

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

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

STAFF'S BRIEF ON COMMISSION QUESTIONS

The Staff of the Kansas Corporation Commission (“Staff” and “Commission,” respectively) states the following in response to the Commission’s December 7, 2017 *Order Establishing Briefing Schedule*:

Question 1: 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?

1. K.S.A. 66-1,187(p) provides the State’s definition of “universal service” and requires telecommunications public utilities to provide “equal access to long distance services.” K.S.A. 66-2002 outlines duties of the Commission related to universal service, which include the responsibility 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.”¹

2. There is no conflict between the two statutes regarding the requirement for “equal access to long distance services.” K.S.A. 66-1,187(p) includes “equal access” as a necessary element of universal service and nothing in K.S.A. 66-2002 contradicts its inclusion. The only conflict between the two statutes arises out of Cox’s interpretation of K.S.A. 66-2002. Cox argues that K.S.A. 66-2002 grants the Commission the power to unilaterally modify the statutory definition of universal service. Staff disagrees, arguing that a proper reading of K.S.A. 66-2002

¹ K.S.A. 66-2002(k).

and past practice of the Commission supports Staff's position that the definition of universal service can only be modified after an investigation into the necessity of any modifications, resulting in a formal recommendation by the Commission followed by legislative action.

3. K.S.A. 66-2002 established a framework for Commission stewardship of the "universal service" definition codified in K.S.A. 66-1,187, beginning with initiating a proceeding on or before July 1, 1996,² to ensure such guidelines are preserved. The statute requires various actions by the Commission to effectuate the enforcement of the "universal service" definition, including submitting reports³ and status updates to the legislature⁴. The statute's instructions to consult, advise and update legislative bodies⁵ over time clearly imply that the development of the "universal service" definition was to be conjunctive responsibility of the Commission and the legislature. That arrangement is confirmed by the legislature's decision to enshrine the definition of "universal service" in statute rather than through Commission regulation which would have allowed the Commission unfettered ability to abridge, modify and grant waivers.

4. This understanding is further supported by the past practices of the Commission. The Commission has reviewed the definition of universal service on three occasions. The first review occurred on June 6, 1997,⁶ at which time comments on changes to the definition were sought and overwhelmingly reflected a desire to preserve the existing definition. As a result the Commission determined not to revise the definition in July of 1997.⁷

5. The second review occurred in 1998 at the behest of the Kansas Legislature, which by letter requested the Commission to expedite a review of the definitions of universal service and

² K.S.A. 66-2002(c).

³ K.S.A. 66-2002(m).

⁴ K.S.A. 66-2002(n).

⁵ K.S.A. 66-2002(n).

⁶ Docket No. 94-GIMT-478-GIT, June 6, 1997 Order Requesting Comments on Universal Service Issue.

⁷ Docket No. 94-GIMT-478-GIT, September 29, 1998 Order Addressing Comment Relating to Universal Service and Requesting Additional Comments.

enhanced universal service and advise various legislative committees of its findings and revisions. The Commission's "Report and Recommendation on the Definitions of Universal Service and Enhanced Universal Service," issued February 12, 1999,⁸ specifically requested language be added to the definition of universal service and that "equal" be removed from the phrase "equal access to long distance services." The legislature decided against making the Commission-recommended changes to the definition of universal service. That the Commission deferred to the legislature's decision to preserve the existing definition demonstrates its deference to the legislature regarding its authority over K.S.A. 66-1,187.

6. The third review of the definition of universal service occurred in 2016 in Docket No. 16-GIMT-575-GIT. The Commission solicited comments on a number of topics, including whether the Commission should align the definition of universal service for KUSF support purposes with the FCC's definition of voice telephony contained in 47 C.F.R. 54.101(a)(1). The rural local exchange carriers (RLECs) stated there was nothing in the proceeding to support the necessity of such changes and requested further scrutiny of the potential consequences before revising the definition. The Commission issued an Order on February 28, 2017, in which it stated that the parties, including Cox, were unanimous in the belief that redefinition was unnecessary at this time.⁹ Six months later, Cox filed its Application in the current docket seeking an individualized waiver from the strictures of the universal service definition.

