COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INQUIRY INTO THE STATE UNIVERSAL SERVICE FUND	))	CASE NO. 2016-00059

JOINT MOTION FOR RECONSIDERATION

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SUMMARY

Shortages in the Kentucky Universal Service fund require difficult policy decisions, but those decisions must be lawful, reasonable, and fair. Forcing wireless providers to collect money from consumers in order to subsidize costs of competing "landline" providers is not lawful. A flash elimination of Lifeline support is not reasonable, particularly when it is not technology neutral. And denying equal financial support to Kentucky's poor who choose wireless telecommunications as their lifeline is not fair.

A better approach, one that is lawful, reasonable, fair, and consistent with the evidentiary record, is to: (i) maintain the interim surcharge rate at fourteen cents, (ii) reduce monthly per line support to a sustainable level, and (iii) support low income voice services on a technology-neutral basis, as the federal fund does. For these reasons, and in light of the General Assembly's fresh enactment that strips the PSC's jurisdiction over basic local exchange service, the Commission should reconsider its March 10 decision (the "March 10 Order").

STANDARDS FOR RECONSIDERATION

KRS 278.400 allows any party to apply for rehearing with respect to "any of the matters" determined by the Commission. Among other things, rehearing is the means for the Commission to reconsider an order in light of alleged errors and omissions.[1] And the Commission has determined KRS 278.400 is authority for the agency to reconsider or modify an order "during the time it retains control over any question under submission to it."[2] This includes the ability to consider information in the initial record or new information developed as part of rehearing.[3] Among other things, the Commission should reconsider an order when a party identifies material in the administrative record that was overlooked in the Commission's order. Since the Commission's March 10 Order does not discuss the record, rehearing is an opportunity for the agency to reconsider whether its decision is lawful and reasonable.

This case is especially appropriate for rehearing because of a change in Kentucky telecommunications law enacted *after* the March 10 Order. 2017 Senate Bill 10[4] will end the PSC's jurisdiction over basic local exchange service for one or more incumbent local exchange carriers. This legislation was signed by Governor Bevin on March 20, 2017.[5] The new law will effectively halt the installation of "landline" service statewide, as its proponents fill future service orders using other voice technology, including wireless service. The March 10 Order speculates "landlines" are the only option for many of Kentucky's poorest citizens eligible for Lifeline. However, beginning September 1, 2017 the Commission shall not regulate the availability of "landline facilities necessary to provide basic local exchange service." That

[1] *See, e.g., Kentucky-American Water Co.*, Case No. 2000-00120, Order at 2-4 (February 26, 2001).
[2] *Kentucky Power Co.*, Case No. 7489 (June 27, 1980).
[3] *Kentucky-American Water Co.*, Case No. 2000-00120, Order at 2-4 (February 26, 2001)
[4] http://www.lrc.ky.gov/record/17RS/SB10.htm
[5] 2017 Ky. Acts Ch. 43.

change alone requires the Commission to reconsider its decision. Unless the state Lifeline fund applies to all voice services, it will no longer benefit the rural poor the Commission is concerned about.

BACKGROUND

The Commission mitigated a universal service funding crisis last year by adjusting the per-access line surcharge it imposes on telecommunications service access lines, enabling the Commission to maintain the Kentucky Universal Service Fund's ("KUSF") support for Kentucky's poor. The Commission made that urgent adjustment after soliciting and receiving comments from numerous service providers, ratepayer advocates, and government agencies. There was virtually no objection to an increase in the surcharge. At fourteen cents, it remains almost inconsequential as a percentage of the monthly telecommunications expense for wireless customers.[6]

As for the structure of the KUSF, there was near unanimous support for maintaining it, including from wireline and wireless providers and the Attorney General.[7] While some carriers did not oppose a reduction in support, no carrier proposed eliminating it.[8] Importantly, no party suggested the Commission should discriminate against the poor based on their choice of provider. No party disputed the importance of wireless service in meeting the needs of low income Kentuckians. Indeed, Kentucky's largest "landline" provider explained that alternative technologies like wireless services are increasingly the first choice for Kentuckians.[9]

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[6] *See* Comments of Airvoice Wireless, American Broadband and Telecommunications Company, Blue Jay Wireless, LLC, Budget Wireless, i-wireless LLC, Ready Wireless, and Telrite Corporation at 8 (six cent increase in monthly surcharge is 0.0013% increase to average monthly wireless customer charge).

