

Mark E. Caplinger, P.A.

Attorney at Law
7936 S.W. Indian Woods Place
Topeka, Kansas 66615
Telephone: (785) 478-9916
Cell: (785) 231-9282
E-mail: mark@caplingerlaw.net

May 8, 2019

Ms. Lynn M. Retz
Secretary to the Commission
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

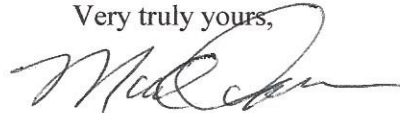
Re: Dkt. 17-SWBT-158-MIS

Dear Ms. Retz,

Enclosed is Nex-Tech, LLC's Petition for Reconsideration of the Commission's Order of April 23, 2019, to be filed in the above-referenced docket.

Please do not hesitate to contact my office with any questions you may have.

Very truly yours,



Mark E. Caplinger
Mark E. Caplinger, PA
Attorney for Nex-Tech, LLC

enclosures
MEC/njm

cc: Jimmy Todd
Rhonda Goddard

**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)	
Telecommunications Carrier Designation)	Docket No. 17-SWBT-158-MIS
In Specified Areas and Notice Pursuant to)	
K.S.A.2015 Supp. 66-2006(d) of Intent to)	
Cease Participation in the Kansas Lifeline)	
Service Program.)	

**NEX-TECH, LLC'S PETITION FOR RECONSIDERATION
OF THE COMMISSION'S ORDER OF APRIL 23, 2019**

Nex-Tech, LLC, ("Nex-Tech"), respectfully submits its Petition for Reconsideration of the Commission's Order on Nex-Tech, LLC's Petition to Intervene and on Petitions for Reconsideration from Nex-Tech and AT&T filed on April 23, 2019, pursuant to K.S.A. 66-118(b) and K.S.A. 77-529. Nex-Tech states as follows:

1. On March 25, 2019, Nex-Tech filed a Petition to Intervene and for Limited Reconsideration of the Commission's *Order on AT&T's Request to Relinquish Its Eligible Telecommunications Carrier (ETC) Designation* ("Order of March 14, 2019") after Nex-Tech was served Notice of the March 14, 2019 Order by the Prehearing Officer on March 15, 2019. The purpose of Nex-Tech's Petition was limited only to AT&T's Kansas ("AT&T") ETC relinquishment designation in the Abilene exchange.

2. On March 29, 2019, AT&T filed a Petition for Reconsideration ("PFR") and Response to Nex-Tech. In its PFR AT&T withdrew its request for relinquishment in 856 census

blocks. Of those, 145 census blocks are located in the Abilene exchange.¹ AT&T requested the Commission revise its Order of March 14, 2019, in exchange for AT&T not pursuing threatened litigation.²

3. On April 3, 2019, the Commission Staff filed its Response to Nex-Tech's Limited PFR and Request for Clarification. Staff did not specifically oppose Nex-Tech's intervention or that its legal rights and issues are at issue in this Docket.

4. On April 5, 2019, Nex-Tech filed a Reply and Response to AT&T's PFR. Nex-Tech was opposed to the Commission accepting AT&T's offer to provide a "newly revised" order in return for AT&T's withdrawal of threatened federal litigation.³

5. On April 10, 2019, Nex-Tech filed its Reply to Staff's Response to Nex-Tech's Limited PFR, pointing out that Staff's response requested clarification requiring additional action by the Commission post the "final" Order of March 14, 2019. Both AT&T's and Staff's PFRs requested and required further Commission action after the Order was issued on March 14, 2019.

6. AT&T filed a Reply in Support of its PFR on April 15, 2019. AT&T, in its Reply argued that, by agreeing to remain an ETC in the 856 census blocks (145 of those being in the Abilene exchange), mooted all legal issues of qualification for relinquishment in those census blocks.⁴

¹ See AT&T's PFR, Revised Exhibit B (filed on Mar. 29, 2019).

² AT&T's PFR, p.2 ¶2 (Mar. 29, 2019).

³ Nex-Tech's Reply to AT&T's PFR p.6 ¶16 (Apr. 5, 2019).

