

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

In re

Q LINK WIRELESS LLC

Application for Designation as an Eligible
Telecommunications For Purposes of Receiving
Federal Universal Service Funds Pursuant to Section
214(e)(2) of the Telecommunications Act of 1996

ICC Docket No. 12-0095

**MOTION TO STRIKE STAFF’S OPENING BRIEF APPENDIX
AND UNVERIFIED STATEMENTS IN ITS OPENING BRIEF
THAT ARE NOT PART OF THE EVIDENTIARY RECORD**

Q LINK Wireless, LLC (“Q LINK”), pursuant to Section 200.160 of the Commission’s Rules of Practice, 83 Illinois Administrative Code Section 200.700, hereby moves to Strike Staff’s Opening Brief Appendices 1.1, 1.2, 2.1, 2.2, 3.1 and 3.3, and certain pages of Staff’s Opening Brief on the basis that the information submitted therein is not part of evidentiary record in this proceeding. Q LINK states as follows in support of its Motion.

ARGUMENT

1. Section 200.700 of the Commission’s rules provides that the “record in any proceeding before the Commission shall include . . . 2) Evidence received;. . .” 83 Ill.Adm.Code Section 200.700.

2. The evidentiary record in this proceeding closed on March 18, 2104. On April 8, 2014, the Illinois Commerce Commission (“Commission”) sent a notice that plainly states that this matter’s evidentiary record was marked “Heard and Taken” by the Administrative Law Judge on March 18, 2014 and is closed.

3. Ignoring the Commission's Order, Staff attempts to support its arguments in its Opening Brief, filed on May 2, 2014,¹ with purported facts that are not in the record. Staff also brazenly includes a 45-page "Appendix" of new information as an attachment to its Opening Brief, and proceeds to examine the new information as part of its Opening Brief analysis.² In addition, Staff makes factual assertions in its Opening Brief that do not rely on or cite to the evidentiary record, or even information contained in the improper appendix. This, despite the Commission's notice that the evidentiary record in this matter is "Heard and Taken" and closed. Staff's attempt to "sneak" evidence into the record after the record has been closed, or even rely on statements that are not in the evidentiary record, is outrageous and should not be permitted by the Commission.

4. Staff had ample opportunity to introduce evidence into the record in this matter. Staff filed testimony and rebuttal testimony, and this proceeding had an evidentiary hearing after the completion of all testimony. Some of the information Staff relies on for its brief was retrieved from the Internet on March 16, 2014, two days before the hearing. Other information was retrieved from the Internet on April 6, 2014, two days before the April 8, 2014 Order was entered marking the record closed.

5. Instead of seeking to introduce this information through the proper means, Staff waited over a month and half after the evidentiary hearing to introduce new information in a purported "Appendices" to its Opening Brief. There is simply no legal justification for Staff ignoring the Commission's order closing the evidentiary record and proceeding in such a manner.

¹ Initial Brief of the Staff of the Illinois Commerce Commission, ICC Dkt. No. 12-0095 (filed May 2, 2014 ("Staff's Opening Brief").

² See Opening Brief, 58, 64-65, 74, 94-97, 99-100, 103-104, 106, 112 (referencing Appendix 1.1, 1.2, 2.1, 2.2, 3.1, 3.2).

6. Worse still, the new information Staff introduces in its Opening Brief was not even part of the discovery exchanged among the parties in this case, and has not been subject to cross examination. Staff apparently dissatisfied with its case, determined that it would Google or otherwise search for miscellaneous information from the Internet and just simply add information to its Opening Brief, ignoring the rules of evidence.

7. Commission “[f]indings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.” *Chicago & E.I. Ry. Co. v. Illinois Commerce Comm’n*, 173 N.E. 380, 383 (1930). Moreover, “[a] rigorous cross-examination may bring to light a variety of reasons to doubt a witness’s testimony, ranging from innocent failures in perceptions and memory to biases, prejudices, or ulterior motives, or outright inconsistencies and falsehoods.” *Jones v. Basinger*, 635 F3d 1030, 1040 (7th Cir. 2011). The right to cross examine is a fundamental legal right that the Staff is circumventing by admitting new information after the record has closed.