[7] *See, e.g.*, Comments of Attorney General (recommending increase of surcharge to eleven cents and decrease of Lifeline subsidy to $2.75, stating "without the KUSF, many Kentuckians would be simply unable to afford basic telephone service which in turn allows them to call 911 for emergency services").

[8] *See* Comments of Appalachian Wireless (reduce monthly support to $2.00); Cincinnati Bell (maintain at $3.50); testimony of Verizon (cap the fund at current levels).

[9] *See* Comments of AT&T Kentucky at 3-4.

The Commission's February 1, 2016 order opening this investigation did not put anyone on notice the agency was considering eliminating state support for some providers of federally-supported voice services. Instead, the Commission's data requests implied the agency would maintain some level of support for all voice services in the state.[10] Yet, after generating thousands of pages of testimony and evidence filed by dozens of parties, the Commission appears not to have considered any of it. Instead, the Commission made the surprising decision to divert state Lifeline support to meet other alleged needs.

ARGUMENT

I. THE COMMISSION'S INITIATING ORDER DID NOT PROPOSE TO ELIMINATE COMPETITIVE NEUTRALITY, NOR COULD IT

The Commission's decision to slash support for wireless Lifeline services conflicts with well-established requirements that universal service mechanisms be technologically and competitively neutral. Moreover, as discussed in Section II. A., there are serious procedural due process problems that require the agency to revisit its March 10 Order.

A. Competitive Neutrality is required by federal law.

The Telecommunications Act of 1996 ("1996 Act") and the FCC rules implementing the universal service-related sections of the 1996 Act have consistently provided that regulation shall not be used to discriminate among competitive providers of telecommunications services. As the FCC explained twenty years ago in its seminal *Universal Service Order* after passage of the 1996 Act:

> Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another,

[10] Data Request Number Four to all carriers stated: "If the Commission's decision is to maintain Lifeline support for only voice service, describe how that decision would affect whether and how you provide Lifeline service in Kentucky."

> and neither unfairly favor nor disfavor one technology over another.[11]

The text of the 1996 Act itself directs the FCC and the Commission to remain competitively neutral when implementing universal service support mechanisms. Section 253's preemption of state and local barriers to competitive entry contains a savings clause related to state universal service programs, but only for those imposed "on a competitively neutral basis and consistent with section 254 . . ." Section 254(f) addresses universal service directly and provides states authority to adopt regulations "not inconsistent with the [FCC's] rules to preserve and advance universal service." Kentucky's decision to adopt a competitively discriminatory Lifeline program cannot be squared with either of these sections. It is clearly in conflict with long-standing federal policy embodied in various FCC universal service decisions.

This conflict is surprising. The Commission's February 1, 2016 order initiating this proceeding did not even hint at the possibility the agency was considering technological discrimination against wireless Lifeline consumers and providers. No provider could have foreseen such an issue. After all, Kentucky's own decisions implementing the KUSF derive directly from the above cited universal service related provisions of the 1996 Act.

Even before the FCC issued the *Universal Service Order* the Kentucky Commission announced that its intrastate universal service fund would be established to "comply with minimum federal standards" while promoting competition.[12] Two years later the Commission cited the FCC's *Universal Service Order* when it said competitive neutrality was a "standard[] of the Act" not to be violated.[13]

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[11] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 47 (1997) (*"Universal Service Order")*

[12] *See Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360 (May 22, 1998), citing *Inquiry into Local Competition, Universal Service, and the Non-Traffic Sensitive Access Rate,* Adm. Case No. 355 (Sept. 26, 1996).