⁴ AT&T's Reply p.1 ¶2 (Apr. 15, 2019).

7. On April 23, 2019, the Commission issued its Order on Nex-Tech, LLC's Petition to Intervene and on Petitions for Reconsideration from Nex-Tech and AT&T (the "Order of April 23, 2019"). It denied Nex-Tech's Petition and granted AT&T's PFR, thus revising its Order of March 14, 2019, accepting AT&T's offer to retain ETC designation in an additional 856 census blocks (including 145 in the Abilene exchange).⁵ It also granted Staff's PFR and clarified the March 14, 2019 Order to require AT&T to serve any petition it may make to the FCC for discontinuance upon all Kansas CETCs.⁶

8. The Commission does not find that Nex-Tech's rights and interests are not affected by its Orders of March 14, 2019 and April 23, 2019. The Commission does deny Nex-Tech's request for intervention utilizing the permissive intervention rules of K.A.R. 82-1-225(b). It is indisputable that Nex-Tech's rights and interests are affected by the Commission's Order of April 23, 2019. The Commission itself recognizes this in its Order in Docket 19-NTHT-244-ETC of the same date.⁷

9. The Commission denies Nex-Tech's intervention on the basis that it is not in the interests of justice for two reasons. The first reason is based on the untimeliness of Nex-Tech's Petition to Intervene. The second reason is based on the Commission's assertion that it will impair the orderly and prompt conduct of the proceeding.

⁵ *Order on Nex-Tech, LLC's Petition to Intervene and on Petitions for Reconsideration from Nex-Tech and AT&T*, p.12 Ordering Clauses A and C (Apr. 23, 2019).

⁶ *Order*, p.12 Ordering Clause D (Apr. 23, 2019).

⁷ Dkt. 19-NTHT-244-ETC *Order on Nex-Tech LLC's ETC Relinquishment and KLSP Non-Participation Application*, p.8 ¶16 (Apr. 23, 2019).

10. The Commission found, “Nex-Tech had notice of the Abilene exchange’s implication in the instant Docket since March, 2017. Thus, Nex-Tech had almost two years prior to the Commission’s Relinquishment Order to intervene in this proceeding.”⁸ Presumably the Commission is referring to the information request sent electronically to Nex-Tech on March 22, 2017 by Commission Staff. Nex-Tech’s response to this information request clearly put Staff on notice that Nex-Tech was unable to ensure continued service in the AT&T exchanges should AT&T receive relinquishment. Nex-Tech also included the explanation that Nex-Tech’s provisioning of service in the AT&T exchanges was based solely on utilizing the facilities of AT&T on a wholesale and resale basis.

11. Staff had recommended in its Report and Recommendation (“R&R”) that the Commission “...provide notice of AT&T’s Application to all carriers designated as ETCs in AT&T’s service area in Kansas and permit ETCs to file for intervention in the Docket. Staff recommends motions to intervene be filed within three weeks of the Order date and include any objections to, or comments about, AT&T’s filing at the time they file their motion.”⁹

12. Staff’s recommendation to provide an order and allow other high-cost ETCs to intervene was vehemently opposed by AT&T in its comments on Staff’s Report and Recommendation dated March 8, 2017.¹⁰ When the Commission Order was issued on April 27, 2017, the Commission did not adopt Staff’s recommendation and did not serve the Order of April 27, 2017, in order to provide notice to the other ETCs to allow for motions to intervene or to provide comments on AT&T’s relinquishment request.

⁸ Dkt. 17-168 *Order*, p.7 ¶17 (April. 23, 2019).

⁹ Staff’s R&R p.1 of 5 ¶2 (Notice of Filing on Feb. 28, 2017).

¹⁰ AT&T’s Comments on Staff’s R&R, p.2 ¶ 3, p.5 ¶ 12-14 (Mar. 8, 1017).

13. There is no statutory requirement obligating Nex-Tech to intervene in the Docket. The intervention or comments by other high-cost ETCs were not critical to the Commission since the Commission did not adopt Staff's recommendation by serving its Order of April 27, 2017, allowing for those entities to intervene. When Nex-Tech did attempt to intervene on March 25, 2019, the Commission denied its motion.