8. As Q LINK demonstrates in its Reply Brief (filed concurrently with this motion), Staff often misconstrues the admitted factual record in this proceeding in an attempt to advance its proposed new ETC designation requirements. It would be fundamentally unfair to permit Staff to introduce and analyze new facts in its Opening Brief, while not permitting Q LINK to respond or test the reliability of those facts.

9. The Commission should strike each insistence of new facts introduced by Staff in its Opening Brief. Failing to do so would be a gross violation of Q LINK’s due process rights.

10. Permitting this information into the record in the manner through which Staff has done would turn this proceeding into an embarrassing sham. Beyond ignoring the Commission's order closing the evidentiary record, the approach taken by Staff plainly violates the Commission's procedures, which might allow Staff to have introduced additional facts upon a proper showing, and through the proper means. To introduce new evidence, the Staff could have filed a notice to reopen the record or asked for leave to submit additional evidence. *See e.g. Commonwealth Edison Co. Petition pursuant to Section 7-102 of The Illinois Pub. Utilities Act for consent to & approval of a Lease of certain real estate located in the Vill. of Highland Park, Lake Cnty., Illinois to N. Shore, Inc., an Illinois Corp.,* 88-0155, 1988 WL 1533628 (Ill. C.C. Sept. 28, 1988); *Re Washington Cnty., Illinois,* 93-0014, 1993 WL 263632 (Ill. C.C. May 5, 1993); *Saline Cnty., Illinois Petition for approval of a 9-1-1 emergency telephone number system,* 92-0301, 1992 WL 12601148 (Ill. C.C. Nov. 24, 1992); *Ford Cnty., Illinois Petition for approval of a 9-1-1 Emergency Tel. No. Sys.,* 92-0169, 1992 WL 12601166 (Ill. C.C. Oct. 28, 1992). Instead, Staff attempts to sidestep Commission procedure by including this new information as embedded information in its Opening Brief. This is plainly improper, and the Staff is certainly charged with responsibility for knowledge of the Commission's rules and practices.

11. The Commission must strike the proposed Appendix 1.1, 1.2, , 2.2, 3.1 and 3.2, as well as the following portions of Staff's Opening Brief which relies on the foregoing information:

- Page 58 of Staff's Opening Brief, discussing Staff's purported visit to the <http://qlinkprepaid.com/> website after the evidentiary record was closed.

- Page 64 and 65, and Appendices 1.1 and 1.2, purporting to providing information about Q LINK's whole customers.
- Page 74 of Staff's Opening Brief, purporting to provide additional information about Lifeline services from USAC.
- Pages 94 through 97, 99 through 100 of Staff's Opening Brief, and Appendices 2.1 and 2.2, purporting to provide information about current ETC designees in Illinois.
- Pages 103 and 104 of Staff's Opening Brief, purporting to provide Illinois telephone penetration rates.
- Page 106 of Staff's Opening Brief, and Appendix 3.1 and 3.2, purporting to provide information about Staff's April 29, 2014 review of Q LINK's website.

CONCLUSION

The Commission should grant this Motion. It would be fundamentally unfair to permit Staff to introduce new evidence into the record during the course of briefing and after the evidentiary record is closed, without seeking permission, and without permitting Q LINK an opportunity to respond to this new information. Indeed, any decision based on Staff's new information would call into question any Order issued based on that information. Therefore, the Commission should strike the new information Staff attempts to introduce through its Opening Brief, and those portions of its Opening Brief that rely on this improper information.

May 30, 2014

Respectfully submitted,

Q LINK WIRELESS LLC

/s/ Henry T. Kelly

By: One of its attorneys

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