[13] *Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360 (August 7, 1998).

The 1997 *Universal Service Order* certainly was not the FCC's last word on neutrality. Even after the 2011 *USF/ICC Transformation Order* the Commission discusses at pp. 8-9 of the March 10 Order, the FCC reaffirmed that universal service programs should remain competitively neutral.[14] Without elaboration, the March 10 Order abandons this twenty year old commitment it previously described as a legal standard.

B. Eliminating Support for Wireless Lifeline Users Conflicts with the Competitive Neutrality Principles Applied to the TRS/TAP Program

The Commission has previously considered competitive and technological parity as a guiding principle for implementing telecommunications support programs. Kentucky's deaf and hard of hearing population has access to telecommunications relay service ("TRS") to enable two-way voice communication with hearing and speaking persons. The relay services are available to all users of voice services. Kentucky also has a Telecommunications Access Program ("TAP") that provides specialized telecommunications devices to persons with hearing and vision disabilities. The Kentucky TRS and TAP programs are specifically created and enabled by state statutes,[15] and the Commission administers the funding mechanisms for each. Telecommunications users statewide are assessed a monthly fee. Carriers collect the fee.

Until 2009, only "landline" providers collected the fee. As consumer preferences shifted to wireless services (including for disabled consumers) the Commission extended the surcharge collection obligation to the wireless industry. In so doing, the Commission cited the need to make its program "competitively neutral and non-discriminatory." [16] In other words, the costs

[14] *Universal Service Contribution Methodology*, Further Notice of Proposed Rulemaking, 27 FCC Rcd. 5357, ¶ 24 (2012) ("The Commission has been committed to competitive neutrality [in universal service programs] since it first implemented the 1996 Act.")
[15] See KRS 278.548, KRS 278.5499.
[16] *See Petition of the Kentucky Commission on the Deaf and Hard of Hearing to Expand the Funding Base for the Kentucky Telecommunications Access Program (TAP)*, Case No. 2007-00464, p. 6 (February 16, 2009)(extending billing surcharge for relay service and equipment program support to the wireless industry).

and benefits applied regardless of technology. There was no reason for the Commission to deviate from that principle here.

C. Competitive Neutrality is Essential in an Evolving State Telecommunications Marketplace.

Effective September 1, 2017 AT&T Kentucky is no longer required to provide "landline" service anywhere in Kentucky, including in the rural areas that, according the March 10 order, lack landline competition. Instead of landlines, AT&T Kentucky can offer wireless or other services to new customers everywhere in its existing exchange territory. Effectively, that puts an end to future state Lifeline support in AT&T exchanges where there is no wireline competition, because the Commission is eliminating Lifeline support for wireless. Thus, the Commission's claim that shifting support only to "landline" providers will promote universal service is highly questionable. Moreover, AT&T Kentucky has made no secret that it does not see a future for "landlines" or plain old telephone service ("POTS") anywhere, including as a way to provide Lifeline services. According to AT&T, POTS has "no relevance in the 21st Century."[17] As the company has explained, its own data shows:

> few Lifeline customers actually want AT&T's Lifeline service. Instead, these consumers overwhelmingly prefer wireless Lifeline service. Thus, it is unnecessary to require any of AT &T's price cap carrier affiliates to continue participating in the Lifeline program.[18]

Of Kentucky's ILECs, AT&T's exchange territory is the largest, and AT&T is the ILEC in various rural communities. But AT&T is correct in claiming POTS is not the best Lifeline option for most consumers. It lacks the benefit of mobility. And with the complete phase out of AT&T's obligation to even offer POTS under state law while AT&T also prefers an end to any

[17] Comments of AT&T Services, Inc., WC Dkt. No. 10-90 (filed September 9, 2015) (Appendix A), available at https://www.fcc.gov/ecfs/filing/60001299470.