14. After Nex-Tech received and responded to the information request of March 22, 2017, AT&T filed for a Stay of the Docket on July 19, 2017. For over nine months the Docket was stayed, eventually prompting the Commission Staff to file a Motion to Dismiss for lack of prosecution on April 24, 2018. Only then did AT&T resume activity in the Docket. After activity resumed, Nex-Tech, rather than intervening in the Docket, began preparing to file its own application for relinquishment in Docket 19-NTHT-244-ETC and did so on December 19, 2018.

15. The Commission Order found "it would be unfair to AT&T to allow Nex-Tech to intervene and attempt to add to the record at this point."¹¹ Nex-Tech's intervention does not seek to add to the record. Rather, it is requesting intervention and requesting the Commission for limited reconsideration of its decision based on the existing record. Such a request is not unfair to AT&T and in fact, it serves the interests of justice by asking the Commission to reconsider its decision as it relates to the Abilene exchange based on its statutory obligations to determine whether relinquishing AT&T is in the public interest of the consumers.

¹¹ Order p. 7 ¶17 (Apr. 23, 2019).

16. The Commission's Order relies on Nex-Tech's application for ETC designation in Dkt. 06-NTHHT-1022-ETC as supporting its decision. Its application stated, "Nex-Tech has constructed an overlay to SBC's network using a fiber/copper facilities, coaxial cable, resale and/or unbundled network elements ("UNE") to meet the requirements for service."¹² The application was for sixteen exchanges, one of which was the Abilene exchange. In those exchanges wherein the competitive market had supported the construction of facilities, Nex-Tech had done so. In many cases where Nex-Tech as a competitive provider had built facilities, it had done so with the assistance of the American Recovery and Reinvestment Act of 2009 ("ARRA"). The Abilene exchange was not part of the ARRA grant. The competitive market in the Abilene exchange did not support the construction of facilities, and as Nex-Tech has asserted in the Docket, it does not have any facilities in the Abilene exchange.¹³

17. The fact is that Nex-Tech customers in the Abilene exchange are being provided services solely on a wholesale/resale basis utilizing AT&T's facilities. Nex-Tech does not have any Lifeline customers in the exchange. The total number of customers Nex-Tech serve represents approximately one-tenth of one percent of the population of the Abilene exchange. Further, the Commission is aware that AT&T, as the incumbent provider, has existing facilities throughout the Abilene exchange. AT&T has been the incumbent provider, essentially from the inception of telephony in Kansas, in the Abilene exchange. The Commission has known for over two years that Nex-Tech was unable to ensure continued services in all of AT&T's exchanges should AT&T be granted relinquishment from those exchanges.

¹² Dkt. 06-1022 *Application of Nex-Tech, Inc. for Designation as an ETC*, p.2 (Mar.17, 2006).

¹³ Nex-Tech's Petition p.7 ¶17 (Mar. 25, 2019).

18. Nex-Tech's intervention and request for limited reconsideration would not disrupt the orderly and prompt conduct of the proceedings. Nex-Tech's Petition essentially is self-restricting. Nex-Tech is not requesting full participation. Nex-Tech is not requesting further discovery, evidence, or hearings. Nex-Tech is asking the Commission to reconsider based on the evidence of record.

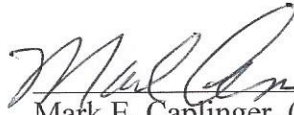
19. As the Commission found, Nex-Tech did in fact contribute to the record by providing responses to Information Requests 12 and 16.¹⁴ The Commission is correct that Nex-Tech's purpose for intervening and requesting limited reconsideration is solely for the Abilene exchange.

20. Nex-Tech does not believe that considering adding the remainder of the Abilene exchange to the 145 census blocks in which AT&T has agreed to remain an ETC in the exchange involves protracted complex litigation. Nex-Tech anticipates that AT&T will respond to this filing by arguing that should the Commission grant Nex-Tech's intervention and reconsider its decision, AT&T would renew its threat of federal litigation involving complex matters. When the Commission is fulfilling its statutory obligations, threatened litigation of a party should not be a factor in its deliberations.