7. In its response to Staff's Report & Recommendation, Cox argues "[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). Staff agrees with this interpretation. The more specific

⁸ Docket No. 94-GIMT-478-GIT, February 12, 1999 Report.

⁹ Docket No. 16-GIMT-575-GIT, February 28, 2017 Order on Definition of Universal Service.

statute with regards to the universal service definition is K.S.A. 66-1,187, which explicitly identifies the required services telecommunications utilities must provide for universal service. K.S.A. 66-2002 is the more ambiguous statute, providing the Commission with authority to recommend modifications to the statutory definition of universal service without limiting those potential modifications to a specific date or time. The 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.

Question 2: 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)?

8. The Commission is limited by the separation of powers enshrined in the Kansas State Constitution, which states that “the legislative power of this state shall be vested in a house of representatives and senate.” Kan. Const. art. II, § 1. “A legislature's delegation of legislative power to make a law is improper, unless the Kansas Constitution permits delegation of legislative power to a different branch of government. If the constitution does not permit that type of delegation, the separation of powers doctrine is violated because legislative power is vested in the legislature only.” *Kansas One-Call Sys., Inc. v. State*, 294 Kan. 220, 230, 274 P.3d 625, 633–34 (2012)

9. The Commission possesses administrative power, which is the power to administer or enforce laws, whereas legislative power is the power to make laws rather than the power to enforce them. *State ex rel. Tomasic*, 264 Kan. at 303, 955 P.2d 1136. “The legislature can delegate the power to fill in the details of an enacted statute. And standards to govern the exercise of such

authority may be implied from the statutory purpose.” 294 Kan.at 230. The legislature can delegate to administrative agencies the ability to “fill in the details,” acknowledging that there are “definite standards to guide the exercise of such authority.” 264 Kan. At 304.

10. The Commission is an administrative body that relies upon the legislature to provide a clear standard of governing the exercise of the authority delegated to it. *See Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n*, 264 Kan. 363, 395, 956 P.2d 685 (1998); *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 491, 495, 720 P.2d 1063 (1986). The power delegated to the Commission by K.S.A. 66-2002 was administrative because the power to adopt definitions, review, approve and ensure compliance, submit reports and establish minimum standards are all administrative in nature.

11. In K.S.A. 66-2002, the legislature directed the Commission to “review and, to the extent necessary, modify the definition of universal service.” The Commission’s ability to fulfill this directive is limited by its administrative nature. It can “fill in the details” of the definition of “universal service” as defined by K.S.A. 66-1,187, but it cannot act to unilaterally contradict the language of the statute it was tasked with adopting.

12. Cox, in its response to Staff’s Report & Recommendation, attempts to piece together a Commission power to rewrite statute through a misinterpretation of other statutes and regulations.

13. Cox first relies on K.S.A. 66-1,188, in which the Kansas Legislature bestowed the Commission with “full power, authority and jurisdiction to supervise and control the local exchange carriers...and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.” Cox readily describes this power as “nearly limitless,”¹⁰

¹⁰ Response of Cox Kansas Telecom, LLC to Staff’s Report and Recommendation, November 16, 2017, Paragraph 7.

but one restraint on that power is the ability to modify statutes absent action by the legislature. While the Commission possesses the ability to issue an order or adopt a regulation that changes the definition of “universal service,” an agency “directive cannot trump a statute.” *In re Protest of Jones*, 52 Kan. App. 2d 393, 398, 367 P.3d 306, 310 (2016), review denied (Feb. 17, 2017). See *NCAA v. Kansas Dept. of Revenue*, 245 Kan. 553, 557, 781 P.2d 726 (1989) (quoting *Director of Taxation v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, Syl. ¶ 2, 691 P.2d 1303 [1984] [agency may not “modify, alter, or enlarge the legislative act which is being administered”]).

14. Cox also invokes K.A.R. 82-1-202(a) to support the notion that, short of altering the statutory definition, the “Commission may waive a regulatory requirement for good cause and if in the public interest.”¹¹ This is a misreading of the regulation’s scope, which deals solely with the rules promulgated by K.A.R. 82-1- 201, *et seq.* as opposed to a statutory definition enacted by legislative action.