[18] *Id*.

FCC-imposed obligation to provide voice service, the Commission should reconsider its decision to divert scarce resources in support of something consumers don't want, and AT&T Kentucky doesn't want to provide.

II. THE RECORD DOES NOT SUPPORT ELIMINATING SUPPORT FOR WIRLESS LIFELINE

A. The March 10 Order is Arbitrary.

The uncontradicted testimony in this case provided plenty of reasons for the Commission to continue with the low income support policy judgments it made in 1997-1998, while making necessary adjustments to the contribution amounts, as it has three other times in the intervening years.[19] The coalition filing these comments did not request a public hearing because no party took serious issue with its position that the Commission should maintain support at the interim level. The fact that no respondent requested a public hearing does not allow the Commission to ignore the thousands of pages of comments, testimony and data responses filed in this case then exercise its regulatory function arbitrarily. *See Kentucky Milk Marketing and Antimonopoly Commission v. Kroger*, 691 S.W.2d 893, 899 (Ky. 1985); *Wagoner v. Blair Fork Coal Company*, 534 S.W.2d 250 (Ky. 1976).

This is more than a quibble. The Commission's eleven page March 10 Order does not cite the voluminous record even once; it does not identify any of the parties that participated or responded to multiple rounds of data requests, it does not discredit (or credit) the testimony of any witness; and, in its recitation of the history of Kentucky's Lifeline program, the decision omits discussion of its most recent pronouncement on Lifeline, a 2012 order adopting the FCC's Lifeline reform principles.[20] This omission is striking. When that 2012 order was issued, *sua sponte*, the FCC-mandated rural ILEC rate rebalancing now criticized by the Commission as

[19] *See February 1, 2016 Order* at p. 3 (discussing other adjustments to the per access line surcharge).
[20] *Lifeline Reform*, Adm. Case No. 2012-00146 (May 1, 2012).

unreasonable (March 10 Order at 9) was already underway. Yet the 2012 Commission Lifeline Order specifically maintained state support at $3.50/per line.

Against that backdrop, a spontaneous decision *five years later* to divert universal service support because "FCC-mandated increase[s] in basic local exchange service rates jeopardize these [rural] Kentuckians' ability to access the telephone network and emergency services" without first developing an evidentiary record on the issue is indeed questionable. Kentucky's Supreme Court has explained in no uncertain terms that a generalized finding of this nature, with no findings of basic evidentiary facts, is "fatal" to the order of the Commission. *Marshall County v. South Central Bell Tel. Co.*, 519 S.W. 2d 616, 619 (Ky. 1975) (reversing extended area service order because "public interest" finding was unsupported by evidentiary facts).

If rural rate rebalancing is relevant to the future of the state's Lifeline program, the Commission could easily have requested evidence or testimony on the issue. To not do so and to decide this important issue based solely on information outside the record is unlawful, and unfair. Regardless, there are other reasons the Commission should not disturb the current structure of the KUSF.

B. There is No Evidentiary Support for Reducing the Fourteen Cent Charge.

As discussed above, there was broad support for increasing the monthly surcharge to fourteen cents. No party proposed eliminating it, and the Commission's reduction of the charge to three cents not explained at all. On rehearing, the Commission should consider what level of funding the current fourteen cent surcharge can support. While it may be challenging to maintain $3.50 of support per Lifeline user, a competitively neutral support mechanism is essential.

C. There is No Evidentiary Support for Adding Age or Rural Living as a Factor in the KUSF.

The Commission's March 10 Order mentions "rural areas with limited wireless coverage" then shifts Lifeline support to "landline" services statewide, regardless of whether the "landline" provider that will receive the reimbursement is in a competitive situation with wireless providers or other providers of fixed services. Likewise, the Commission's order injects age as a factor to consider in Lifeline fund implementation. Here too, the Commission does not cite anything in the extensive case record that would support its fact-finding. And this favoritism toward supporting fixed services ignores the Commission's frequent finding in ETC certification cases that mobility is an important public interest factor.[21]

D. If External Costs for "Landline" Providers are Relevant, the Commission Must also Consider Changes in Law for 911 fees.

