

**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 REPLY TO INITIAL BRIEF OF COX KANSAS TELECOM, LLC**

The Staff of the Kansas Corporation Commission (“Staff” and “Commission,” respectively) files the following response to the *Initial Brief of Cox Kansas Telecom, LLC* filed January 12, 2018, as required by the Commission’s December 7, 2017 *Order Establishing Briefing Schedule*:

**I. Cox Misstates the Commission’s Authority to Violate Statutes**

1. Cox, in its Initial Brief, repeatedly attempts to clarify that it is not seeking a legislative amendment to the State’s definition of “universal service” in K.S.A. 66-1,187(p), which currently requires telecommunications public utilities to provide “equal access to long distance services.” Instead, Cox clarifies that it is seeking an “individualized” waiver to the “universal service” definition.<sup>1</sup>

2. Cox argues that the Commission possesses the authority to grant “individualized” waivers to the “universal service” definition, not based on a statutory authority to grant waivers to telecommunications companies on a case by case basis; instead, it cites the Commission’s “nearly limitless”<sup>2</sup> power granted in K.S.A. 66-1,188. K.S.A. 66-1,188 outlines the Commission’s authority with regard to telecommunications companies which is broad, but expressly limited by K.S.A. 66-1,187 as evidenced by the plain language of the statute, which reads:

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<sup>1</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 9.

<sup>2</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 11.

“The Commission is given full power, authority and jurisdiction to supervise and control local exchange carriers, as defined in K.S.A. 66-1,187, and amendments thereto, doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”

3. K.S.A. 66-1,188 grants broad power over local exchange carriers as defined by K.S.A. 66-1,187. K.S.A. 66-1187(h) defines local exchange carriers as “any telecommunications public utility or its successor, not to include an electing carrier, providing switched telecommunications service within any local exchange service area, as approved by the commission on or before January 1, 1996.” Cox is not a local exchange carrier, because it received a certificate after January 1, 1996, making Cox a “telecommunications carrier” as defined by K.S.A. 66-1,188(m). The Commission’s “nearly limitless” power granted to it by K.S.A. 66-1,188 does not grant it authority over, or related to, Cox.

4. Additionally, the Commission’s “full power, authority and jurisdiction” remains constrained to the limitations set by law. “Administrative agencies are created by statute, so they have only the powers granted by statute.” *In re Protest of Rakestraw Bros.*, L.L.C., 50 Kan. App. 2d 1038, 1042–43, 337 P.3d 62, 67 (2014). *See Ft. Hays St. Univ. v. University Ch., Am. Ass’n of Univ. Profs.*, 290 Kan. 446, Syl. ¶ 1, 228 P.3d 403 (2010). The legislature delegated authority to the Commission to enforce its statutes, specifically K.S.A. 66-1,187. “The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained from the statute.” *Bluestem Tel. Co. v. Kansas Corp. Comm’n*, 33 Kan. App. 2d 817, 824, 109 P.3d 194, 200 (2005). The legislature intended the definition of universal service to include “equal access,” as evidenced by its inclusion in K.S.A. 66-1,187(p). Granting an “individualized” waiver of “universal service” would require the Commission to act in contravention to the legislature’s intent. Agency actions that “go beyond the authority authorized,

which violate the statute, or are inconsistent with the statutory power of the agency have been found void.” *Pork Motel, Corp. v. Kansas Dep't of Health & Env't*, 234 Kan. 374, 379, 673 P.2d 1126, 1132 (1983)

5. Cox makes several attempts to identify other statutes or regulations it argues grant the Commission an ability to act legislatively or in contravention of statute (while still arguing its Application did not request a legislative fix). For example, Cox conflates the Commission’s legislatively delegated ratemaking ability, authorized in K.S.A. 66-101, with its ability to regulate telecommunications companies in K.S.A. 66-1,188. Although the phrasing of the two statutes is similar, K.S.A. 66-101 specifically provides the Commission with powers relative to electric public utilities and does not address the Commission’s authority over local exchange carriers. Ratemaking, which some Courts have referred to as a legislative or quasi-legislative function, is a specific function the Commission has authority to perform for electric public utilities pursuant to statute.<sup>3</sup> There is no similar case law that refers to the Commission’s authority over the universal service definition as legislative in nature.

6. Cox again invokes K.A.R. 82-1-202 to support the notion that the “Commission may waive a regulatory requirement for good cause and if in the public interest.”<sup>4</sup> K.A.R. 82-1-202(a) reads, in relevant part: “Unless otherwise required by law, the requirements of these regulations may be waived by the commission if good cause is shown and if it is in the public interest to do so.”<sup>5</sup> The regulation’s scope is clearly limited to waiving “the requirements of these regulations,” meaning K.A.R. 82-1- 201, *et seq.* and is clearly not applicable to those “otherwise required by law.”

