STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

American Broadband and Telecommunications Company	)	
	)	Docket No. 14-0432
Petition for a Partial Waiver of the Agreed Joint Stipulation as a Condition of ETC Designation.	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned attorneys and pursuant to Section 200.800 of the Commission's Rules of Practice, 83 Ill. Adm. Code 200.800, respectfully submits its Reply Brief in the above-noted proceeding.

Staff stands behind all of its previous points and arguments made in testimony and in its Initial Brief, even if it does not expressly repeat them here.

I. By Entering Into the Stipulated Agreement and the Attempting to Evade Two of Its Most Significant Provisions, American Broadband Deprived the Commission of the Opportunity to Review its Application on the Merits

American Broadband has alleged in this proceeding that it requires a waiver from the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation in order to comply with federal law. Petition at paragraph 4. As Staff explained in its Initial Brief, American Broadband argues essentially that it made a unilateral mistake of law regarding the application of federal rules and the Joint Stipulation. Staff IB at 4. In its Initial Brief American Broadband reveals that it seeks more than to remedy this perceived error in legal

judgment, stating: "… regardless of the conflict with federal law and rules, the Commission should not condone the 80% - 20% ratio requirement as a condition of ETC designation in Illinois" and "[e]ven if the Commission looks beyond the direct conflict with federal law and regulations and the fact that it undermines the purpose and goals of the universal service requirement, the Commission should reject the 80% - 20% ratio requirement because it would hinder Illinois consumers' access to the Lifeline plan of their choice and deny Illinois' consumers access to federal subsidies." AB IB at 2 and 25, respectively (emphasis added).

Quite apart from the fact that the requirement would not deny Illinois consumers access to federal subsidies, but instead would deprive American Broadband of access to such subsidies, this assertion is ill-taken. In the absence of any conflicts with federal law and rules, making determinations regarding the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation would deprive the Commission of the ability to assess American Broadband's ETC designation on the basis of evidence different from that relied upon by Staff in the American Broadband's ETC designation proceeding.

Staff proposed to conduct American Broadband's ETC proceeding in typical fashion with offerings of testimony. Tr. at 100 lines 4 – 8. American Broadband instead sought a settlement. Id. American Broadband notes that it did so "to avoid the time and expense relating to submitting testimony, conducting an evidentiary hearing, and drafting and filing briefs." AB IB at 5. Now, having obtained its designation through settlement, American Broadband

seeks to remove, in part, one of the most important bases that induced Staff to support American Broadband's designation. To allow American Broadband to alter the basis for its ETC designation in such fashion deprives the Commission of its ability to review and/or elicit alternative evidence on whether American Broadband should, in the absence the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation, be designated as an ETC.

American Broadband's proposal would also conceal evidence necessary to support the Commission's determination regarding the company's financial and technical capability. The requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation were proposed by Staff as way for American Broadband to demonstrate its financial and technical wherewithal consistent with FCC rules. Tr. at 98, lines 9-12. Staff supported American Broadband's designation as an ETC based upon the Agreed Joint Stipulation entered into between the Staff and Applicant American Broadband Telecommunications Company, filed on October 22, 2013, and subject to the terms thereof. Staff Cross Examination Exhibit 3.0. Removing the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation, removes, in part, the basis for Staff's support of American Broadband's ETC designation. It is unclear whether there is alternative evidence that American Broadband could produce that would be sufficient to substitute for requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation. Regardless of whether or not such evidence exists, this waiver proceeding does not afford Staff or the Commission the opportunity to reassess American

Broadband's financial and technical fitness. It invalidates the Commission's determination, which the Commission is required under FCC rules to make, that American Broadband has the financial and technical capability necessary to be designated as an ETC.

II. American Broadband was Not Compelled to Enter Into the Agreed Joint Stipulation

American Broadband suggests that it signed the Agreed Joint Stipulation under duress. AB IB at 10. This is risible. Nothing prevented American Broadband from presenting its case through testimony, in evidentiary hearings, and through briefs. As noted above, American Broadband itself elected to bypass these procedural steps. Staff might or might not have opposed American Broadband's ETC designation on the basis of the case American Broadband might have ultimately presented, had that case been presented. American Broadband, however, chose to sign a stipulation in order to induce Staff to support its designation. AB IB at 3. Such circumstances, self-evidently, do not constitute duress at all, much less of the nature that would justify setting aside the Agreed Joint Stipulation. Stipulations in proceedings before the Commission are often, by their vary nature, agreements between parties to resolve differences. Setting aside agreements that settle issues which otherwise would be contested issues would not only invalidate the vast majority of settlements in past Commission proceedings, but would almost certainly have a chilling effect on negotiations at the Commission. Staff would certainly never agree to resolve differences through a stipulation if such a stipulation were susceptible to being

deemed invalid on the basis that it resolved what would have been (or could have been) a contested issue.