As we have seen, the Commission's March 10 order rationalizes shifting support to rural carriers subject to the FCC's benchmark rate for local services, apparently in sympathy with those providers that have decried the loss of federal high cost support and the Kentucky NTSRR intrastate counterpart preempted and eliminated by the *USF/ICC Transformation Order*.[22] The discussion of relative carrier cost factors seems out of place in policymaking for Lifeline service, especially when the issue was not identified for the comment cycle and there is nothing in the record. But if the Commission were justified in examining cost considerations, it should have also considered a change in Kentucky law that, effective January 1, 2017, imposes new 911 fees on wireless Lifeline providers. *See* KRS 65.7636. Absent support from the state Lifeline fund, it is not clear how those fees will be paid in the future. Many wireless Lifeline providers in

[21] *E.g., Application of American Broadband,* Case No. 2013-00175, p. 12 (November 5, 2013)(ETC designation order).

[22] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17968, ¶ 870 (2011).

Kentucky provide no-charge Lifeline service. When the federal Universal Service Fund is used for Lifeline purposes, the money is to reimburse providers for the *rates* they forego. The FCC has made clear that when determining what a "rate" is for Universal Service funding purposes, *state 911 fees may not be included.*[23] In addition, the intergovernmental tax immunity doctrine limits the ability of Kentucky to divert the federal Lifeline benefit to fund emergency dispatch services. The Kentucky 911 Service Board (f/k/a CMRS Board), which filed public comments in this proceeding, may have had this issue in mind when it suggested the "Commission may consider raising the state USF reimbursement to offset the 911 fees as one of its recommendations at the conclusion of the review."[24] While the joint commenters believe the focus of this case should be on universal service for low income consumers, at least the 911 fee issue (unlike the rural high costs issue) is part of the record on which the Commission could make a decision.

III. A FLASH CUT ELIMINATION OF STATE SUPPORT WILL HARM KENTUCKY'S POOR BY ELIMINATING CHOICES OF MOBILE LIFELINE

As some of the joint commenters explained in comments last year, new Lifeline compliance requirements adopted in 2012 by the FCC spurred some ETCs to no longer participate in Lifeline programs and focus instead on competing in the broader, unsubsidized consumer market. Some of the largest carriers serving Kentucky have curtailed or eliminated Lifeline participation nationwide.[25] For the reasons discussed in Section I. C., *supra*, AT&T Mobility's exit is particularly noteworthy. If a consumer in AT&T Kentucky territory who currently uses AT&T's basic local exchange service for Lifeline moves to another location, they

[23] *Connect America Fund et al*., WC Docket No. 10-90 et al., Third Order on Reconsideration, 27 FCC Rcd 5622, 5631 (2012).
[24] CMRS Board comments at 2 (filed May 26, 2016).
[25] AT&T Mobility, Verizon Wireless, and Cricket Communications are examples of ETCs no longer offering Lifeline Service in Kentucky.

may no longer have access to state supported service, because AT&T Kentucky is not obliged to install basic local exchange service, and its wireless voice alternative is not eligible for support under the March 10 Order. Also, although AT&T Kentucky and other ILECs face CLEC and other voice competition within their exchanges, for the most part those competitors (unlike wireless competitors) are not ETCs and do not offer Lifeline service.

A related problem involves promoting the benefits of the Lifeline programs, in particular to eligible consumers who do not have a permanent residence and cannot subscribe to "landline" service in any event. Many of the Kentucky ETCs have gone to low-income areas and used a combination of retail stores and temporary locations near homeless shelters, community kitchens and counseling centers, bringing the necessary hardware to process applications and confirm eligibility. These efforts reach eligible citizens who cannot enroll online (lacking Internet access) or have other issues that would be barriers to enrollment but for face-to-face outreach with an agent trained to explain the program. Without state support, wireless providers have far less incentive to extend outreach to the more vulnerable populations, where successful completion of the application process requires direct human interaction and assistance, imposing labor costs beyond what carriers may experience when providing traditional wireless services.