Question 3: What are the potential ramifications of the Commission modifying the definition of universal service in K.S.A. 66-1,187?

15. The Commission simply does not possess the ability to modify the definition of universal service “in K.S.A. 66-1,187.” Any action by the Commission, be it in the form of a Commission order or the creation of or revision to an existing regulation, would not change the statutory language of K.S.A. 66-1,187.

16. If, hypothetically, the Commission opted to modify the definition of universal service solely via agency action, the agency’s definition would directly contradict the statutory definition, which would still be featured in each subsequent year’s statutory updates. It is unlikely

¹¹ Response of Cox Kansas Telecom, LLC to Staff’s Report and Recommendation, November 16, 2017, Paragraph 7.

an interested party would even encounter the Commission's definition, tucked away in a labyrinth of dockets and orders, while the statutory definition is readily available.

17. The existence of the difference between the Commission's definition and the statutory definition would lead to uncertainty regarding the requirements of universal service that would have to be litigated to be resolved. At the very least, it would open Cox up to potential litigation from watchdog organizations or customers seeking to hold the Company accountable to the statutory definition of universal service. The Commission would also be at risk of a likely appeal on the basis it acted beyond the scope of its powers.

18. If the legislature wanted the definition to be modified solely by the Commission it could have done so instead of outlining the definition in statute. The legislature tasked the Commission with a number of duties in K.S.A. 66-2002, but those duties did not include sole responsibility for the definition of universal service, which it chose to establish in a separate statute.

Question 4: What are the policy implications of allowing the Commission to unilaterally modify the definition of universal service?

19. Staff has already stated that it is not "philosophically opposed"¹² to Cox's reasoning for dropping the equal access requirements from the definition of universal service. Staff agrees that the long distance market has dramatically changed in the decades since the definition was established.

20. Staff simply does not feel the Commission can "waive or simply ignore the statutory definition of universal service contained in K.S.A. 66-1,187."¹³ Even putting aside the

¹² Staff's Report & Recommendation, November 2, 2017, Paragraph 5.

¹³ Staff's Report & Recommendation, November 2, 2017, Paragraph 7.

issue of K.S.A. 66-1,187 trumping any waiver or order of the Commission, granting a waiver to Cox does not serve administrative economy, nor is it the correct remedy.

21. Despite Staff's position that the definition of universal service should be revisited, granting a waiver is an improper use of agency resources. Granting Cox a waiver opens the door for each company governed by the "universal service" definition to seek individualized waivers of aspects of that definition. If 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.

22. The goal of the program enacted by the legislature was to create "universal" service, as in service that a given customer could come to expect from telecommunications companies in the state of Kansas. If Cox is granted a waiver, the definition is "universal (except for Cox) service." This contradicts the State's public policy goals.

23. As discussed above, there is no statutory or regulatory framework upon which Cox relies for the issuance of a "waiver" from the statutory definition of "universal service." Without express statutory authorization to waive the necessity of compliance with statute, there is no means of achieving a waiver. The correct mechanism for modification of the definition, outlined in K.S.A. 66-2002(k), is for the Commission to "review," presumably in the form of a docket as has been past practice, and issue an order recommending the legislature "modify" the statutory definition of universal service.

24. As previously discussed, such a docket was open six months prior to the filing of Cox's Application in the present docket. In 16-GIMT-575-GIT, Cox filed reply comments stating it did not oppose aligning the definition of universal service for KUSF support purposes with the FCC's definition of voice telephony in 47 C.F.R. 54.101(a)(1). However, the final order filed in

that docket reflected that the parties were unanimous in the belief that no changes were necessary at this time. Given the recency of this effort to modify the definition universal service, it is unlikely an effort to make those same modifications less than a year later would be successful or an efficient use of agency resources.

WHEREFORE, Staff requests that the Commission adopt the recommendations contained in its November 2, 2017, Report & Recommendation.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

18-COXT-057-MIS

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Brief on Commission Questions was served by electronic service on this 12th day of January, 2018, to the following:

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