III. The Stipulation Does Not Constitute Regulation of Wireless Rates

American Broadband argues that the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation "attempt to regulate American Broadband's non-Lifeline wireless rates." AB IB at 22. This is patently untrue. A plain reading of these requirements reveals that nothing in them prescribes any rates for American Broadband. The requirements go only to ensuring that American Broadband has the ability to make a meaningful offer of non-Lifeline wireless service.

American Broadband's argues that "it would be required to reduce the costs of its non-Lifeline wireless packages to maintain compliance with the 80% - 20% the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation. However, American Broadband should not be excused on this basis, since its ability to maintain a viable wireless non-Lifeline presence in Illinois goes to the heart of the requirement. The requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation were proposed by Staff, consistent with FCC guidelines, as way for American Broadband to demonstrate that it has a viable non-Lifeline business and therefore will not have the incentives specifically identified by the FCC to engage in waste, abuse or fraud. Staff IB at 7-9. The information elicited in this proceeding reveals that this condition has worked as intended.

American Broadband states that "… American Broadband is not able to profitably reduce the costs of its non-Lifeline wireless service offerings to increase consumer demand …[.]" AB IB at 23. It has further stated "… American Broadband's non-Lifeline wireless service plans are in mid-tier range in comparison to other non-Lifeline wireless service plans in Illinois. As result, consumer demand is not as great [sic] in comparison to American Broadband's Lifeline service offerings." AB Ex. 2.0 at 8. This information certainly calls into question the viability of American Broadband's non-Lifeline wireless service offering. This is especially true where, as here, the company's *willingness* to provide non-Lifeline wireless service is very much in question. As late as July 10, 2014, American Broadband's own website announced to its customers that "We are not a cell phone company and do not offer cell phone service." Staff Response to the Petition at 9.

The requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation do not, therefore, regulate the rates American Broadband charges for its non-Lifeline wireless service, but rather require American Broadband to operate as a <u>cell phone company</u> with a meaningful non-Lifeline wireless service offering, instead of a subsidy-based business with incentives to defraud the federal entity dispersing the subsidies. This requirement does not conflict with federal laws or rules and, in fact, directly results from the FCC's guidelines for evaluating a prospective company's financial and technical capability.

IV. The Requirements in the Stipulation are Not Discriminatory

American Broadband argues that the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation are "not competitively neutral" because "… American Broadband is the only ETC designee in the state of Illinois subject to the 80%-20% ratio requirement." AB IB at 24. However, American Broadband neglects to point out the salient fact that it is the first provider designated as a new Illinois ETC since the implementation of FCC rules which prohibit State commissions from designating a carrier as Lifeline-only ETC unless the carriers have made a financial and technical showing. Therefore, American Broadband is not the subject of discrimination, except insofar as federal regulations make it such, and only to the extent that the application of financial and technical requirements contained in those regulations mandate that ETC designations be conducted differently than they have in the past.

American Broadband committed to complying with subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation. The Commission relied upon this commitment in making its designation. It is unclear what evidence the Commission would have required in order to designate American Broadband an ETC with a different set of evidence and facts. The Commission, as it should and must do, made its determination on the unique facts before it. It is duplicitous for American Broadband to offer to commit to the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation as an offer of proof of its qualifications as a potential ETC and then to argue, mere months

after Commission acceptance of those conditions, that they are discriminatory . The Commission should reject American Broadband's arguments in this regard.

American Broadband further argues, with respect to the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation it committed to, "… if the avoidance of potential future fraud were really Staff's concern, Staff's chosen proposal for addressing this concern is the least effective method for achieving its goals. Instead, imposing mandatory searches on databases identifying the subscribers or potential subscribers that qualify for eligible low income programs would more effectively address Staff's concerns." American Broadband's claim is untimely, unsubstantiated, and wrong. First of all, Staff's proposals are derived from FCC requirements. The FCC, not Staff, has implemented methods to prevent waste fraud and abuse, and if American Broadband objects to them, it is free to renounce its ETC designation and cease to collect subsidies under this federal program.