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<sup>3</sup> K.S.A. 66-101-K.S.A. 66-101h.

<sup>4</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 9.

<sup>5</sup> K.A.R. 82-1-202.

## **II. K.S.A. 66-2002 Does Not Grant the Commission the Ability to Grant an individualized “Waiver” to the Universal Service Definition**

7. There is no statutory authorization granting the Commission authority to confer an “individualized” waiver to the “universal service” definition. Granting such a waiver would put the Commission in conflict with the legislatively enacted statute that sets the standard for “universal service” followed by eligible telecommunications carriers in Kansas. 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”] ).

8. In K.S.A. 66-2002, the legislature directed the Commission to “review and, to the extent necessary, modify the definition of universal service.” In its Initial Brief, Staff argued that 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 administering.

9. Cox argues that Staff errs in limiting the Commission’s authority to modify the definition of universal service and enhanced universal service by “construing the term ‘modify’ to mean ‘amend’ legislatively.”<sup>6</sup> Cox argues that this “stifles” the Commission’s “nearly limitless” authority, but nonetheless provides no alternate interpretation of “modify.” Cox immediately

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<sup>6</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 12.

abandons this line of reasoning, instead arguing that it is not actually seeking a modification of the statute, but instead an “individualized” waiver.<sup>7</sup>

10. Black’s Law Dictionary defines “modify,” in relevant part, as:

1. To make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness
2. To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate

Both definitions support Staff’s interpretation that modification to the definition of universal service is “to make small changes” in “effectiveness.” In order to make effective changes to the universal service definition it must be changed legislatively, otherwise the changes lack “effectiveness.”

11. Compare the definitions of “modify” to Black’s Law Dictionary definition of “waiver,” which, in relevant part reads:

1. The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage

The definition of a waiver entails a very different act - abandoning a legal right to enforce an aspect of the universal service definition. The legislature tasked the Commission with enforcing the definition of universal service as it is enshrined in statute. It is not within the Commission’s authority to abandon enforcement of that legal right or advantage on behalf of the state.

### **III. The Legislature Has Already Rejected An Attempt to Remove “Equal Access” from the Universal Service Definition**

12. The Kansas Legislature, in 1998, requested the Commission to expedite a review of the definitions of universal service and enhanced universal service and advise various legislative

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<sup>7</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 13.

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,<sup>8</sup> 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. The legislature's refusal to remove the equal access requirement demonstrated clear legislative intent that the requirement remain in the statute.

#### **IV. An Individualized Waiver is Not the Correct Remedy**

13. Cox argues that it has a particularized situation necessitating a waiver of the "equal access" requirement of the universal service definition. Notwithstanding the fact that an "individualized" waiver would not eliminate Cox's statutory obligation to provide "equal access," the Commission should not grant individualized waivers of statutes because it is an unwise use of agency resources.

14. Cox's arguments are disingenuous. First, it argues that granting an "individualized" waiver to Cox "would have no effect on other companies;"<sup>9</sup> however, granting a waiver to Cox would result in an uneven playing field between eligible telecommunications carriers. Cox also argues that the "equal access" requirement is so burdensome that "if the Commission does not grant Cox's waiver request...Cox will have to withdraw from Lifeline because it will not be able to provide equal access."<sup>10</sup> In the span of two paragraphs, Cox attempts to argue the "equal access" requirement is inconsequential and would have no effect while also arguing the requirement is so burdensome it will cause Cox to withdraw from Lifeline.

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<sup>8</sup> Docket No. 94-GIMT-478-GIT, February 12, 1999 Report.

<sup>9</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 16.

<sup>10</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 17.

15. In fact, granting Cox an “individualized” waiver opens the door for each company governed by the “universal service” definition to seek unique waivers of aspects of that definition. Cox suggests the Commission could easily “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.”<sup>11</sup> The Commission should not allow companies to seek waivers to tailor the definition to its business model or skirt their statutory requirement.

16. The statute requires carriers to provide “universal” service to a given customer. Granting a waiver to Cox, and subsequently each of the eligible telecommunications carriers subject to the statutory requirement would not result in “universal” service definition, but “individualized” service carriers in contradiction to the State’s public policy goals.

## **V. Conclusion**

17. 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. In the alternative, any entity could seek a legislative change from the legislature.

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<sup>11</sup> Initial Brief of Cox Kansas Telecom, LLC, Paragraph 20.

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 Reply to Initial Brief of Cox Kansas Telecom, LLC was served by electronic service on this 26th day of January, 2018, to the following:

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