BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the Matter of the Application of Cox Communications, LLC, to Expand its Service Area And for Designation as an Eligible Telecommunications Carrier in Certain Rural Territories in the State of Kansas	)))))	Docket No. 15-COXT-396-ETC

REPLY OF WAMEGO TELECOMMUNICATIONS COMPANY, INC. TO RESPONSES OF COMMISSION STAFF AND COX KANSAS TELECOM

COMES NOW intervenor Wamego Telecommunications Co., Inc. ("Wamego") and submits its Reply to the Response of Commission Staff ("Staff") dated May 15, 2015 and the Response of Cox Telcom, LLC (the "applicant" or "Cox") dated May 18, 2015, each such Response addressing Wamego's Motion of May 8, 2015 for determination of the sufficiency of Cox's request to Wamego for negotiation of interconnection. In support of its Motion and in reply to the Responses thereto, Wamego states:

1. Neither of the Responses addresses the central issue of Wamego's Motion. Staff's Response relies on a distinguishable judicial construction of an inapplicable federal statute, while Cox's Response addresses only Cox's claimed attempt to satisfy a Kansas rural entry guideline other than the guideline underlying the Motion.

2. Specifically neither Staff nor Cox directly addresses the evidently undisputed fact that Cox seeks to provide competitive local exchange service in the service area of an incumbent rural telephone company (Wamego), but its proposal affirmatively indicates Cox's intent to offer service in an area less than the entire study area of the incumbent carrier.

3. The obligation to offer service to all consumers throughout the study area of an incumbent rural telephone company is a specific prerequisite to certification as a

competitive provider of local exchange service in the service area of that rural company. Each of the rural entry guidelines adopted by order of this Commission, as required by K.S.A. 66-2004 and 2005, must be satisfied.

4. The clear purpose of the "serve all" guideline is to preclude anticompetitive provision of service in which the incumbent is required to serve both high cost and low cost areas of its service area, while a putative competitor seeks to provide service only where its costs are low. This distortion of fair competition, often referred to as cherry picking or cream skimming, has long been recognized as a threat to reliable and affordable universal service. This Commission's 1997 order adopting the "serve all" guideline was adopted under legislative mandate (K.S.A. 66-2004(b)) to:

> ...initiate a rulemaking procedure to adopt guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers. The preservation and advancement of universal service shall be a primary concern.

5. The responses of Staff and Cox offer no new information suggesting that Cox can meet or intends to meet the Commission's threshold requirements for certification. The controlling undisputed facts are that Cox's Application affirmatively states an *inability* to provide such service throughout Wamego's Wamego and St. George exchange areas, and that Application makes no mention of any intent to offer service in any part of Wamego's Paxico exchange. All three exchange areas are within the Wamego study area as defined by both this Commission and the Federal Communications Commission.

6. Cox's evident inability to satisfy in their entirety the Commission's rural entry guideline prevents Cox from qualifying as a carrier in the service area for which it has requested negotiation with Wamego. Since Cox does not qualify as a carrier it is not

entitled to the benefit of the requirements of the federal Telecommunications Act generally requiring negotiation of interconnection with any carrier. The applicability of the rural exemption in the federal act (47 U.S.C. §251(f)(1)(C)) does not come into play, as neither a rural company nor any other telecommunications carrier is required to negotiate with an entity unable to qualify as a carrier.

7. Wamego understands C ox's request for negotiation of interconnection to apply to the exchange of local traffic. It appears Cox cannot be certified to provide local service, and Cox would therefore be unable to generate local traffic to exchange locally with Wamego. Under the set of facts it remains unreasonable to require Wamego to engage in negotiations for an agreement that cannot be implemented.

8. Staff's response relies entirely on the provisions of 47 U.S.C. §251(f)(1)(C). This section creates an exception to the general rural telephone company exemption of §251 (f) in the case of a rural company that provides video service as of a given date. As addressed hereafter Staff's analysis and claimed authority are inapplicable. Even if Staff's analysis of the exception were correct, it is inapplicable to Wamego's motion. That motion does not rely on the statutory rural company exemption but rather on the failure of Cox to qualify as a carrier. Wamego needs no rural company exemption under these facts, so any exception to that exemption is immaterial.

9. Staff' own analysis recognizes "Wamego is required to interconnect in good faith with any requesting *carrier*..." (Staff Response, ¶ 6, p. 3; emphasis supplied). That analysis, though, merely assumes Cox's status as a carrier. If Staff is correct, the duty to interconnect depends on the requesting entity's status as a carrier with or without the existence of a bona fide request. The record indicates Cox lacks that status as to local traffic in the Wamego service area.

10. *Ass'n of Commercial Enterprises v. F.C.C.*, 235 F.3d 662 (D.C. Cir. 2001), generally known in telecommunications law as the ASCENT case, cited by Staff at ¶ 8, p. 3 of its Response, stands for the proposition that Staff quoted, *i.e.*, the purpose of the requirements of Sec. 251(c) is to prevent an incumbent local exchange carrier ("ILEC") from abusing its market power of the local loop to prevent competition. However, the market-opening goals of 251(c) and the provision of video service by a rural affiliate are two unrelated issues. The ASCENT case involved the merger of two large Bell Operating Companies, and whether they could avoid Section 251(c) obligations for advanced services by transferring the provision of all of those services to an affiliate. The advanced services at issue in ASCENT were services that would have normally been subject to resale but for the fact that they were effectively "screened off" in an affiliate.

11. ASCENT does not address the rural exemption, or services not subject to resale. Video services are not subject to resale, though the services used by the incumbent to provide video services (*e.g.*, broadband fiber, T3, OC service, etc.) may be subject to resale. In the present case, the video service at issue is not subject to resale because it is not a telecommunications service, and therefore, the ASCENT case is inapplicable to the service provided by a Wamego affiliate.