Second, if American Broadband had knowledge of more effective methods to prevent potential future fraud, it could have and should have introduced such ideas within its ETC designation docket. It did not. Additionally, American Broadband has no factual basis for its assertion that there is a database identifying the subscribers or potential subscribers that qualify for eligible low income programs. Nor are there any facts in record regarding how much accessing such a database would cost. In fact, while carriers can access databases to determine whether potential customers are participating in a few of the low income programs that would qualify them as eligible to participate in the

Lifeline program, there is no such database that provides verification to carriers for all qualifying low-income programs. Again, none of this was relevant to American Broadband's ETC designation, because American Broadband relied upon the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation as proof of its eligibility.

V. American Broadband has Failed to Comply with Federal Requirements

While there is disagreement between Staff and American Broadband regarding whether ETC providers may suspend their offers pursuant to the approval or direction of this Commission or the FCC, Staff agrees that an ETC may not unilaterally suspend its offering of Lifeline service. Nevertheless, this is exactly what American Broadband did. American Broadband states that it "… began denying qualified Lifeline applicants in an attempt to comply with the Conditions of Paragraphs 5(a) and (b) "in approximately mid-May." AB IB at 6 and AB Ex. 2.0 at 3. Thus, American Broadband unilaterally determined to stop offering Lifeline to new customers in order to avoid a Commission-imposed requirement that it stop offering Lifeline to new customers at a later date. While American Broadband advances the theory, which is incorrect, that the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation are in conflict with federal law and rules, this theory fails to explain its own unilateral decision to stop offering Lifeline service before it was required to do so by either the Commission or FCC direction. American Broadband's actions represent a clear case of American Broadband operating in violation of federal

law and rules. Its lack of knowledge of such law and rules does not excuse such behavior and goes directly to its technical ability to implement the federal Lifeline program.

VI. Illinois Customers Will Not Lose Federal Subsidies

American Broadband asserts that enforcement of the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation will "result in a loss of federal subsidies to pay for low-income consumers' telephone service." AB IB at 2. Notably, while enforcement may cause *American Broadband* to lose federal subsidies, it does not necessarily result in a reduction in subsidies to *Illinois low-income customers*. American Broadband has testified that other carrier's Lifeline customers have switched to American Broadband. AB Ex. 2.0 at 14. Switching from one carrier to another does not reduce the amount of subsidies paid to Illinois customers, but does change the ETC through which subsidies are distributed. There is no evidence in this proceeding that the requirements of subsections (a) and (b) of Paragraph 5 of the Agreed Joint Stipulation will result in a reduction in the amount of federal subsidies to pay for low-income consumers' telephone service.

VII. American Broadband's Allegations Regarding Marketing are Baseless

American Broadband argues that "Illinois consumers that are denied Lifeline services under … circumstances [where American Broadband must deny all new Lifeline applicants subject to the requirements of subsections (a) and (b) of

Paragraph 5 of the Agreed Joint Stipulation] likely will have little understanding that they may qualify for a Lifeline program but were denied solely because of restrictions placed on American Broadband as an ETC provider" and that such denials "will result in consumer complaints because consumers will invest time and effort responding to American Broadband's advertising, after investigating and deciding to choose American Broadband's Lifeline services, only to be denied Lifeline services when they submit a Lifeline application." AB IB at 16 -17. American Broadband similarly argues, without a scintilla of factual support, that "[u]ndoubtedly, many of these denied applicants will simply assume that they do not qualify for the Lifeline program because of the denial, resulting in Illinois Lifeline eligible consumers without telephone service because of their mistaken belief that they do not qualify for Lifeline subsidies. Such an outcome directly contravenes the goal of universal service." AB IB at 19.

The real key to American Broadband's concern seems to appear earlier in its own Brief. In particular, American Broadband notes that it initially advertised its Lifeline service before it started offering that service. "American Broadband began advertising its Lifeline program in Illinois on its website (using a 'coming soon' tag) prior to March 25, 2014." AB IB at 7. Ironically, while arguing that customers will be confused and complain if a company advertises a service it doesn't currently offer, American Broadband freely concedes that it successfully engaged in precisely such an advertising campaign.

Furthermore, American Broadband's argument is the rifest speculation. There is no basis in this record to assume that Illinois low-income customers believe

that they have no alternative but American Broadband. More probably, American Broadband is concerned that such customers might correctly surmise that they do have options other than American Broadband, and might take advantage of those options.

VIII. Conclusion

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission's order in this proceeding deny American Broadband's waiver request.

Respectfully submitted,

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