As the coalition explained in its comments and testimony, Kentucky's existing state Lifeline subsidy provides significant incentive for ETCs in Kentucky to go the extra distance to promote universal service goals. A dramatic reduction in or elimination of state Lifeline subsidies is likely to make it uneconomic for the remaining ETCs to continue their targeted outreach efforts and is likely to further decrease the number of ETCs willing to serve Lifeline customers in Kentucky. No party challenged this assertion or offered evidence to the contrary. The Commission's March 10 order turns this partial success story on its head at page 7, n.17,

admitting that 60% of eligible consumers do not have Lifeline service they are eligible for, but suggesting that an increase in the penetration rate might be undesirable because it could force the Commission to increase the surcharge to maintain solvency of the fund. But nothing in the record suggests the solution to this problem is to discard wireless support altogether. Depriving wireless competitors KUSF support by claiming their future participation harms the fund is a pretext the Commission must avoid, especially where the Commission has announced it will divert the money to support carriers who compete against wireless providers. *See Motor Vehicle Com.v. Hertz Corp.*, 767 S.W.2d 1, 4-5 (Ky. App. 1989) (reversing agency action that favored business interests of car dealers over car rental agencies in the guise of consumer protection). By basing a decision on erroneous, incomplete data and information from outside the record, the Commission has no "meaningful standards . . . to govern the exercise of [its] discretionary power," thus rendering its action "arbitrary and capricious and violative of Section 2 of the Kentucky Constitution." *Id*. Moreover, flash cut elimination of wireless support contradicts the FCC's own admonition in the *USF/ICC Transformation Order*[26] of "no flash cuts" to avoid the consumer disruption in access to communications services.

Ironically, the March 10 Order uses the gradual and ongoing access reform provisions of the *USF/ICC Transformation Order* as an excuse for a flash cut elimination of state Lifeline support. But even if there is actuarial pressure to reduce per line support, dropping support altogether on April 30 will be highly disruptive and is unreasonable. Wireless providers facing the regulatory uncertainty caused by the March 10 Order may have to adjust marketing, advertising, and outreach programs. Consumer confusion and disruption is likely. April 30 will

[26] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17968, ¶ 870 (2011).

arrive before the date on which parties harmed by the March 10 Order must appeal. At a bare minimum, the Commission should promptly extend the transition deadlines while considering the legal issues raised here.

CONCLUSION

The March 10 order to deny the wireless industry participation in the KUSF violates federal law and the Commission's own commitments to competitive neutrality. The order also lacks the evidentiary support needed to withstand appellate review. Intervening changes in law will further diminish universal service in Kentucky unless the wireless industry can participate to the same degree as "landline" providers. Because the Commission never proposed discriminating against ETCs or their customers based on technology, the Commission should:

- vacate its March 10 decision
- order the current fourteen cent end user charge to remain in place
- re-calculate Lifeline support based on neutral eligibility standards and expected funding levels; and
- schedule an informal conference to identify remaining issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND ACKNOWLEDGMENT OF ELECTRONIC FILING PROCEDURES

In accordance with 807 KAR 5:001, Section 8, I certify that the March 31, 2017 electronic filing of this Joint Motion for Reconsideration is a true and accurate copy of the same document being filed in paper medium; that the electronic filing was transmitted to the Commission on March 31, 2017; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original paper medium of this Objection will be mailed to the Commission by first class United States mail, postage prepaid, on March 31, 2017.

I further certify that I am the authorized agent for the entities filing this Motion and possess the facilities to receive electronic transmissions.

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Douglas F. Brent