A. 66-1,178?

- d) What are the policy implications of allowing the Commission to unilaterally modify the definition of universal service?

Order at 3.

## II. ARGUMENT

- A. *Is there a statutory conflict between K.S.A. 66-1,187(p) and K.S.A. 66- 2002? If so, how should the conflict be resolved?*

8. In its Report, Staff appears to suggest that K.S.A. § 66-1,187(p) and K.S.A. 66-2002 are somehow "in conflict." Not so. It is a long-established principle of statutory construction in Kansas 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). Here, the above statutes can be harmonized without conflict, and the more specific provisions of K.S.A. § 66-2002(a) and (k) — permitting the Commission to exercise its nearly limitless authority to define and/or modify the definition of universal service in K.S.A. § 66-1,187(p) when advances in telecommunications so warrant — are controlling. As a result, Staff's perceived statutory conflict is readily resolved.

9. Staff also suggests, without citing any authority in support, that the Commission's exercise of its specific authority per K.S.A. § 66-2002(a) and (k) in this proceeding "would need to be followed by a similar revision by the Kansas Legislature to the definition of universal service in K.S.A. 66-1,187(p)." Report at 3. However, Cox is not requesting a legislative amendment. Instead, Cox has explicitly applied for individualized relief — a waiver of the requirement to provide equal access to interexchange carriers within the local calling area when Cox offers Lifeline service, pursuant to the Commission's statutory authority to revise the

definition of "universal service" as it sees fit. Just as the Commission may waive a regulatory requirement for good cause and if in the public interest, upon the specific request by a party pursuant to K.A.R. 82-1-202(a), the Commission may also exercise its vast powers to narrowly craft the remedy requested by Cox pursuant to K.S.A. §§ 66-1,188, 66-2002(a), and 66-2002 (k).

10. The basis of Staff's concern with Cox's requested relief is a mistaken statutory conflict and an unrequested expansion of Cox's discrete application; Staff otherwise "is not philosophically opposed to Cox's request and agrees with Cox in that the long distance market has dramatically changed in the decades since the equal access to interexchange carriers service element was included in the definition of universal service[.]" Report at 5. Accordingly, Cox's request is undisputed.

B. *What if any limits are there on the Commission's authority to "modify the definition of universal service and enhanced universal service" under K.S.A. 66-2002(k)?*

11. The Commission has nearly limitless authority to "modify the definition of universal service and enhanced universal service" under K.S.A. § 66-2002(k). First, pursuant to K.S.A. § 66-1,188, the Commission is broadly vested with the "full power, authority and jurisdiction to supervise and control the telecommunications public utilities...doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." Next, K.S.A. § 66-2002(a) states that the Commission shall adopt a definition of "universal service" and "enhanced universal service" as those terms are contained in K.S.A. §§ 66-1,187(p) and (q), respectively. Further, K.S.A. § 66-2002(k) provides, in its entirety, that the Commission shall: "commencing on June 1, 1997 and periodically thereafter, 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 service." Read together, the Commission has broad authority under K.S.A. § 66-1,188 to do all things necessary to exercise its power, authority and jurisdiction over telecommunications public utilities, which includes the specific authority under K.S.A. §§ 66-2002(a) and (k) to adopt a definition, periodically review, and/or modify the definition of universal service in K.S.A. § 66-1,187(p) when advances in telecommunications so warrant.

12. In its Report, Staff seems to limit the Commission's authority to "modify the definition of universal service and enhanced universal service" by construing the term "modify" to mean "amend" legislatively. *See* Report at 3. Such a narrow interpretation stifles the Commission's ability "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction" per K.S.A. § 66-1,188.

13. However, notwithstanding Staff's restrictive interpretation of the Commission's authority, it is important to note that Cox does not seek to "modify" or "amend" the definition of universal service; rather, Cox seeks a waiver from the provision contained in the definition of universal service, which requires equal access to long distance services. Such activity appears to fall squarely within both the Commission's broad general authority and specific authority to regulate telecommunications public utilities.

C. *What are the potential ramifications of the Commission modifying the definition of universal service in K.S.A. 66-1, 178?*

14. As discussed above, Cox is not seeking to "modify the definition of universal service;" Cox has applied for an individualized waiver from the current definition. Indeed, 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.”).

15. Crucially, Cox’s application does not prevail upon the Commission to exercise the *broadest extent* of its authority to “modify the definition of ‘universal service and ‘enhanced universal service.” *See Stanford v. Gas Serv. Co.*, 346 F. Supp. 717, 721 (D. Kan. 1972) (“The Kansas Legislature has vested extremely broad powers in the Kansas Corporation Commission[.]”). Rather, Cox seeks an *isolated waiver* — relief well within the Commission’s comprehensive authority, but well short of a universal definition modification.

16. A universal service definition modification, which Cox is not seeking and does not advocate, could present ramifications such as the need for a generic investigative docket to include all companies subject to the current definition. However, 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.

17. 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.

D. *What are the policy implications of allowing the Commission to unilaterally modify the definition of universal service?*

18. Similar to Cox's responses to the above Questions A-C, Cox's application *does not seek* to “unilaterally modify” the definition of universal service. Importantly, Cox seeks lesser relief: a Cox-specific waiver from such definition because Cox can no longer comply with the equal access requirement.

19. Further, as discussed above, the Commission undisputedly possesses the legislated authority to “unilaterally” act to grant the relief requested by Cox in this case — without any contingent action or input by the Legislature. *See Little v. State*, 121 P.3d 990, 993 (Kan. Ct. App. 2005) (“Generally, state agencies administer, enforce, or interpret particular laws



of the state, as authorized by the legislature. State agencies have decision-making authority and are not merely advisory groups.”).

20. The only policy implication potentially resulting from Cox’s application is that other similarly situated carriers may also seek a waiver from the equal access requirement. In that event, 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. From a policy standpoint, the Commission should grant Cox’s requested relief here because: (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 universal service, without requiring a generalized modification or legislative amendment.

### III. CONCLUSION

21. Cox requests a waiver of the requirement to provide 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.

22. 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 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.

23. 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 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.

24. 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. First, Staff believes that K.S.A. § 66-1,187(p) and K.S.A. § 66-2002(a) and (k) are irreconcilably in conflict, when, in truth, they can be read together and harmonized. Further, Staff 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 statutory authority to define the definition of "universal service" as it sees fit.

WHEREFORE, based on the legal and policy arguments set out herein, Cox respectfully requests that the Commission deny the recommendation contained in Staff's November 6, 2017 Report, and grant Cox's Application for a waiver of the requirement to provide access to interexchange carriers within the local calling area when offering Lifeline service.

Respectfully submitted,

/s/ Susan B. Cunningham

---

Susan B. Cunningham (KS Bar No. 14083)  
DENTONS US LLP  
7028 SW 69th Street  
Auburn, KS 66402  
Office: (816) 460-2441  
Cell: (785) 817-1864  
Facsimile: (816) 531-7545  
Email: [susan.cunningham@dentons.com](mailto:susan.cunningham@dentons.com)

*Attorney for Cox Kansas Telcom, LLC*

**VERIFICATION**  
**K.S.A. 53-601**

STATE OF KANSAS            )  
                                      )  
COUNTY OF SHAWNEE    )       ss:

I, Susan B. Cunningham, verify under penalty of perjury that I have caused the foregoing Initial 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 12, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Initial Brief of Cox Kansas Telcom, LLC, was electronically served this 12th day of January, 2018, to the parties appearing on the Commission's service list as last modified on December 1, 2017.

/s/ Susan B. Cunningham

\_\_\_\_\_  
Susan B. Cunningham