WHEREFORE, Nex-Tech respectfully requests the Commission reconsider and grant Nex-Tech's Petition to Intervene and for Limited Reconsideration of the Commission Order granting AT&T's request for ETC relinquishment in the Abilene exchange.

¹³ Order p.8 ¶19 (Apr. 23, 2019).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark E. Caplinger', is written over a horizontal line.

Mark E. Caplinger, (#12550)
Mark E. Caplinger, P.A.
7936 SW Indian Woods Place
Topeka, Kansas 66615
Telephone: (785) 478-9916
mark@caplingerlaw.net
Attorney for Nex-Tech, LLC

VERIFICATION

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

I, Mark E. Caplinger, of lawful age, being first duly sworn upon his oath states:

That he is an attorney for Nex-Tech, LLC, that he has read the above and foregoing document, and upon information and belief, states that the matters therein appearing are true and correct.



Mark E. Caplinger

SUBSCRIBED AND SWORN to before me this 8th day of May, 2019.





Notary Public

My Commission Expires:

11-15-19

CERTIFICATE OF SERVICE

I, Mark E. Caplinger, hereby certify that a true and correct copy of the above and foregoing document was electronically served to the following on this 5th day of May, 2019

Michael Duenes, Assistant General Counsel
Kansas Corporation Commission
1500 SW Arrowhead
Topeka, KS 66604
m.duenes@kcc.ks.gov

Michael Neeley, Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead
Topeka, KS 66604
m.neeley@kcc.ks.gov

Ahsan Latif, Litigation Counsel
Kansas Corporation Commission
1500 Arrowhead Road
Topeka, KS 66604
a.latif@kcc.ks.gov

Todd E. Love, Attorney
Citizens' Utility Ratepayer Board
1500 Arrowhead Road
Topeka, KS 66604
t.love@curb.kansas.gov

David W. Nickel, Consumer Counsel
Citizens' Utility Ratepayer Board
1500 Arrowhead Road
Topeka, KS 66604
d.nickel@CURB.kansas.gov

Della Smith
Citizens' Utility Ratepayer Board
1500 Arrowhead Road
Topeka, KS 66604
d.smith@CURB.kansas.gov

Shonda Rabb
Citizens' Utility Ratepayer Board
1500 Arrowhead Road
Topeka, KS 66604
s.rabb@CURB.kansas.gov

Colleen R. Jamison, Attorney
Jamison Law, LLC
P.O. Box 128
Tecumseh, KS 66542
colleen.jamison@jamisonlaw.legal

Thomas E. Gleason, Attorney
Gleason & Doty Chartered
PO Box 6
Lawrence, KS 66049
gleason@sunflower.com

Mark Doty, Attorney
Gleason & Doty Chartered
401 S. Main St. Ste. 10
PO Box 490
Ottawa, KS 66067
Doty.Mark@gmail.com


Bruce Ney, Senior Legal Counsel
Southwestern Bell Telephone Co. dba AT&T Kansas
816 Congress, Suite 1100
Austin, TX 78701
bn7429@att.com

Javier Rodriguez, Area Manager Regulatory Relations
Southwestern Bell Telephone Co. dba AT&T Kansas
816 Congress, Suite 1100
Austin, TX 78701
jr1515@att.com

Rob Logsdon, Director Regulatory Affairs
Cox Kansas Telcom, LLC dba Cox Communications, Inc.
11505 West Dodge Rd
Omaha, NE 68154
ROB.LOGSDON@COX.COM

Mark P. Johnson, Partner
Dentons US LLP
4520 Main Street, Ste. 1100
Kansas City, MO 64111
MARK.JOHNSON@DENTONS.COM

Susan Cunningham, SVP Regulatory and Government Affairs, General Counsel
Kansas Electric Power Co-op, Inc.
600 Corporate View
PO Box 4877
Topeka, KS 66604
scunningham@kepco.org



Mark E. Caplinger