12. It does not appear that the FCC or the federal courts have directly addressed the question of whether the provision of cable service by a rural ILEC's CLEC affiliate will trigger the provisions in Sec. 251(f)(1)(C). The decision nearest to direct authority on the specific theory raised by Staff is the FCC's I*n re Armstrong* decision issued in 2000 (*In the Matter of Petition for Declaratory Ruling of Armstrong Communications, Inc. Regarding the Definition of "Providing Video Programming" Under Section 251(f)(1)(C) of*

The Telecommunications Act of 1996, 15 FCC Rcd 1200; 2000 FCC LEXIS 287; 19 Comm. Reg. (P & F) 450; January 19, 2000 Released; Adopted January 18, 2000.)

13. In *Armstrong* the FCC was asked whether a rural ILEC was "providing video programming" for purposes of Sec. 251(f)(1)(C) if the ILEC had obtained section 214 authorization to build and operate a cable system, but had not started to provide the video service itself. The FCC stated that there was no reason that it should interpret the word "provide" in the statute to also mean "authority to provide", and the FCC refused to deviate from the plain words in the statute. Given that the FCC refused to read more into Sec. 251(f)(1)(C) in *Armstrong*, it would be consistent with *Armstrong* for the KCC also to interpret that section using standard statutory construction principles, and not read into the statute more than what is written. Provision of video services by an affiliate would be a condition beyond the plain language of the Act's exception to the rural exemption.

14. It should be noted that the situations in which the FCC has attributed the operations of a CLEC to an affiliated ILEC generally involve cases where the applicability of FCC rules or policy were involved, or where there was some scheme designed to get around FCC rules, rather than a circumstance where the interpretation of a statute was at issue. For example, the FCC will not allow a rural ILEC to circumvent its access stimulation rules for "traffic pumping" by allowing the ILEC to route the traffic through an affiliated CLEC. Similarly, the FCC will not allow a CLEC to get around the rural exemption for access charges limiting rural CLEC service to non-urban areas by dividing operations between a rural CLEC and a CLEC serving urban areas, if the sole purpose for the division is solely to maintain the rural CLEC access charge exception.

15. The consistent theme that runs through these situations – in which affiliate activity is effectively imputed to the incumbent carrier – is that the rural telephone company has concocted an improper scheme that has no apparent purpose other than to engage in regulatory arbitrage. In Wamego's case there is no indication whatever of such a practice or intent in the provision of video services by an affiliate, and FCC policy is inconsistent with the interpretation urged by Staff.

16. Again, although the ASCENT case is readily distinguishable and although relevant FCC action is inconsistent with Staff's theory, that theory addresses a statute immaterial to Wamego's motion. Cox is not eligible for designation as a carrier for the purposes subject to its request for negotiation; therefore Wamego need not rely on the federal rural exemption. It is of no matter whether there is an exception to that exemption, since the exemption itself is not the basis for Wamego's motion.

17. Cox's Response similarly fails to address the applicant's inability to satisfy the entirety of this Commission's rural entry guidelines. Instead, Cox asserts its request for negotiation is intended to satisfy an entirely separate element of the rural entry guidelines. It matters not whether Cox seeks to satisfy some other portion of the Commission's ordered and statutorily mandated guidelines, as satisfaction of all the guidelines is a prerequisite to the certification Cox seeks.

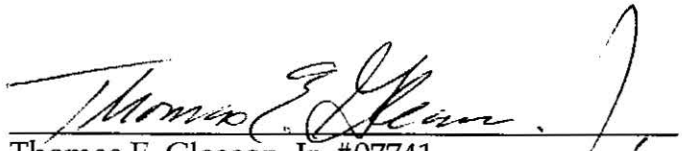
18. Wamego takes strong exception to Cox's gratuitous claims about motive. As an eligible telecommunications carrier Wamego has an obligation to ratepayers and KUSF contributors to restrain its recoverable administrative costs. Wamego stands ready to negotiate an interconnection in good faith if it is legally obligated to do so, but it would be contrary to public policy to require such a commitment of time and expense if the negotiation could not result in an agreement that could be implemented. It appears to Wamego that an interconnection agreement for the exchange of local traffic

with Cox could not lawfully have effect, due to Cox's ineligibility for certification to generate – and thus exchange – local traffic. It follows that negotiation for such an agreement would amount to wasteful activity and expense.

19. In fact it would be more burdensome for the public and for all parties if Wamego had not sought the determination requested in its Motion. The alternative would be for Wamego unilaterally to decline negotiation, in which case the Commission potentially could be forced into acting on a request for an arbitration proceeding at a later date under 47 U.S.C. §252(b). It is plainly far more reasonable to resolve the extent (if any) of Wamego's obligation to negotiate at an earlier date as the company has requested by its Motion.

WHEREFORE Wamego renews its request for the Commission's determinations whether the Cox request constitutes a bona fide request for interconnection and whether Wamego is obliged to negotiate interconnection as requested by Cox.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS)
) SS:
COUNTY OF DOUGLAS)

I, Thomas E. Gleason, Jr., of lawful age, being first duly sworn upon my oath, state: I am attorney for Wamego Telecommunications Co., Inc.; I have read the foregoing Reply, and upon information and belief state that the matters therein appearing are true and correct to the best of my knowledge and information.

Thomas E. Gleason, Jr.

Subscribed and sworn to before me this 20th day of May, 2015.

Notary Public

My Commission Expires:
8-20-16

NOTARY PUBLIC - State of Kansas
SHARON M. STALLINGS
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CERTIFICATE OF MAILING

Thomas E. Gleason, Jr. certifies that the foregoing Motion was served electronically to the following on the 20th day of May, 2015:

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